Digest of United States Practice in International Law

2019

A Note About this Online Publication of the *Digest*

I am pleased to present this online version of the *Digest of United States Practice in International Law* for the calendar year 2019.

This is the twenty second edition of the *Digest* published by the International Law Institute, and the seventh edition published online by ILI. Each year the U.S. Department of State has published the *Digest of United States Practice in International Law*. From 1989 to 2010 ILI and the State Department co-published a hard bound edition of the *Digest* through the active participation of the Department's Office of the Legal Advisor. During the latter part of that period, Oxford University Press joined as co-publisher with ILI and State. Beginning in 2011, the State Department has posted the entire edition of the *Digest* on its website. That year ILI and Oxford University Press also published the *Digest* as a hard bound edition, and for the year 2012 ILI published a hard bound edition jointly with the American Society of International Law.

In light of the general worldwide trend towards online publishing and the increased reliance on online materials for legal research, ILI has suspended publication of a hard bound edition of the *Digest* and in lieu thereof is presenting this online version of the 2019 *Digest* on ILI's website.

This online version exactly duplicates the *Digest* for 2019 published by the State Department on State's website. Selections of materials in this *Digest* were made solely by the Office of the Legal Advisor of the State Department, based on judgments as to the significance of the issues, their possible relevance to future situations, and their likely interest to government lawyers, their foreign counterparts, scholars and other academics, and private practitioners.

It is my hope that practitioners and scholars will find this new edition of the *Digest*, tracking the most important developments in the state practice of the United States during 2019, to be useful.

Don Wallace, Jr.
Chairman
International Law Institute

DIGEST OF
UNITED STATES PRACTICE
IN INTERNATIONAL LAW

2019

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Editor

Office of the Legal Adviser

United States Department of State

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Introduction

I am pleased to introduce the 2019 edition of the *Digest of United States Practice in International Law*. This volume reflects the work of the Office of the Legal Adviser during calendar year 2019. The *Digest* also covers some international legal developments within the purview of other departments and agencies of the United States, such as the U.S. Trade Representative, the Department of the Treasury, the Department of Justice, and others with whom the Office of the Legal Adviser collaborates. The State Department publishes the online *Digest* to make U.S. views on international law quickly and readily accessible to our counterparts in other governments, and to international organizations, scholars, students, and other users, both within the United States and around the world.

This volume features explanations of U.S. international legal views in 2019 delivered by representatives of the U.S. government. The Secretary of State designated the Islamic Revolutionary Guard Corps ("IRGC"), including its Qods Force, as a foreign terrorist organization ("FTO"). The United States formally commented on three projects of the International Law Commission ("ILC"): the draft Guide to Provisional Application of Treaties; the draft Articles on Crimes Against Humanity; and the draft Guidelines on Protection of the Atmosphere. Other U.S. government attorneys and I also delivered remarks on the numerous topics covered in the report of the ILC on the work of its 71st Session. The United States joined a group of 23 countries at the UN Committee on the Elimination of Racial Discrimination ("CERD") in condemning the Chinese government's targeting of ethnic Uighurs and other human rights violations and abuses in the Xinjiang Uighur Autonomous Region, repeating that condemnation in other fora, including the International Labor Organization ("ILO"), the UN General Assembly and Third Committee, as well as through the imposition of U.S. visa restrictions and in the State Department's annual report to Congress on international religious freedom. The State Department reiterated U.S. support for the territorial integrity of Ukraine and again condemned Russia's purported annexation of Crimea in a 2019 "Crimea is Ukraine" statement. The State Department issued statements of concern regarding Turkey's attempts to conduct drilling operations in the waters off Cyprus and China's coercive behavior against other countries' oil and gas development activities in the South China Sea. Secretary Pompeo announced the administration's view that the establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law. And after participating and providing a paper on its practices at the Vienna

Conference on Protecting Civilians in Urban Warfare, the United States also joined Belgium, France, Germany, and the United Kingdom in producing a technical compilation of practical measures to strengthen the protection of civilians during military operations in armed conflict for the follow-up meetings in Geneva in November.

There were numerous developments in 2019 relating to U.S. international agreements, treaties and other arrangements. El Salvador, Guatemala, and Honduras signed Asylum Cooperative Agreements ("ACAs") with the United States. The American Institute in Taiwan ("AIT") and the Taipei Economic and Cultural Representative Office in the United States ("TECRO") signed a Memorandum of Understanding ("MOU") Regarding Certain Consular Functions. The United States and Croatia signed bilateral extradition and mutual legal assistance agreements. The United States concluded its first agreement under the Clarifying Lawful Overseas Use of Data Act ("CLOUD Act") with the United Kingdom. Protocols to tax treaties with Spain, Switzerland, Japan, and Luxembourg received the U.S. Senate's advice and consent to ratification, as did the Protocol on the Accession of North Macedonia to NATO. In 2019, the United States negotiated new air transport agreements with The Bahamas and Belarus; and negotiated and signed or initialed amendments to the air transport agreements with Suriname, Argentina, Japan, and Kenya. The three parties to the U.S.-Mexico-Canada Agreement ("USMCA") concluded their negotiations to replace the North American Free Trade Agreement ("NAFTA"), with the U.S. House of Representatives approving the USMCA in late 2019 (and the Senate in early 2020). The United States ratified the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean and the United States and Canada continued negotiations in 2019 to modernize the Columbia River Treaty regime. The United States entered into six agreements pursuant to the 1970 UNESCO Cultural Property Convention. The United States signed the Singapore Convention on Mediation, ratified the Marrakesh Treaty to Facilitate Access to Public Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, and became the second State Party to the UN Convention on the Assignment of Receivables in International Trade. On October 17, 2019, in a joint U.S.-Turkish statement, Turkey announced a ceasefire in Northeast Syria after a week-long offensive. The United States suspended its obligations under the INF Treaty and subsequently withdrew from the Treaty (effective August 2, 2019) and submitted notification to the UN of its withdrawal from the Paris agreement on climate change (effective November 4, 2020). The President withdrew the Arms Trade Treaty from Senate consideration and the Secretary of State notified the UN that the United States did not intend to join. The United States revoked its denunciation of the constitution of the Universal Postal Union ("UPU"), remaining a UPU member after an extraordinary congress of the UPU approved reforms.

In the area of diplomatic relations, the United States recognized Juan Guaidó as the interim president of Venezuela, and joined Venezuela and other countries in invoking the Inter-American Treaty of Reciprocal Assistance ("TIAR" or "Rio Treaty"). The United States also required the departure of two diplomats from Cuba's mission to the UN.

The U.S. government participated in litigation in U.S. courts in 2019 involving issues related to foreign policy and international law. The Executive Branch continued to defend its discretion to regulate and restrict the entry of aliens into the United States in challenges brought after the 2018 Supreme Court decision in *Trump v. Hawaii*. The

Department of Homeland Security ("DHS") announced compliance with preliminary injunctions against termination of temporary protected status ("TPS") for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan. The United States government successfully opposed certiorari in *Alimanestianu v. United States*, in which petitioners argued that a global claims settlement agreement with Libya espousing their claims and compensating them for their injuries constituted a taking of their rights to seek damages through litigation. The Supreme Court also denied certiorari after the U.S. filed an opposition brief in *Argentine Republic v. Petersen Energia Inversora*, a case in which Argentina was found by the lower courts to lack immunity under the Foreign Sovereign Immunities Act ("FSIA") based on commercial activities with regard to petroleum contracts. The Supreme Court also denied cert in *de Csepel v. Republic of Hungary*, a case concerning the scope of the expropriation exception to the FSIA in the context of an art collection taken during the Holocaust era (again, aligning with the U.S. amicus brief recommending the petition be denied and affirming that the sovereign—Hungary in this case—was immune). The U.S. brief in the Supreme Court in *Opati v. Sudan*, a case arising out of the 1998 bombings by al-Qaeda at the U.S. Embassies in Kenya and Tanzania, argued that plaintiffs suing foreign state sponsors of terrorism under the terrorism exception may recover punitive damages for conduct pre-dating amendments to the FSIA authorizing such suits. The Supreme Court issued its decision in *Jam v. IFC* (the U.S. brief was filed in 2018), holding that the International Organizations Immunities Act ("IOIA") grants international organizations the same immunity from suit as foreign governments now enjoy under the FSIA.

The United States government also participated in a variety of international court proceedings and arbitrations in 2019. The United States made non-disputing party submissions in dispute settlement proceedings in cases in 2019 under NAFTA, the U.S.-Korea Free Trade Agreement, the U.S.-Panama Trade Promotion Agreement ("TPA"), and the U.S.-Peru TPA. In June 2019, the Iran-U.S. Claims Tribunal concluded the series of hearings on Case B/1, which began in 2018, and relate to Iran's former participation in the U.S. Foreign Military Sales program. Activity at the International Court of Justice ("ICJ") involving the United States continued in 2019, with the ICJ issuing a preliminary ruling in *Certain Iranian Assets* (rejecting many of Iran's claims); and issuing an advisory opinion (contrary to U.S. submissions) regarding the United Kingdom's administration of the British Indian Ocean Territory ("BIOT").

The *Digest* discusses other forms of U.S. participation in international organizations, institutions, and initiatives. In addition to activity described above at the UN, the ICJ, and before international tribunals, Secretary Pompeo and other State Department officials addressed the Organization of American States ("OAS") on restoring democracy and respect for human rights in Venezuela and Nicaragua. And the United States participated at the OAS Inter-American Commission on Human Rights through written submissions and participation in a number of hearings. The U.S. Mission to the UN transmitted to the president of the Security Council a letter informing the Council of an action taken in self-defense, resulting in the destruction of at least one Iranian unmanned aerial system approaching a U.S. ship in the Strait of Hormuz on July 18, 2019. The United States led the successful effort at the Organization for the Prohibition of Chemical Weapons ("OPCW") to add novichoks to the Chemical Weapons Convention's Annex on Chemicals so they are subject to rigorous verification, in

response to the Russian Federation's use of a novichok nerve agent in an assassination attempt in the United Kingdom in 2018.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2019 volume, attorneys whose early and voluntary contributions to the *Digest* were particularly significant include Anna Cavnar, Michael Coffee, Sharla Draemel, Jeremy Freeman, Joshua Gardner, Peter Gutherie, Monica Jacobsen, Mahvish Madad, Jennifer Marcovitz, Aaron Marcus, Semra Mesulam, Lorie Nierenberg, John Padilla, Lana Vahab, Niels Von Deuten, Amanda Wall, Thomas Weatherall, Jeremy Weinberg, Alison Welcher, and Vanessa Yorke. Sean Elliott at the Foreign Claims Settlement Commission also once again provided valuable input. I express very special thanks to Law Librarian Camille Majors and Office of the Legal Adviser interns Christine Hulsizer and Kevan Christensen for ensuring the accuracy of the *Digest*, and to Jerry Drake and Nicholas Stampone for their expertise in formatting the *Digest* for final publication. Finally, I thank CarrieLyn Guymon for her continuing, outstanding work as editor of the *Digest*.

Marik String
Acting Legal Adviser
Department of State

Note from the Editor

The official version of the *Digest of United States Practice in International Law* for calendar year 2019 is published exclusively online on the State Department's website. I would like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible and aided in the release of this year's *Digest*.

The 2019 volume follows the general organization and approach of past volumes. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Introductions (in Calibri font) prepared by the editor are distinguishable from excerpts (in Times Roman font), which come from the original sources. Some of the litigation-related entries do not include excerpts from the court opinions because most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs. Bracketed insertions indicate editorial clarification or correction to the original text.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through May 2020) are provided in footnotes. For example, we note the release of U.S. Supreme Court and other court decisions, as well as other noteworthy developments occurring during the first several months of 2020 where they relate to the discussion of developments in 2019.

Updates on most other 2020 developments are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross-references to related entries within the volume and to prior volumes of the *Digest*.

As in previous volumes, our goal is to ensure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided a specific internet citation in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily accessible elsewhere, we have placed them on the State Department website, which was updated in 2019, at https://www.state.gov/digest-of-united-states-practice-in-international-law/, where links to the documents are organized by the chapter in which they are referenced.

Other documents are available from multiple public sources, both in hard copy and from various online services. The United Nations Official Document System makes UN documents available to the public without charge at https://www.un.org/en/sections/general/documents/index.html. For UN-related information generally, the UN's home page at *www.un.org* also remains a valuable source. Legal texts of the World Trade Organization ("WTO") may be accessed through the WTO's website, at https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

The U.S. Government Printing Office ("GPO") provides electronic access to government publications, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports;

the U.S. Code, Public and Private Laws, and Statutes at Large; Public Papers of the President; and the Daily Compilation of Presidential Documents. GPO retired the Federal Digital System ("FDsys") in December 2018 and replaced it with govinfo, available at https://www.govinfo.gov, as the online site for U.S. government materials.

On treaty issues, this site offers Senate Treaty Documents (for the President's transmittal of treaties to the Senate for advice and consent, with related materials), available at https://www.govinfo.gov/app/collection/CDOC, and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at https://www.govinfo.gov/app/collection/CRPT. In addition, the Office of the Legal Adviser provides a wide range of current treaty information at https://www.state.gov/bureaus-offices/treaty-affairs/ and the Library of Congress provides extensive treaty and other legislative resources at https://www.congress.gov.

The U.S. government's official web portal is https://www.usa.gov, with links to government agencies and other sites. The State Department's home page is http://www.state.gov. The website of the U.S. Mission to the UN is https://usun.usmission.gov.

While court opinions are most readily available through commercial online services and bound volumes, individual federal courts of appeals and many federal district courts now post opinions on their websites. The following list provides the website addresses where federal courts of appeals post opinions and unpublished dispositions or both:

U.S. Court of Appeals for the District of Columbia Circuit:
https://www.cadc.uscourts.gov/bin/opinions/allopinions.asp;

U.S. Court of Appeals for the First Circuit:
http://media.ca1.uscourts.gov/opinions/;

U.S. Court of Appeals for the Second Circuit:
http://www.ca2.uscourts.gov/decisions.html;

U.S. Court of Appeals for the Third Circuit:
http://www.ca3.uscourts.gov/search-opinions;

U.S. Court of Appeals for the Fourth Circuit:
http://www.ca4.uscourts.gov/opinions/search-opinions;

U.S. Court of Appeals for the Fifth Circuit:
http://www.ca5.uscourts.gov/electronic-case-filing/case-information/current-opinions;

U.S. Court of Appeals for the Sixth Circuit:
https://www.ca6.uscourts.gov/opinions;

U.S. Court of Appeals for the Seventh Circuit:
http://media.ca7.uscourts.gov/opinion.html;

U.S. Court of Appeals for the Eighth Circuit:
https://www.ca8.uscourts.gov/all-opinions;

U.S. Court of Appeals for the Ninth Circuit:
https://www.ca9.uscourts.gov/opinions/;

U.S. Court of Appeals for the Tenth Circuit:
https://www.ca10.uscourts.gov/opinion/search;

U.S. Court of Appeals for the Eleventh Circuit:
http://www.ca11.uscourts.gov/published-opinions;

U.S. Court of Appeals for the Federal Circuit:
http://www.cafc.uscourts.gov/opinions-orders/0/all.

The official U.S. Supreme Court website is maintained at www.supremecourtus.gov. The Office of the Solicitor General in the Department of Justice makes its briefs filed in the Supreme Court available at https://www.justice.gov/osg. Many federal district courts also post their opinions on their websites, and users can access these opinions by subscribing to the Public Access to Electronic Records ("PACER") service. Other links to individual federal court websites are available at http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links.

Selections of material in this volume were made based on judgments as to the significance of the issues, their possible relevance for future situations, and their likely interest to government lawyers, especially our foreign counterparts; scholars and other academics; and private practitioners.

As always, we welcome suggestions from those who use the *Digest*.

CarrieLyn D. Guymon

CHAPTER 1

Nationality, Citizenship, and Immigration

A. NATIONALITY, CITIZENSHIP, AND PASSPORTS

1. *Hinojosa*

In February 2019, the United States filed a brief in opposition to the petition for certiorari in the Supreme Court of the United States in *Hinojosa* et al. *v. Horn*, No. 18-461. In 2018, after consolidating the *Hinojosa* and *Villafranca* cases for review, the U.S. Court of Appeals for the Fifth Circuit affirmed the lower court's dismissal of challenges to separate decisions denying or revoking petitioners' U.S. passports (based on lack of evidence of U.S. citizenship). *Hinojosa v. Horn*, 896 F.3d 305 (5th Cir. 2018); see also *Digest 2018* at 1-5; *Digest 2017* at 4-7. The Court of Appeals held that petitioners were not entitled to review under the Administrative Procedure Act ("APA") because they had an adequate alternative remedy which they had failed to pursue. Excerpts follow (with citations to the record omitted) from the U.S. brief opposing certiorari. The Supreme Court denied the petition for certiorari on March 18, 2019.

_____

* * * *

Petitioners contend that the district court erred by dismissing their APA claims seeking review of the Department of State's action regarding their passports on the ground that 8 U.S.C. 1503 provides an adequate alternative remedy that petitioners have not exhausted. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. 704. …

a. Petitioners' APA claims seek review of the Department of State's action denying or revoking their passports based on the Department's determinations that petitioners had not adequately established that they are natural-born U.S. citizens. … Petitioners contend … that

those determinations of noncitizenship were erroneous because each petitioner was born in Texas rather than in Mexico.

Section 1503 of Title 8, United States Code, entitled "Denial or rights and privileges as national," establishes a detailed procedure for individuals who claim they have been denied a right or privilege as a U.S. national to obtain review of that alleged denial. 8 U.S.C. 1503. The process differs depending on whether such an individual is present in the United States or is abroad. For a "person who is within the United States" who "claims a right or privilege as a national of the United States," and who "is denied such right or privilege by any" federal agency or official "upon the ground that he is not a national of the United States," Section 1503(a) provides that the person may seek judicial review by filing an action under the Declaratory Judgment Act, 28 U.S.C. 2201, against the agency or official for a judgment "declaring him to be a national of the United States." 8 U.S.C. 1503(a). Such an action must be brought "within five years after the final administrative denial of such right or privilege." *Ibid.* Section 1503(a) contains an exception prohibiting such declaratory relief where the question of a person's status as a U.S. national "arose by reason of, or in connection with," or is "in issue in," a removal proceeding. *Ibid.*

For a "person who is not within the United States" but was "physically present in the United States" at some previous point in time (or is under the age of 16 and was born abroad to U.S.-citizen parents), and who claims the denial of "a right or privilege as a national of the United States," Section 1503(b) and (c) prescribe a different mechanism for challenging that denial. 8 U.S.C. 1503(b). Section 1503(b) provides that such a person may "make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission." *Ibid.* If the person presents "proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis," the officer "shall issue to such person a certificate of identity." *Ibid.* If the certificate of identity is granted, Section 1503(c) provides that the person may then "apply for admission to the United States at any port of entry." 8 U.S.C. 1503(c). Upon admission to the United States, the person would then be eligible to seek a declaratory judgment under 8 U.S.C. 1503(a) that he is a citizen.

As the court of appeals observed, if a person outside the United States is unsuccessful at either administrative phase of the process prescribed by Section 1503(b) and (c), judicial review is available at that time. …

Petitioners each "concede[d] that [the] § 1503 procedures apply to them." … And they do not appear to dispute that, if they had pursued those procedures, whatever the outcome at the various stages of the administrative process, judicial review would be available. Yet neither petitioner alleges that she began, let alone exhausted, the statutorily prescribed process in Section 1503(b) and (c) before bringing her APA suit. The court of appeals therefore correctly determined that the APA does not authorize judicial review in these cases because petitioners have, but declined to pursue, an alternative "adequate remedy." 5 U.S.C. 704.

b. Petitioners principally contend … that this Court's decision in *Rusk* v. *Cort*, 369 U.S. 367 (1962), abrogated on other grounds by *Califano* v. *Sanders*, 430 U.S. 99 (1977), compels a contrary conclusion. The court of appeals correctly rejected that contention. … As the court explained, the question this Court addressed in *Cort* must be understood in the context of the circumstances of that case. See *id.* at 14-15.

Cort involved a person who was a natural-born U.S. citizen at birth, but whose citizenship was revoked on the ground that he had evaded the draft and whose passport application from abroad was denied on that basis. …

Cort sought judicial review of his passport denial from abroad under the APA. *Cort*, 369 U.S. at 369-370. In particular, he sought to challenge the constitutionality of the INA provision that stripped native-born U.S. citizens of their citizenship for draft evasion, *id.* at 370—a provision that the Court later held was unconstitutional, see *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 163-184 (1963). The district court denied the government's motion to dismiss Cort's APA claim on the ground that Section 1503(b) and (c) provided the exclusive means for challenging the Department of State's citizenship determination, *Cort*, 369 U.S. at 369-370, and this Court affirmed over a dissent, see *id.* at 371-380; see also *id.* at 383-399 (Harlan, J., joined by Frankfurter and Clark, JJ., dissenting).

In reaching that decision, the Court framed the question presented narrowly and consistent with the specific circumstances of the case, explaining that,

> precisely stated, the question in this case is whether, despite the liberal provisions of the Administrative Procedure Act, Congress intended that a native of this country living abroad must travel thousands of miles, be arrested, and go to jail in order to attack an administrative finding that he is not a citizen of the United States.

Cort, 369 U.S. at 375. The Court answered that case-specific question in the negative. See *id.* at 375-380. In doing so, the Court reasoned that "the purpose of [Section 1503(b) and (c)] was to cut off the opportunity which aliens had abused under" prior law "to gain fraudulent entry to the United States by prosecuting spurious citizenship claims." *Id.* at 379. The Court concluded that the circumstances of Cort's case—in which Cort sought to challenge the constitutionality of the statutory provision by which his natural-born citizenship had been revoked, and where returning to the United States to do so would subject him to arrest and likely criminal penalties in light of pending charges—did not implicate that congressional purpose. See *ibid.* As the court of appeals here explained, the Court held that, "[i]n light of the extreme burden the § 1503 procedures would have placed on [Cort], whose claim and circumstance § 1503 was not specifically intended to address, the plaintiff could proceed under the APA." …

The court of appeals correctly determined that *Cort*'s reasoning and result do not compel a similar conclusion here in light of the significant differences in the circumstances between that case and this one. … Unlike Cort, petitioners have a "clear path to judicial review," *id.* at 15, and pursuing that path would not require them to be subject to inevitable arrest and criminal prosecution on already-pending criminal charges, *id.* at 14. In addition, whereas Cort's original entitlement to U.S. citizenship was never questioned, and his suit sought to challenge the revocation of his birthright citizenship on the ground that the applicable statute was unconstitutional, here it is precisely the factual determinations by the Department of State concerning petitioners' claimed citizenship of which they seek review. In contrast to Cort, petitioners thus "are precisely the sort of persons that Congress, according to [*Cort*], was concerned to regulate under §§ 1503(b)-(c)," and "[t]hese cases present the exact facts that [*Cort*] held would implicate the jurisdictional restrictions." *Id.* at 15 (emphasis omitted).

* * * *

2. *Chacoty*

In *Chacoty v. Pompeo*, 392 F. Supp. 3d 1 (D.D.C. 2019), a federal district court in the District of Columbia held (contrary to the Fifth Circuit's holding in *Hinojosa*) that 8 U.S.C. § 1503 did not provide an adequate remedy and permitted claims under the APA to proceed. After reaching that holding, however, the court granted the U.S. cross-motion for summary judgment on the merits of plaintiffs' claims to citizenship regarding the interpretation of "residence" under the applicable statute. The July 17, 2019 opinion in *Chacoty* is excerpted below.

* * * *

Plaintiffs contend that they are U.S. citizens by birth pursuant to 8 U.S.C. § 1401(c). That provision confers birthright citizenship on a person born abroad, as Plaintiffs were, if both her parents are U.S. citizens and one of her parents "has had a residence in the United States" prior to her birth. 8 U.S.C. § 1401(c). Each of the Plaintiffs applied to the State Department for proof of citizenship in the form of a Consular Report of Birth Abroad ("CRBA"). The State Department either denied their CRBA applications or, in the case of two of the Plaintiffs, revoked their previously-issued CRBAs. The Department concluded that Plaintiffs are not U.S. citizens because none of their parents satisfied the residency requirement of § 1401(c). Plaintiffs challenge those decisions under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*., and the Due Process Clause of the Fifth Amendment. The Court previously concluded that it has jurisdiction to consider Plaintiffs' claims. The parties' cross-motions for summary judgment on the merits with respect to two representative plaintiffs are now before the Court.

… The Department, in its opposition and cross-motion, argues that the two representative plaintiffs may not challenge the cancellation of their CRBAs under the APA because the APA cause of action is available only to plaintiffs who have "no other adequate remedy in a court," 5 U.S.C. § 704, and because 8 U.S.C. § 1503(b) provides an alternative means for a person who is not in the United States to seek a determination of her citizenship. But, even if the APA provides an avenue for challenging the denial or cancellation of a CRBA, the Department continues, the representative plaintiffs' claims fail on the merits because § 1401(c)'s "residence" requirement demands more than fleeting physical presence in the United States.

As explained below, the Court agrees with Plaintiffs that § 1503 does not provide an adequate remedy sufficient to supplant Plaintiffs' APA causes of action (and does not even arguably supplant their stand-alone due process claims) but agrees with the Department that Plaintiffs' claims fail on the merits. The Court, accordingly, will **DENY** Plaintiffs' motion for summary judgment and will **GRANT** the Department's cross-motion.

* * * *

1. *Is the Department's Current Reading of 8 U.S.C. § 1401 Permissible?*

Under 8 U.S.C. § 1401(c), U.S. citizenship is conferred at birth on "a person born outside of the United States … of parents both of whom are citizens of the United States and one of whom has had a residence in the United States … prior to the birth of such person." The INA defines "residence" as "the place of general abode" and, in turn, defines "the place of general abode of a person" as "his principal, actual dwelling place in fact, without regard to intent." 8

U.S.C. § 1101(a)(33). Here, Plaintiffs contend that Kayla and Chana Sitzman's mother, Masha Bodenheimer Sitzman, satisfied § 1401(c)'s "residence" requirement before their birth because she was present in the United States prior to their birth on three occasions: from July 31, 1974 to September 11, 1974; from April 4, 1982 to May 3, 1982; and "for approximately 10 days" in February 1990. AR CIV000263. During these visits, Marsha "stayed with relatives on both sides of [her] family and participated in family activities and chores as a member of each [of these] household[s]," although her immediate family "did not contribute to household finances." *Id.* During the 1974 stay, moreover, Marsha's family "stopped their mail in Israel" but did not "look[] for employment or schooling opportunities" in the United States." *Id.*

* * * *

b. The Department's Reading of "Residence" Under Plaintiffs' construction of the INA, an individual can satisfy the "residence" requirement so long as she can demonstrate "any physical presence short of a brief, hours-long transit through the United States." … The Deputy Assistant Secretary disagreed, and in her final determination she concluded that residence requires more than "physical presence" and requires consideration of "the nature and quality of the person's connection to the place." … Even without granting any deference to the Deputy Assistant Secretary, the Department has the better reading of the statute.

The Court "begin[s], as usual, with the statutory text." *Maslenjak v. United States,* 137 S. Ct. 1918, 1924 (2017). The INA defines "residence" as an individual's "place of general abode," which means his or her "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). This statutory definition is at odds with Plaintiffs' contention that "almost anyone … would seem to satisfy the [INA's] definition," short of "a person who is merely transiting the United States on his way to another country." … Most notably, Plaintiffs' interpretation would read the words "place of *general* abode" and "*principal*, actual dwelling place" out of the statute. 8 U.S.C. § 1101(a)(33) (emphasis added). The statute does not simply require that the putative citizen's parent have "dwelled" or been present in the United States for a limited time; it requires that the parent's abode in the United States eclipse any other residence the parent had at the time. The statutory definition of "residence," in other words, requires a degree of primacy over other places of residence. …

The Department's interpretation … sets forth criteria for determining whether a location is, in fact, an individual's "*principal*, actual dwelling place." 8 U.S.C. § 1101(a)(33) (emphasis added). …Applying this definition to the Sitzmans, the Deputy Assistant Secretary examined "the fact that Mrs. [Bodenheimer Sitzman] visited [the United States] on three occasions and that for one of the trips her parents temporarily stopped mail delivery in Israel while they visited the United States does not support the claim that Mrs. [Bodenheimer Sitzman] had a residence here." The Deputy Assistant Secretary concluded there was "no evidence that these visits to the U.S. were anything other than vacation visits to see family and attend family events." *Id.*

* * * *

The INA's legislative history makes the distinction between objective place of residence and physical presence even clearer. According to a 1952 Senate Judiciary Committee Report, the statute's definition of "residence" is meant to be "a codification of judicial constructions of the term 'residence' as expressed by the Supreme Court of the United States in *Savorgnan v. United*

States, 338 U.S. 491, 505 (1950)." S. Rep. No. 82–1137, at 4–5 (1952); *see also United States v. Arango*, 670 F.3d 988, 997 (9th Cir. 2012). In *Savorgnan*, the Supreme Court held that a United States citizen who obtained Italian citizenship and lived in Italy from 1941 to 1945 relinquished her American citizenship. *Savorgnan*, 338 U.S. at 496. The petitioner argued that, even though she swore allegiance to Italy and lived there, she had not actually expatriated. *Id.* at 499. Noting that expatriation occurred when an individual naturalized as a foreign citizen and then "resided" abroad, she argued that she had no "intention of establishing a permanent residence abroad or abandoning her residence in the United States, or of divesting herself of her American citizenship." *Id.* at 496. The Supreme Court disagreed. It concluded that "[w]hatever may have been her reasons, wishes or intent, her principal dwelling place was in fact with her husband in Rome where he was serving in his Foreign Ministry. Her intent as to her 'domicile' or as to her 'permanent residence,' as distinguished from her actual 'residence,' 'principal dwelling place,' and 'place of abode,' is not material." *Id.* at 506. Thus, when the INA specifies that an individual's residence is determined "without regard to intent," that simply means that the inquiry is objective, not subjective. It does not, as Plaintiffs contend, convert "residence" into "physical presence."

Because the Department's reading better comports with the plain meaning, structure, and legislative history of the INA, the Court concludes that Plaintiffs' challenge to the Department's interpretation fails.

2. *Was the Department's Revocation of the CRBAs Permissible?*

That conclusion, however, does not fully resolve the Sitzmans' claims. In addition to challenging the Department's current construction of "residence," Plaintiffs challenge the Department's authority to revoke the Sitzmans' previously-issued CRBAs. … Given the level of generality of these statements, it is difficult to discern the basis for Plaintiffs' contention that the revocations were unlawful. …

First, Plaintiffs argue that "until roughly 2007, Defendants interpreted and applied the term 'residence' in [§] 1401(c) to mean any physical presence short of a brief, hours-long transit through the United States." …

* * * *

There are two problems, however, with Plaintiffs' argument. As an initial matter, although the Jerusalem consulate previously announced a practice in accord with Plaintiffs' view of the statute, Plaintiffs have not shown that *the Department* has changed position at all. To the contrary, as the Department explains in its briefs, the "State Department's interpretation has *consistently* been that temporary visits to the United States do not establish 'residence.'" … The Jerusalem consulate (and other consulates), accordingly, appears to have implemented its own, erroneous interpretation of the INA separate from—and at odds with—the Department's guidance. …

Moreover, even if the Jerusalem consulate's fact sheet could be attributed to the Department as a whole, the Department rejected that interpretation because it is inconsistent with the meaning of the statute. …

Second, Plaintiffs adopt the hearing officer's contention that "[a]ny change in the interpretation and application of the law should be applied only prospectively, if at all." As explained above, Plaintiffs have not shown that the Department actually changed any Department-wide policy. But even putting that problem aside, this contention also fails. … The

Department … did nothing more than Congress authorized and, in doing so, it enforced the law as Congress enacted it.

To be sure, had the Department revoked the Sitzmans' U.S. citizenship, that would have raised grave equitable considerations, and, indeed, would have required a "federal judicial order." *Xia*, 865 F.3d at 650. As the Supreme Court has explained, "[i]t would be difficult to exaggerate [citizenship's] value and importance," *Schneiderman*, 320 U.S. at 122, and its revocation "may result in 'loss of both property and life; or of all that makes life worth living,'" *United States v. Minker*, 350 U.S. 179, 187 (1956) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). But that is not what the Department did. Rather, it revoked a document *evidencing* the Sitzmans' citizenship. As in *Xia*, "the statutory authority on which the government relied is quite explicit that it authorizes only revocation of certain evidence of citizenship, *not* the citizenship status itself, … administrative actions alone are inadequate to extinguish any United States citizenship plaintiffs may have." 865 F.3d at 655 (emphasis in original). Although undoubtedly a serious step, revocation of a CRBA is far less serious than revoking citizenship from someone who was—and then, as a result, no longer—a U.S. citizen, and Plaintiffs have failed to identify any legal or factual basis to question the Department's authority to correct its prior, erroneous issuance of the CRBAs.

* * * *

3. *Zzyym*: Indication of Sex on U.S. Passports

As discussed in *Digest 2018* at 5-12, Dana Zzyym ("Zzyym") is an intersex individual who filed suit after the State Department denied Zzyym's request for a passport with an "X" in the sex field, contrary to its policy of requiring either "M" or "F." Zzyym's complaint alleged violations of the APA and equal protection under the Fifth Amendment. On September 19, 2018, the U.S. District Court for the District of Colorado decided that the State Department's policy and denial of the requested passport violate the APA and enjoined the Department from relying on the policy to deny the requested passport.

The Department of State has unsuccessfully sought stays of the district court injunction in both district court and the U.S. Court of Appeals for the Tenth Circuit. The Court of Appeals denied the motion for stay on April 3, 2019, reasoning that the Department was not required to do anything under the district court's order if there was no pending renewed application for a passport from Zzyym. *Zzyym v. Pompeo*, No. 18-1453 (10th Cir.). Oral argument on the merits of the case on appeal is scheduled for 2020. The U.S. briefs filed in support of motions for stay in 2019 in the district court and the Court of Appeals are available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

4. Citizenship Claims in Cases of Assisted Reproductive Technology ("ART")

On October 11, 2019, the United States filed its brief on appeal in the U.S. Court of Appeals for the Ninth Circuit in *E.J. D.-B. v. Pompeo*, No. 19-55517 (9th Cir.). The case concerns a minor, E.J. Dvash-Banks, conceived using a surrogate and sperm from one of his fathers, Elad Dvash-Banks, who is not a U.S. citizen. Elad and his husband, Andrew

Dvash-Banks—who is a U.S. citizen—were recognized in Canada as E.J.'s legal parents. However, the U.S. consulate in Ontario, Canada determined that E.J. did not acquire citizenship at birth because Elad is not a U.S. citizen and E.J. has no biological relationship with Andrew. The family brought suit after they moved to the United States, seeking (among other things) a judicial declaration of E.J.'s citizenship. The lower court held that E.J. is a citizen. The lower court construed 8 U.S.C. § 1401(g), which confers citizenship at birth on "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States," as applicable based on Ninth Circuit precedents. *Dvash-Banks v. Pompeo*, No. 18-cv-00523 (C.D. Cal. Feb. 21, 2019). The U.S. brief appealing the lower court's decision is excerpted below (with record citations omitted) and available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

This Court has previously held that a child born overseas may acquire citizenship at birth under 8 U.S.C. § 1401(g) even if he is not biologically related to his U.S. citizen mother or father. *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005). Unless this case is heard initially en banc, the district court's judgment that E.J. is a U.S. citizen must be affirmed, but the government respectfully submits that initial en banc consideration may be warranted because this Court's precedents are incorrect for the reasons discussed below.

Section 1401(g)'s text supports the Department's interpretation that a child born overseas cannot acquire citizenship at birth under that provision unless he is biologically related to a U.S. citizen parent. The statute confers citizenship on individuals "born ... of parents" who meet the statutory requirements, and "[t]here can be little doubt that the 'born of' concept generally refers to a blood relationship." *United States v. Marguet-Pillado*, 560 F.3d 1078, 1083 (9th Cir. 2009).

That textual interpretation is bolstered by § 1401(g)'s context: the conferral of *jus sanguinis* citizenship. *Jus sanguinis* literally means the "right of blood." Consistent with that historical meaning, the Supreme Court has repeatedly emphasized the importance of the government's interest in "assuring that a biological ... relationship exists" between a child and a parent through whom the child claims citizenship. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 62 (2001).

A related provision, 8 U.S.C. § 1409(a), explicitly requires a biological relationship for a child to claim citizenship through his father when the child's parents were unmarried at the time of his birth. But that is no reason to construe § 1401(g) as lacking a biological-relationship requirement. Section 1409(a) simply reflects the fact that, when a child is born outside a marriage, the identity of the child's father must be "established"—rather than presumed—for the purpose of applying § 1401(g) to the child.

The district court based its conclusion partly on the view that § 1401(g) incorporates the common-law "presumption of legitimacy that applies when a child is born to married parents." That is incorrect. Presumptions of legitimacy are legal fictions that render biological parentage irrelevant for certain purposes. But in this context, Congress has made clear that a child's legal

parent—whose identity is properly determined not by federal common law but by the law of the relevant state or foreign jurisdiction—must also be his biological parent for § 1401(g) to apply.

To the extent § 1401(g) remains ambiguous, the Court should defer to the State Department's interpretation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). That interpretation is reasonable, consistent, and longstanding, and it reflects the Department's extensive experience adjudicating citizenship applications. A biological-relationship requirement is a powerful tool in the government's efforts to prevent fraud. Without such a requirement, citizenship claims could be supported merely by documents purporting to show legal relationships between parents and children, and it can be quite difficult (especially in certain countries) to verify that such documents are genuine and accurate.

The district court opined that the Department's interpretation of § 1401(g) is not "consistent with the legislative history of the INA" because it undermines Congress's goal "'of keeping families of United States citizens and immigrants united.'" But the law affords alternative paths to citizenship for children in E.J.'s circumstances. For example, E.J. could become a lawful permanent resident of the United States by virtue of his relationship to Andrew, and Elad could become a U.S. citizen by virtue of his marriage to Andrew; at that point, E.J. could acquire U.S. citizenship through Elad.

* * * *

5. U.S. Passports Invalid for Travel to North Korea

As discussed in *Digest 2017* at 7, and *Digest 2018* at 12, U.S. passports were declared invalid for travel to the Democratic People's Republic of Korea ("DPRK"), pursuant to 22 CFR § 51.63(a)(3), beginning September 1, 2017 and extending until August 31, 2019. On August 14, 2019, the Secretary of State extended the restriction until August 31, 2020 unless extended or revoked. 84 Fed. Reg. 43,259 (Aug. 20, 2019).

B. IMMIGRATION AND VISAS

1. Consular Nonreviewability

a. Hussain v. Beecroft

On March 4, 2019, the United States filed its brief on appeal in *Hussain v. Beecroft*, No. 18-2110 (6th Cir.), in the U.S. Court of Appeals for the Sixth Circuit. Mr. Hussein appealed the district court's dismissal of his APA and due process claims relating to the State Department's refusal and return of an immigrant visa application he filed on behalf of his purported wife, Ms. Abdulrab, a citizen of Yemen. The consular officer in Cairo, Egypt refused the application pursuant to INA § 221(g), noting suspicions about their marriage. The court found that the doctrine of consular nonreviewability barred review of the refusal and that plaintiffs' claims against the Department were moot upon the return of the underlying petition to USCIS for review. Excerpts follow from the U.S. brief on appeal. The brief is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/. The Court of Appeals subsequently affirmed.

* * * *

The district court properly dismissed Plaintiffs-Appellants' mandamus petition because it lacked subject matter jurisdiction over Plaintiffs-Appellants' claims. Inasmuch as Ms. Abdulrab sought review of the consular officer's determination to refuse her visa application, the doctrine of consular nonreviewability as laid out in *Kerry v. Din*, 135 S. Ct. 2128 (2015), "precluded the court all of the putative claims and arguments by the plaintiffs that invite[d] the Court to look beyond the facial basis for the refusal … since the consular decision denying the application is not open to substantive review by the Court." …Defendants-Appellees provided Plaintiffs-Appellants with a facially legitimate and bona fide reason for refusal of Ms. Abdulrab's visa application: Plaintiffs-Appellants "failed to meet the burden of establishing the bona fides of the marital relationship upon which the petition approval was based—a prerequisite for the immigrant visa." …

Further, unlike what appears to be the case in the instant filing before this Court, Plaintiffs-Appellants did not dispute before the district court that the I-130 petition had been sent to the [National Visa Center or] NVC for return to [U.S. Citizenship and Immigration Services or] USCIS for reconsideration and possible revocation. … As shown here, Plaintiffs-Appellants are even inconsistent on their position of return of the petition within the same filing, their Opening Brief. However, the record reflects that the I-130 petition was sent to the NVC in November 2017 to return to USCIS with a memo to USCIS explaining the reason for the return. ... Thus, even assuming, arguendo, the district court had found the refusal of the visa application and the doctrine of consular nonreviewability insufficient to strip it of subject matter jurisdiction, the district court correctly determined Plaintiffs-Appellants' claims were moot "because the consular role in the process of reviewing the application fully was performed upon the return" of the petition to the NVC to return to USCIS. ... Consequently, this court should affirm the district court's grant of dismissal of the mandamus petition.

In the same manner, this Court should find denial of Plaintiffs-Appellants' motion to amend their mandamus petition proper, as amendment is futile. As the district court found, "the amended petition could not withstand a motion to dismiss." … Plaintiffs-Appellants move to amend to add claims that will not change the outcome that the district court lacks jurisdiction over claims against the existing Department of State defendants. ...Further, Plaintiffs-Appellants' request to add new parties and new claims against USCIS and the DHS was—and remains—futile because Plaintiffs-Appellants have pointed to no statute or regulation that requires that USCIS move them to the front of the line of petition returns, or that USCIS must act on a returned petition in any specified period of time. Therefore, this Court should also find that Plaintiffs-Appellants' motion to amend was rightfully denied.

* * * *

II. LAW REGARDING VISA REFUSALS AND RETURNS TO USCIS

a. Visa Application Refusal for Failure to Establish Eligibility

The INA allows certain relatives of U.S. citizens to apply for immigrant visas based on certain family relationships. *See* 8 U.S.C. § 1151(a)(1). A United States citizen may file an I-130 Petition on behalf of an "immediate" alien relative. 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. §§ 204.1(a)(1), 204.2(a). If the petition is approved, the alien may apply for an immigrant visa. *See* 22 C.F.R. § 42.42. An immigrant visa application is executed at the interview before the consular officer. *See* 22 C.F.R. § 42.67. At the conclusion of the interview, a consular officer *must either*

issue or refuse the visa. *See* 22 C.F.R. § 42.81 (emphasis added). The burden of proof is upon the applicant to establish eligibility to receive the visa. 8 U.S.C. § 1361. If the applicant fails to establish to the satisfaction of the consular officer that he or she is eligible for the visa, the consular officer *must* refuse the visa. *See* 8 U.S.C. §§ 1201(g), 1361 (emphasis added).

b. Petition Returns

The Department of State should "suspend [an] action in a petition case and return the petition, with a report of the facts, for reconsideration by DHS … if the [consular] officer knows or has reason to believe that … the beneficiary is not entitled, for some … reason, to the status approved." *See* 22 C.F.R. § 42.43(a). Upon return, USCIS "may revoke the approval of [a] petition upon notice to the petitioner on any ground other than those specified in § 205 when the necessity for the revocation comes to the attention of this Service." *See* 8 C.F.R. § 205.2(a). "Revocation of the approval of a petition … under paragraph (a) of this section will be made only on notice to the petitioner …. The petitioner … must be given the opportunity to offer evidence in support of the petition … and in opposition to the grounds alleged for revocation of the approval." *Id.* at § 205.2(b).

* * * *

Following briefing and two hearings, the district court found: (1) Defendants-Appellees provided Plaintiffs-Appellants with a facially-legitimate and bona fide justification for refusal of the visa application, ...; (2) "the consular role in the process of reviewing the application fully was performed upon the return of the [petition] to the National Visa Center,"...; and (3) "the consular decision denying the application is not open to substantive review by the Court" due to the well-established doctrine of consular nonreviewability. ... On appeal, Plaintiffs-Appellants have failed to demonstrate clear error in the district court's factual findings. *See Whitbeck*, 382 F.3d at 636 (6th Cir. 2004). Consequently, this Court should affirm the district court's dismissal of Plaintiffs-Appellants' mandamus petition.

b. Denial of Plaintiffs-Appellants' Motion to Amend was Proper Because Amendment Will be Futile

Plaintiffs-Appellants also sought amendment of their mandamus petition to "add Defendants: (1) USCIS; (2) Director USCIS, [L. Francis] Cissna; (3) United States Department of Homeland Security [], and; (4) Secretary of DHS, Kirstjen Nielsen as parties." …However, as explained *supra*, … Plaintiffs-Appellants' claims regarding the refusal of Ms. Abdulrab's immigrant visa application and return of the I- 130 petition have been properly dismissed for lack of subject matter jurisdiction as Defendants-Appellees provided a facially legitimate and bona fide reason for refusal, and have returned the petition to USCIS. …

What is truly at issue before this Court regarding the requested amendment is Plaintiffs-Appellants' claim of unreasonable delay of USCIS's adjudication of Ms. Abdulrab's returned petition. However, as the district court concluded, this Court should find denial of Plaintiffs-Appellants' request to amend proper, and deny Plaintiffs-Appellants' request for remand, as their proposed amended petition cannot withstand a motion to dismiss.

* * * *

b. Aboutalebi v. Department of State

On December 18, 2019, the U.S. District Court for the District of Colombia issued its

decision in *Aboutalebi v. Department of State*, No. 19-cv-2605 (D.D.C.). Ms. Aboutalebi challenged the failure to adjudicate her visa application but also alleged that denial of the application would violate the APA. After the litigation began, the U.S. Embassy in London notified Aboutalebi that she had been found ineligible for a visa under Section 212(f) of the INA, pursuant to Presidential Proclamation 9932. See discussion of Proclamation 9932 in section 4.c., *infra*. The court accordingly determined that her claims regarding failure to adjudicate were moot. As to the APA claim, the court found it lacked subject matter jurisdiction under the doctrine of consular nonreviewability. Excerpts follow from the court's decision, which is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

Under the doctrine of consular nonreviewability, federal courts lack subject matter jurisdiction over a consular official's decision to issue or withhold a visa. As the D.C. Circuit has explained, "a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise." *Saavedra Bruno*, 197 F.3d at 1159. The doctrine operates out of respect for "the political nature of visa determinations," *id.*, and acknowledges that "[c]onsular officers have complete discretion over issuance and revocation of visas," *id.* at 1158 n.2. It "predates passage of the APA," and therefore "represents one of the 'limitations on judicial review' unaffected by [5 U.S.C.] § 702's opening clause granting a right of review to persons suffering 'legal wrong' from agency action." *Id.* at 1160. The doctrine sweeps wide and deep. It precludes judicial review "even where it is alleged that the consular officer failed to follow regulations, where the applicant challenges the validity of the regulations on which the decision was based, or where the decision is alleged to have been based on a factual error." *Van Ravenswaay v. Napolitano*, 613 F. Supp. 2d 1, 4 (D.D.C. 2009) (quoting *Chun v. Powell*, 223 F. Supp. 2d 204, 206 (D.D.C. 2002)). And if Aboutalebi's "claims are barred by the doctrine of consular non-reviewability," then "the Court has no subject-matter jurisdiction to hear the case." *Jathoul v. Clinton*, 880 F. Supp. 2d 168, 172 (D.D.C. 2012); *see also Singh v. Tillerson*, 271 F. Supp. 3d 64, 72 (D.D.C. 2017).

Aboutalebi preemptively alleges in her complaint that any later denial of her visa application would violate the APA. Compl. 97–100. In part of count three and count four, she asks the Court to declare that she is, in fact, entitled to a visa. *Id.* 94, 102. But under the doctrine of consular nonreviewability, the Court lacks subject-matter jurisdiction to review Defendants' decision to deny her application, and these claims must be dismissed.

Aboutalebi makes several attempts to sidestep this doctrine. First, she appears to question its force by arguing that the Supreme Court has neither endorsed the doctrine nor applied it to dismiss a case for lack of jurisdiction. *See* Supp. Br. at 2. She also points to *Trump v. Hawaii*, *id.*, in which the Supreme Court "assume[d] without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue," 138 S. Ct. 2392, 2407 (2018). But the Court may not so gingerly leapfrog controlling precedent. "[D]istrict judges, like panels of [the D.C. Circuit], are obligated to follow controlling circuit precedent until either [the Circuit], sitting en banc, or the Supreme Court, overrule it." *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997). And an intervening Supreme Court decision "effectively overrules" controlling precedent only if it "eviscerates" the prior precedent such that the two cases are "incompatible." *Perry v. Merit Sys. Prot. Bd.*, 829 F.3d

760, 764 (D.C. Cir. 2016) (quoting *United States v. Williams*, 194 F.3d 100, 105 (D.C. Cir. 1999)), *rev'd on other grounds*, 137 S. Ct. 1975 (2017). Whatever may be said of the above language in *Trump v. Hawaii*, it does not "eviscerate" *Saavedra Bruno*, which continues to be applied by other courts in this District. *See, e.g.*, *Rohrbaugh v. Pompeo*, 394 F. Supp. 3d 128, 131 (D.D.C. 2019).

Aboutalebi's other arguments fare no better. She spends considerable time explaining why Defendants' denial is unlawful. For example, she argues that Proclamation 9932 is not a valid basis to deny her visa application because it concerns "suspension of entry," which she argues is separate from a finding of ineligibility for a visa. *See* Supp. Br. at 3–5; Supp. Reply at 2–4. The proclamation, she argues, "temporarily pauses the physical entry of a class of aliens," but it does not render them "ineligible for a visa." *See* Supp. Br.at 4. But that distinction, even if accurate, makes no difference here, because Aboutalebi's claims challenge the reason for the denial of her specific visa application, which is prohibited by the doctrine. *Saavedra Bruno*, 197 F.3d at 1160.

Aboutalebi also argues that a consular officer did not make the decision in her case, and as a result, it is not covered by the doctrine. *See* Supp. Br. at 10. But Defendants represent that her "visa application was finally adjudicated by a consular officer in the Nonimmigrant Visa Unit of the U.S. Embassy in London," Supp. Opp'n at 7, and there appears no reason to question their representation. Indeed, by law consular officers are the only persons empowered to issue or deny J-1 visas. *See* 8 U.S.C. §§ 1101(a)(9), 1103(a)(1), 1104(a), 1201(a)(1); 22 C.F.R. § 41.111; *see also Garcia v. Baker*, 765 F. Supp. 426, 428 (N.D. Ill. 1990) ("Neither the Attorney General nor the Secretary of State can require consular officers to grant or deny visa applications, and they are without power to issue visas."); *Shen v. U.S. Consulate Gen. at Shanghai*, 866 F. Supp. 779, 780 (S.D.N.Y. 1994). Aboutalebi pivots in her Supplemental Reply to argue that a consular officer could not have adjudicated her application because the proclamation instructs that "the Secretary of State, or the Secretary's designee" must identify persons covered by the proclamation. Supp. Reply at 5. But there is no reason why the Secretary could not have designated a consular officer to do so. And even if the Secretary or some other official identified persons covered by the proclamation, there remains no reason to doubt, as Defendants represent, that a consular officer made the subsequent decision regarding Aboutalebi's specific visa application. Thus, the Court lacks the power to review it. *Saavedra Bruno*, 197 F.3d at 1160.

Aboutalebi also argues that her case is distinguishable from *Saavedra Bruno* because, unlike in that case, "the alleged basis of ineligibility is not a statutory basis for ineligibility at all." Supp. Br. at 10. But, as Defendants point out, the reasoning supporting the doctrine is not so cabined. *See* Supp. Opp'n at 7–8. The doctrine is grounded in deference to the political branches' power to determine who may enter the country. *Saavedra Bruno*, 197 F.3d at 1158– 59. As the *Saavedra Bruno* court instructed, it is "not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Saavedra Bruno*, 197 F.3d at 1159 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)). Aboutalebi has not pointed to any law that would permit this Court to review her visa denial.

Finally, Aboutalebi argues that her father is not a "senior official of the Government or Iran" under Iranian law and that she is not his "immediate family member" as properly understood under U.S. law. *See* Supp. Br. at 5–8, 10–11. For that reason, she argues, the proclamation does not apply to her. *Id.* at 11. But again, Aboutalebi asks the Court to do what it

cannot: review a consular officer's adjudication, whatever its underlying merits. *Chun*, 223 F. Supp. 2d at 206.

* * * *

2. Diversity Visa Lottery

On November 4, 2019, the U.S. District Court for the District of Colombia issued its decision on a motion for preliminary injunction in *E.B. v. Department of State*, No. 19-cv-02856 (D.D.C.), a challenge to the rule requiring that any individual who seeks to participate in the annual diversity visa lottery must possess a valid passport from her home country when she registers for the lottery. The Diversity Visa Program (Pub. L. No. 101-649, § 131, 104 Stat. 4978, 4997 *et seq*. (1990) (codified at 8 U.S.C. § 1153(c))) allows the State Department to issue up to 50,000 diversity visas annually to individuals from countries and regions that are historically underrepresented in immigration to the United States. *See* 8 U.S.C. § 1151(e). The process uses a "lottery" to select potential visa applicants from among the approximately 14 million individuals who register each year. 84 Fed. Reg. 25,989 (June 5, 2019) (codified at 22 C.F.R. § 42.33). The court first found that the plaintiffs were likely to succeed in demonstrating standing to sue under the APA. Then the court considered whether plaintiffs could meet the requirement of showing a likelihood of irreparable harm in order to obtain a preliminary injunction. The court's consideration of irreparable harm, excerpted below (with record citations omitted), concludes with the court denying the motion for a preliminary injunction due to the failure to show a likelihood of irreparable harm from the rule. The full opinion is available at https://www.state.gov/digest-of-united-states-practice-in-international-law.

* * * *

Applicant Plaintiffs argue that the "cost and time of obtaining a passport" will effectively preclude them from applying for this year's lottery. They argue that "losing the opportunity to apply for a diversity visa in this year's lottery" would constitute irreparable harm that "cannot be subsequently redressed." Thus, the harm they allege is the loss of the *chance* to apply for an immigrant visa, not the loss of the visa itself. … Family Plaintiffs, for their part, argue that their irreparable harm flows from that same loss of a chance. They contend that "the denial of the conditional benefit of family unification through this year's Diversity Visa Program would also comprise an irreparable injury that cannot be remedied once the lottery has taken place."

Plaintiffs have not shown that missing the lottery this year will subject them to irreparable harm under the law of this Circuit. First, the loss of such a small chance is not sufficiently "great" to warrant a preliminary injunction. As discussed above, to warrant preliminary relief, the alleged injury must not only be "certain" but also "great." *Wisc. Gas Co.*, 758 F.2d at 674. Even the certain loss of a tiny—about 0.8%—chance of a desired benefit cannot suffice under this exacting standard. While "there is some appeal to the proposition that any damage, however slight, which cannot be made whole at a later time, should justify injunctive relief," the Court cannot ignore that "some concept of magnitude of injury is implicit in the [preliminary injunction] standards." *Gulf Oil Corp. v. Dep't of Energy*, 514 F. Supp. 1019, 1026 (D.D.C. 1981). Plaintiffs have cited no case in which a court found that the loss of such a

small chance at a benefit met the irreparable harm standard, even a benefit as potentially significant as a diversity visa.

Second, the "greatness" of Plaintiffs' injury is also undermined by the lottery's annual repetition. By statute, the State Department must issue diversity visas every year, 8 U.S.C. § 1153(c)(1), and must do so randomly, 8 U.S.C. § 1153(e)(2). Plaintiffs thus are not losing their *only* chance at a diversity visa if they do not participate in the lottery this year. That the lottery is held annually further underscores why the alleged injury is insufficiently "great" to be irreparable. *Cf. Reynolds v. Sheet Metal Workers, Local 102*, 702 F.2d 221, 226 (D.C. Cir. 1981) ("The uncertainty of future opportunities emphasizes the irreparable character of the injury class members would sustain if discriminatory selection were permitted.").

Third, at least on this record, the lack of a direct connection between the alleged injury and the Passport Rule further weakens Plaintiffs' case for irreparable harm. An irreparable injury must "directly result from the action which the movant seeks to enjoin." *Wisc. Gas Co.*, 758 F.2d at 674. Applicant Plaintiffs allege that they cannot obtain a passport in time to enter the lottery because they either lack the money to do so or learned about the new requirement too late. But these obstacles, to the extent that they exist, do not "directly result" from the Passport Rule for irreparable harm purposes.

* * * *

…[T]he Passport Rule was published in the Federal Register on June 5, 2019. *See* Passport Rule. And while the Court understands that Applicant Plaintiffs likely do not regularly check the *Federal Register*, the rule's publication there serves to provide them notice as a matter of law. 44 U.S.C. § 1507; *see also Nat'l Ass'n of Mfrs. v. N.L.R.B.*, 717 F.3d 947, 953 (D.C. Cir. 2013), *overruled on other grounds by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) ("The Federal Register Act further provides that the filing of a document required to be published in the Federal Register constitutes constructive notice to anyone subject to or affected by it."). None of the Applicant Plaintiffs' representations suggest that, had they started the process of obtaining passports when they had constructive notice of the rule in June, they would not have been able to secure them five months later, by November 5, 2019. This amounts to another reason why the Applicant Plaintiffs' harm from missing the lottery this year does not "directly result" from the Passport Rule itself.

Another court in this District recently found an insufficient causal connection between government action and alleged irreparable harm in the visa context in *Feng Wang v. Pompeo*, 354 F. Supp. 3d 13 (D.D.C. 2018). That case concerned the EB-5 visa program, which allows foreign immigrant investors, their spouses, and their young unmarried children to be admitted to the United States as permanent residents. *Id*. at 17. The annual number of EB-5 visas is limited and, because the demand for EB-5 visas outpaces the supply, prospective EB-5 immigrant investors from China must wait years for a visa. *Id.* at 16–19. Immigrant investor plaintiffs challenged the State Department's policy of counting family members towards the annual limit—which they alleged caused the long wait—as unlawful. *Id.* at 19. They argued that without an injunction, their children would be too old to join them by the time they obtained visas. *Id.* at 25–26. And as a result, they asserted, they would be irreparably harmed because their families would be separated. *Id.* In denying their motion for a preliminary injunction, the court found that the causal link between the government's policy and the potential separation of the plaintiffs' families was not direct enough to show irreparable harm. *Id.* at 25–26, 28. The Court reasoned that "State's counting policy does not, in and of itself, cause family separation. Rather, the causal

connection is between the counting policy and the choice investors face if their children age out by the time EB-5 visas become available." *Id.* at 26.

In support of their irreparable harm claim, Plaintiffs cite cases that present a few distinct scenarios, but none are akin to the unusual circumstances here. They point to several cases from outside this Circuit in which courts have held that the loss of a chance to bid on a contract can constitute irreparable harm. …[U]nlike the plaintiffs in those cases, Applicant Plaintiffs are not losing out on a unique opportunity because the lottery is held annually.

Plaintiffs also refer to cases in which courts have held that the loss of a chance to take the bar exam can constitute irreparable harm. *See, e.g.*, *Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1166 (9th Cir. 2011). Again, the harm in those cases was "greater" than that faced by Plaintiffs here because in all likelihood those plaintiffs had far higher chances of passing the bar exam than Applicant Plaintiffs have of winning the lottery. Moreover, in those cases, courts found that the plaintiffs' loss of a chance to take the exam would harm them in specific ways beyond mere delay.

* * * *

3. Visa Waiver Program

The agreement between the United States and Poland on cooperation on border security and immigration was signed at Washington on August 16, 2019 and entered into force November 14, 2019. The full text of the agreement is available at https://www.state.gov/poland-19-1114.

On March 7, 2019, U.S. Ambassador-at-Large and Coordinator for Counterterrorism Nathan A. Sales delivered remarks at the Heritage Foundation on the role of the Visa Waiver Program ("VWP) in strengthening U.S. security. Ambassador Sales's remarks are excerpted below and available at https://www.state.gov/the-visa-waiver-programs-role-in-strengthening-our-security/.

* * * *

[T]he Visa Waiver Program is the gold standard for international security cooperation. The VWP helps us push our borders out: It enables us to identify terrorists attempting to travel here and stop them long before they reach our shores.

That's because visa-free travel doesn't mean *vetting*-free travel. As a condition of membership, our partners share valuable information that strengthens our national security, like terrorist watchlists and criminals' fingerprints. They invest in sophisticated border security technology. They upgrade their passport security programs. And they amend their counterterrorism laws to address the new threat landscape.

* * * *

The VWP's Security Requirements

The Visa Waiver Program's economic benefits are well known. In 2017, the United States welcomed more than 22.6 million visitors under the program. While they were here, they collectively spent more than $94 billion in our country. On average, VWP travelers spend 44 percent more during a trip to the United States than other visitors.

* * * *

The criteria for membership are fairly straightforward. By law, member countries must have a nonimmigrant visa refusal rate lower than three percent. … Members also have to implement a number of tough security measures to combat terrorist travel.

DHS is responsible for ensuring that countries meet the VWP's strict security criteria. The State Department's Counterterrorism Bureau, which I lead, plays a key role in ensuring the VWP is helping to secure our homeland and keep our citizens safe.

Let me say a few words about five key security requirements in the program.

First, there's the Electronic System for Travel Authorization, or ESTA. Citizens of VWP countries apply online before boarding their plane or ship to the U.S. DHS then screens their data to determine if they might pose a threat. If their ESTA is denied, they must apply for a visa at a U.S. embassy or consulate.

This vetting works because of a second VWP requirement—it gives us unprecedented access to other countries' terrorism-related data.

One of the lessons we learned on 9/11 was the need to tear down the walls that kept officials within and among governments from talking to one another. We can't allow ourselves to forget that vital lesson.

Under the VWP, member states must provide us with their watchlists of known and suspected terrorists. They also have to share information about serious criminals, including their fingerprints and other biometrics.

In addition, since 2017, VWP members have been required to screen travelers arriving in their countries against U.S. watchlists, and notify us about any encounters with potential terrorists. This dramatically expands our awareness of global terrorist travel and makes it harder for terrorists to cross borders anywhere. Think of it as a global neighborhood watch where everyone's looking out for emerging terrorist threats.

Third, we've leveraged INTERPOL's capabilities to enhance the security of the VWP.

VWP partners are required to report lost or stolen passports within 24 hours, either to INTERPOL or directly to the U.S. This helps us spot terrorists trying to travel on forged documents. In fact, VWP countries are responsible for over 70 percent of the 84.5 million records in INTERPOL's database of stolen and lost travel documents.

We also recently began requiring member countries to report foreign terrorist fighter identities to organizations like INTERPOL and Europol. …

Fourth, the VWP helps us spot unknown terrorists—the ones hiding in plain sight.

The VWP's intensive information sharing requirements enable us to stop travelers who've been watchlisted. But we need to do more if we're going to stop terrorists who've managed to escape notice. To help flag these previously unidentified threats, we've called on our VWP partners to analyze Passenger Name Record data, or PNR.

PNR is the information you give an airline when you book a ticket. …

The United States began using PNR in 1992, and in 2002 collection became mandatory for all flights to and from our country. We made it a requirement for VWP members in 2015.

PNR is one of the most valuable weapons in our counterterrorism arsenal, because it draws connections between known terrorists and their unknown associates. The technique is called "link analysis." If a traveler has booked a ticket with the same phone number as, say, the underwear bomber, he probably deserves a closer look than a typical airline passenger.

In fact, if investigators had applied simple link analysis techniques to PNR and related data, they could have uncovered the ties among all 19 of the 9/11 hijackers.

We can also use PNR to spot potential terrorists based on their travel patterns. We can tell if a traveler flies with a companion who's on a watchlist. We can tell if a passenger's current travel varies from previous routes. We can tell if a traveler is taking odd routings to get from point A to point B.

Fifth, the VWP isn't just about sharing threat information or screening travelers. It also enables DHS to evaluate partners' border security and passport facilities …

DHS experts regularly visit VWP countries to inspect airport security, see how border officials screen travelers, visit refugee-processing facilities, and check that government offices are issuing passports to genuine applicants. …

Why are member states willing to live up to these strict security requirements? Part of the answer is that, like the U.S., they take seriously the threat of international terrorism.

But partly it's because the benefits of visa-free travel are worth it to them. In short, the VWP is a carrot with which we can induce member states to live up to the very highest security standards. It buys us data and cooperation we otherwise wouldn't get. Because of the VWP, we have more watchlists, more fingerprints, and more leverage. And more security.

* * * *

In December 2017, the UN Security Council unanimously adopted a tough, landmark resolution on terrorist travel. Resolution 2396 requires all UN members to use tools like watchlists and PNR. [Resolution] 2396 internationalizes American policies and practices. …

Similarly, the European Union is now setting up its own ESTA-like system. …

Going forward, we'll continue using the VWP as a lever to induce other countries to embrace state-of-the art border security.

For that reason, we're also open to welcoming new members that meet the program's strict criteria. …

* * * *

4. Visa Regulations and Restrictions

a. Proclamation 9645

(1) Congressional communications regarding waiver provision

As discussed in *Digest 2017* at 17-28, and *Digest 2018* at 21-37, the U.S. Supreme Court upheld Presidential Proclamation ("P.P.") 9645 as a lawful exercise of executive discretion to suspend the entry of aliens into the United States. On February 22, 2019, the State Department responded to a letter from several members of both chambers of Congress regarding the waiver provision in P.P. 9645. The February 22, 2019 response is excerpted below (without the referenced enclosures, which include sensitive, non-public information). The State Department has also submitted regular reports to the appropriate congressional committees on the implementation of P.P. 9645, as mandated by Public Law 116-6, the Consolidated Appropriations Act of 2019. Those reports are available at https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/presidential-proclamation9645.html.

* * * *

Thank you for your letter of October 12, 2018 regarding Presidential Proclamation 9645—Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats (the Proclamation or PP 9645). …

Your letter requested the Department's guidance regarding the processing of waivers to foreign nationals affected by the Proclamation and specific statistical data on such waivers. In addition to the information provided in this letter, the Department also makes a broad range of visa statistics publically available at https://travel.state.gov/content/travel/en/us-visas.html.

The Department works closely with U.S. embassies and consulates to ensure visa applicants who are subject to PP 9645 and otherwise eligible for visas are considered for exceptions and waivers under the Proclamation. An applicant whose situation fits into one of the exceptions set forth in the Proclamation, and who is otherwise eligible for a visa, may be issued a visa without going through the waiver process.

If an applicant does not fall into an exception category, but is otherwise eligible for a visa, a consular officer will *automatically* consider the applicant for a waiver based upon the three-part test set forth in PP 9645. The applicant need not prepare any separate application for a waiver. Consular officers adjudicate waivers as part of the visa application process based on information provided in the standard visa application and an in-person interview of the applicant. Aliens who are subject to the Proclamation's entry restrictions may present evidence regarding their eligibility for a waiver pursuant to the regulations applicable to immigrant and nonimmigrant visa applicants. *See e.g.* 22 C.F.R. §§ 41.105(a), 41.121(b)(l), 42.65, 42.81(b).

The burden of proof is on the alien to establish that they are eligible for a visa and a waiver to the satisfaction of the consular officer. *See e.g.* 8 U.S.C. § 1361; 22 C.F.R. § 40.6. The text of the Proclamation and these regulations and other helpful information, including frequently asked questions regarding the Proclamation and the total number of waivers approved (updated biweekly) for applicants subject to PP 9645 travel restrictions, are available on the Department's public website, travel.state.gov. Certain information has also been made publicly available on the Department's Freedom of Information Act website, foia.state.gov, as discussed in the attachment.

The Department noted in its responses to your prior two letters from 2018 that, although two cases had been cleared for waivers as of January 8, 2018 (which was only one month after the Department began processing cases under the Proclamation), that number was expected to grow as time elapsed. The attached data reflect[] that approximately 5.9 percent of applicants hav[e] been found to qualify for waivers as of October 31, 2018. In addition, more than 11,000 applicants have been determined to meet the first two requirements for a waiver and are now under review to determine whether they meet the remaining national security and public safety criterion. Due to the time required to fully evaluate an applicant's eligibility for a waiver, the Department is providing statistics using October 31 as a cut-off date, which is likely to give a more accurate indication of the portion of applicants covered by the Proclamation who qualified for waivers. Many applicants who applied between October 31 and the present are still being considered for a waiver. Furthermore, as discussed in the attachment and in the appendix, once a consular officer determines that an applicant meets all three criteria for a waiver, the timing of visa issuance often depends on how quickly the applicant provides documents required for visa issuance to the consular officer. This includes documents such as medical exam results, police

certificates, passports, and other documents required under the … INA or implementing regulations.

As requested, please find enclosed answers to the questions enumerated in your letter. The responses include statistics for the period between December 8, 2017 and October 31, 2018. …

* * * *

(2) Litigation regarding waiver provision

There were several lawsuits filed in 2019 challenging the Trump administration's application of the waiver provision in P.P. 9645. On December 5, 2019, in *Najafi v. Pompeo*, No. 19-cv-05782 (N.D. Cal.), the U.S. District Court for the Northern District of California denied plaintiffs' motion for a preliminary injunction requiring completion of waiver adjudication within fifteen days. Excerpts follow from the section of the court's order considering the "likelihood of success" requirement for a preliminary injunction. The court's order is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law.

* * * *

To the extent that Plaintiffs are arguing that their APA claim regarding timing is subject to APA review, however, the Court finds that Plaintiffs have not established reviewability. Plaintiffs point to no objective standard in PP 9645 that can be applied to determine what is a reasonable time. While Plaintiffs point to *Nine Iraqi Allies v. Kerry*, this case is distinguishable because there, the relevant statutes required that the government process applications within nine months. 168 F. Supp. 3d 268, 293 (D.D.C. 2016). Thus, when determining what was a reasonable time, the district court was able to find that the statutes "provide[d] just such a timetable or other indication of speed." *Id.* (internal quotation omitted). No such timing obligation exists in PP 9645, however, and thus the Court has no manageable standards to assess Defendants' compliance. *See Darchini* Ord. Denying Prelim. Inj. at 6 (distinguishing *Nine Iraqi Allies* "because there is no similar statutory directive here").

Accordingly, the Court finds that Plaintiffs' claim as to whether consular officers' discretion and authority to make individual waiver decisions is being unlawfully usurped is reviewable under the APA. The Court finds, however, that Plaintiffs have not established that their claim regarding the reasonable timing of such decisions is reviewable under the APA.

b. Consular Nonreviewability

Defendants argue that Plaintiffs are attempting to "short-circuit consular nonreviewability" via the APA… "It has been consistently held that the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review." *Bustamante v. Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008). Here, consular nonreviewability does not apply because Plaintiffs are not challenging the consular officer's decision, but the lack thereof, as well as the procedures by which PP 9645 is being implemented. … Further, as Beneficiary Plaintiffs are still *waiting* for a decision by the consular officer, there is no decision to review and thus consular nonreviewability is not at issue.

* * * *

c. Unreasonable Delay

On the merits, the Court finds that Plaintiffs have failed to show a likelihood of success on the merits as to whether the waiver decisions have been unreasonably delayed. Again, as discussed above, the Court finds that Plaintiffs have not shown that they can bring an APA claim based solely on the timing. Rather, Plaintiffs have established reviewability as to an APA claim based on the alleged policy depriving consular officers of the discretion and authority to issue waivers. Even if Plaintiffs succeed on this violation, however, Plaintiffs fail to connect this policy with any unreasonable delay. At most, Plaintiffs point to the e-mail by Mr. Nantais stating that "the goal of this effort is not to create timely processing of waivers for any applicant who is ineligible under the proclamation." (Pls.' Mot. for Prelim. Inj., Exh. 95 at 6.) This e-mail, however, is not proof of intentional delay, as the e-mail goes on to state: "The goal is to as thoroughly and effectively screen and vet every affected applicant prior to waking [sic] a waiver determination." Thus, at most the e-mail states that the priority is on vetting rather than timeliness. Nor is it clear that Mr. Nantais's e-mail is representative of a government policy…

Even if the Court was to find that the challenged policy causes delay, Plaintiffs fail to establish that such delay is unreasonable. Plaintiffs urge the Court to apply the factors set out in *Telecommunications Research and Action Center v. FCC* ("*TRAC* factors") for determining unreasonable delay…

The first *TRAC* factor requires the application of a "rule of reason." …Here, the Court cannot say that the time taken by Defendants thus far is unreasonable. Indeed, courts in this district have recognized that "[t]errorist-related determinations involving immigration applicants are not made lightly and may be time-consuming." *Islam v. Heinauer*, 32 F. Supp. 3d 1063, 1071 (N.D. Cal. 2014). Additionally, in finding that PP 9645 was lawful, the Supreme Court accepted (and this Court is bound by its ruling) PP 9645's "extensive findings describing how deficiencies in the practices of select foreign governments … deprive the Government of 'sufficient information to assess the risks those countries' nationals pose to the United States.'" *Trump v. Hawaii*, 138 S. Ct. at 2408 (quoting PP 9645 § 1(h)(i).) Thus, as Defendants explain, "[t]he vetting process may be more difficult and time consuming for the [Beneficiary Plaintiffs] because, as the Presidential Proclamation explains, Iran does not adequately provide public-safety and terrorism-related information." (Defs.' Opp'n at 19; *see also Darchini* Ord. Denying Prelim. Inj. at 8 ("The Court is persuaded by the Government's argument that this vetting process is more difficult and time consuming for Iranian nationals because, [as] the Presidential Proclamation explains, Iran does not adequately provide public-safety and terrorism-related information") (internal quotation omitted).)

In arguing that Defendants are able to complete the waiver determinations within fifteen days, Plaintiff argues that "Defendants have stated that waiver considerations can be completed in 'one business day.'" (Pls.' Mot. for Prelim. Inj. at 21.) The relevant e-mail is an automatic reply from the "Countries-of-concern-inquiries" e-mail, and states: "In urgent cases, a response from the Visa Office can be provided within one business day, provided that the Visa Office has all the information needed." (Pls.' Mot. for Prelim. Inj., Exh. 74 at 1.) The e-mail does not suggest that waiver considerations can in fact be completed in one business day; it only states that responses can be provided in one business day in urgent cases. It is not clear, however, that this e-mail address is used for waiver considerations only; notably, the State Department's Operating Q&As states that this e-mail is to be used "[i]f the applicant does not fit under one of the undue hardship and national interest waiver examples . . . but the interviewing consular

officer and consular manager believe that the applicant meets the undue hardship and national interest requirements for the waiver for other reasons . . . .” (Pls.’ Mot. for Prelim. Inj., Exh. 75 at 6.) The auto-reply also refers to “general inquiries,” which suggests this e-mail address is used for many different functions, some of which may be capable of responses within one business day.

Plaintiffs also point to the Defendants’ implementation of the enhanced, automated front-end screening for security checks, which greatly reduces the time necessary for adjudication. (Pls.’ Mot. for Prelim. Inj. at 21-22.) While this appears to be true, it does not show that the delay in adjudication up to this point is unreasonable. The automated system was not implemented until July 2019, at which point there was already a backlog of approximately 17,000 waiver applications. It is not clear that the implementation of automated screening necessarily means Defendants can now complete the waiver determinations within fifteen days for Plaintiffs. Thus, the Court finds this factor weighs in favor of Defendants.

The second *TRAC* factor considers where there is a mandated timetable. No timetable exists in PP 9645. While Plaintiffs argue that the President “promised to create a ‘robust’ waiver program,” and points again to the “one business day” e-mail, the Court finds that the plain language of PP 9645 creates no timing requirement. Thus, this factor is neutral.

Courts typically consider the third and fifth *TRAC* factors together, namely the dangers to human health and welfare as well as the nature of the interests prejudiced by the delay. *See Islam*, 32 F. Supp. 3d at 1073; *Beyene*, 2012 WL 2911838, at *7. Plaintiffs point to the hardships that they are suffering due to family separation. Defendants do not appear to dispute these factors, and the Court finds they weigh in favor of Plaintiffs.

The fourth *TRAC* factor considers the effect of expediting adjudication “on agency action of a higher or competing priority.” *TRAC*, 750 F.2d at 80. Plaintiffs argue that “the agency’s competing priorities are a difficult metric to analyze because Defendants have abandoned all pretense of competing priorities, by prioritizing only a blanket preclusion of entry . . . .” (Pls.’ Mot. for Prelim. Inj. at 24.) The Court does not find this conclusory argument persuasive, particularly when waivers have in fact been granted to Plaintiffs in this case since its filing. (Defs.’ Opp’n, Exh. B at 13, 40, 45 (visas issued to Plaintiffs Aryana, Shafeian, Rayatidamavandi, and Beykli.) As Defendants point out, there are also competing priorities including the need for national security vetting and the thousands of other waiver applicants in line. (Defs.’ Opp’n at 22.) In particular, “national security concerns constitute the stated purpose for the proclamation, and given that this purpose has been expressly approved by the Supreme Court, we must weigh this factor decisively in favor of Defendants.” *Yavari v. Pompeo*, 2:19-cv-2524-SVW-JC, Dkt. No. 27 at 13 (citing *Trump v. Hawaii*, 138 S. Ct. at 2420).

The final *TRAC* factor concerns bad faith. Plaintiffs state that at this juncture, they are not alleging any impropriety. (Pls.’ Mot. for Prelim. Inj. at 24.) A court “need not find that an agency acted in bad faith to conclude unreasonable delay.” *Qureshi*, 2012 WL 2503828, at *7 (citing *Indep. Mining Co.*, 105 F.3d at 510). Thus, this factor weighs slightly in favor of Defendants.

Considering the factors together, the Court finds that Plaintiffs have not established a likelihood of success that Defendants have subjected them to unreasonable delay. In particular, the rule of reason and competing agency priorities weigh strongly against such a finding. *See Darchini* Ord. Denying Prelim. Inj. at 7-9 (finding that *TRAC* factors weigh against finding unreasonable delay based on identical facts); *Jamal* Ord. Denying Prelim. Inj. at 7-9 (same).

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In *Darchini v. Pompeo*, No. 19-cv-01417 (C.D. Cal.) (referenced by the *Najafi* court's order), the U.S. District Court for the Central District of California denied the plaintiffs' motion for a preliminary injunction on September 24, 2019 and granted the U.S. government's motion to dismiss on December 3, 2019. Excerpts follow from the section of the court's order dismissing the APA claims, without prejudice. The court also dismissed the Fifth Amendment (due process) and mandamus claims without prejudice. The court's order is available at https://www.state.gov/digest-of-united-states-practice-in-international-law.

* * * *

First, the Government argues that Plaintiffs have failed to allege unreasonable delay under the APA, 5 U.S.C. §§ 555(b) and 706(1). Mot. at 13. To succeed on such a claim, a plaintiff must establish that the agency has a "discrete" duty to act and that the agency unreasonably delayed acting on that duty. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-65 (2004). "[F]or a claim of unreasonable delay to survive, the agency must have a statutory duty in the first place." *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 885 (9th Cir. 2002). Accordingly, "there can be no unreasonable delay" where "the governing statute does not require action by a certain date." *Id*. at 885-86.

In their Complaint, Plaintiffs allege that the Government has failed to act within a reasonable time because it has "failed to adjudicate Beneficiary Plaintiffs visa waivers within 90 days," although Plaintiffs offer no explanation for this particular deadline. Complaint 166. But in their Opposition, Plaintiffs do not address the Government's arguments regarding the lack of a statutory requirement. The Court finds that Plaintiffs have not adequately alleged that the Government has unreasonably delayed agency action it is required to take. Therefore, the Court dismisses Plaintiffs' first cause of action under §§ 555(b) and 706(1), without prejudice.

Next, the Government argues that Plaintiffs fail to state a claim under § 706(2)(A) and (D). Mot. at 17-18.

The APA bars federal agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or is conducted "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) and (D). Plaintiffs claim that the Government's alleged requirement that visa and consular section chiefs concur with consular officers' determinations regarding waivers is unlawful under PP 9645. See Complaint 174-181.

The Government argues that Plaintiffs "point to no source of law prohibiting consular-officer consultation with supervisors or other State Department components or federal agencies in making the national-security and public safety assessment," and that the Proclamation "does not define 'consular officer.'" Mot. at 17. The Government further suggest that PP 9645 contemplates agency involvement beyond that of rank-and-file consular officers, because it provides for the Secretary of State and the Secretary of Homeland Security to promulgate "standards, policies, and procedures for: ... determining whether the entry of a foreign national would not pose a threat to the national security or public safety of the United States," as Plaintiffs note. See Complaint 7; Mot. at 18. The Government contends that individual consular officers could not have access to all of the intelligence and national-security information they need to make the waiver adjudications, and so the participation of other officials in the process is appropriate. *Id*.

Plaintiffs' response is that the Government cannot "make up a new meaning" for the phrase, "consular officer." Opp'n at 14. To this argument, the Government notes that the definition of "consular officer" in federal law "easily encompasses consular officers who are managers and supervisors beyond the one, single, regional, rank-and-file officer before whom an individual Plaintiff visa applicant executed their visa application." Reply at 7; …The Court agrees with the Government that Plaintiffs' allegations regarding the propriety of officials other than rank-and-file consular officers participating in the waiver adjudication process do not plausibly support their substantive APA claim.

Plaintiffs do not otherwise provide any legal support for their contention that the waiver adjudication process is unlawful. The Court finds that their Complaint fails to plausibly state a claim under §§ 706(2)(A) and (D) and dismisses this cause of action, without prejudice.

* * * *

(3) International Refugee Assistance Project ("IRAP") v. Trump

In the *IRAP* case, multiple plaintiffs—including organizations (such as IRAP) and U.S. citizens and residents seeking visas for their relatives from Iran, Syria, Yemen, and Somalia—challenged Presidential Proclamation 9645 as unconstitutional. The district court denied the U.S. government's motion to dismiss, notwithstanding the Supreme Court's decision in *Trump v. Hawaii*, holding that the Proclamation survives rational basis review because of its national security justification. See *Digest 2018* at 21-37. Excerpts follow from the U.S. brief filed October 22, 2019 in the U.S. Court of Appeals for the Fourth Circuit. *International Refugee Assistance Project v. Trump*, No. 19-1990 (4th Cir.). The brief is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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* * * *

I. In *Hawaii*, the Supreme Court unequivocally held that the Proclamation survives rational-basis review. That decision is controlling here. The district court committed a variety of fundamental errors in concluding to the contrary.

The district court erred in relying upon, and crediting, precisely the same arguments that the Supreme Court rejected in *Hawaii*. The district court believed plaintiffs' rational-basis challenge was viable under three cases—*Moreno*, *Cleburne*, and *Romer*—even though Hawaii held that the Proclamation did not fit the pattern of those cases. The district court also stated that the Proclamation's national-security rationale was undermined by statements from the President, supposed deviations from the Proclamation's baseline criteria, the rate at which waivers are granted, and the statutory scheme. But Hawaii considered and rejected the exact same arguments.

The district court's effort to distinguish *Hawaii* is without merit. Although the Court reviewed a preliminary injunction under the likelihood-of-success standard, *Hawaii*'s holding turned on a binding legal conclusion that the Proclamation survives rational-basis scrutiny, not a tentative merits analysis or balancing of harms that would be relevant to a discretionary assessment of equitable relief. Also unavailing is the district court's reliance on the possibility of new evidence—specifically, concerning the approval of waivers. But this purported new evidence is legally irrelevant, because *Hawaii* already rejected the argument that the rate at

which waivers are granted affects the Proclamation's rational basis. And it is also factually immaterial, in light of the thousands of waivers approved under the Proclamation since the restrictions were first imposed. Accordingly, the district court offered no persuasive rationale for disregarding the Supreme Court's holding in *Hawaii*, which is binding here and forecloses plaintiffs' constitutional claims.

The district court also fundamentally misunderstood the legal standard for applying rational-basis review at the motion to dismiss stage. The court's call for a "more fulsome" record on these issues is simply incompatible with the rational-basis standard, which is not subject to courtroom fact-finding. Likewise, the court's examination of what "motivated" the Proclamation cannot be squared with rational-basis review, in which actual motivations are entirely irrelevant. The court's questioning of the Proclamation's national-security efficacy is also improper, because the Proclamation survives review so long as its rationales are arguable, even if they were erroneous.

The district court also erred in its view that, on a motion to dismiss, plaintiffs' rational-basis challenges may succeed based on nothing more "plausible" attacks on the Proclamation. Although the court must accept all plausibly pled factual allegations as true on a motion to dismiss, the district court was wrong to apply that principle to legal conclusions, including the question whether the Proclamation is supported by a rational basis. Moreover, rational-basis review asks whether there are plausible reasons supporting the law, not whether there are plausible bases for attacking it.

Finally, even if the district court were somehow able to evade the Supreme Court's application of rational-basis review, the Proclamation must still be upheld. The district court focused exclusively on arguments it believed undermined the Proclamation's national-security rationale; but those arguments do not question the Proclamation's other, independent rationale—to encourage foreign governments to improve their practices, thus facilitating the government's vetting process overall—and the Proclamation can be sustained on that basis alone. Furthermore, while *Hawaii* did not reach this question, the Supreme Court strongly suggested that the Proclamation should more properly be analyzed under *Mandel* rather than rational-basis review, and there is no doubt that the Proclamation survives that more deferential standard.

II. Wholly apart from the threshold flaw that *Hawaii* forecloses this suit, plaintiffs' claims also must be dismissed for additional, alternative reasons. First, plaintiffs' Due Process claim fails on the merits because plaintiffs have no cognizable liberty interest in the issuance of a visa to a foreign national relative. And at a minimum, they have received all the process they are due. Second, plaintiffs' Equal Protection and Establishment Clause claims fail on the merits because those claims are not predicated on any violation of plaintiffs' own constitutional rights. The Proclamation does not apply to plaintiffs at all; it applies only to aliens abroad. Accordingly, plaintiffs' challenges must be predicated only on derivative claims based on the rights of foreign nationals who themselves have no constitutional rights. But it is a long-established rule that a party must assert his own rights based on being himself subject to the challenged government policy. Plaintiffs cannot satisfy that requirement, and so their claims fail on the merits.

Contrary to the district court's suggestion, the Supreme Court in *Hawaii* expressly declined to address this alternative basis for rejecting these claims.

* * * *

On December 17, 2019, the United States government filed a further reply brief in support of its appellate brief, excerpted above. Excerpts follow from the reply brief in

IRAP v. Trump, which is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

The Supreme Court in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), held that "the Government has set forth a sufficient national security justification [for Presidential Proclamation 9645] to survive rational basis review." That binding holding forecloses plaintiffs' rational-basis challenges to the Proclamation.

Though decided in a preliminary-injunction posture, the Supreme Court's legal conclusion is fully binding here. The Court's decision did not turn on the balancing of harms or the equities involved; its comprehensive opinion did not express any tentativeness or eschew any definitive judgment; and the parties fully argued all the merits issues.

The motion-to-dismiss standard does not permit plaintiffs to open discovery on claims that the Supreme Court has already held fail as a matter of law. Whether the Proclamation rests on a rational basis is a question of law. And the pertinent legal question under rational-basis review is whether there are plausible grounds supporting the Proclamation, not whether plaintiffs have alleged plausible grounds for attacking it. If there are plausible grounds supporting the Proclamation—and *Hawaii* held that there are—then rational-basis review is at an end.

Plaintiffs merely recycle the same legal arguments that the Supreme Court already considered and rejected; they have not made any new allegations that would suffice to negate the rational basis identified and affirmed by the Supreme Court. The Court rejected the argument that the Proclamation could be explained only by anti-Muslim bias, and held instead that the Proclamation was rationally grounded in legitimate national-security concerns and foreign-policy objectives.

Plaintiffs' arguments fare no better regarding the Government's alternative grounds for dismissal. The Proclamation's purpose of encouraging other countries to improve their information-sharing practices is plainly legitimate, as the Supreme Court recognized. The Proclamation is not irrational merely because it does not single-mindedly pursue that purpose to the exclusion of all other interests and considerations. The Government has not waived any argument about information-sharing objective; the Proclamation expressly identifies its information-sharing purpose, which was asserted at every stage of this litigation. That legitimate, rational objective is sufficient to uphold the Proclamation even if is related to the Proclamation's national-security purpose. In all events, plaintiffs fail to refute that they cannot prevail under the more deferential standard of *Kleindienst v. Mandel*, 408 U.S. 753 (1972). *Hawaii* rejected plaintiffs' argument that the Proclamation can be explained only by animus, and unequivocally stated that applying Mandel would put an end to its review.

Finally, plaintiffs also fail to demonstrate any cognizable violations of their own rights. The Supreme Court has squarely held that Equal Protection and Establishment Clause claims cannot proceed unless the plaintiff is personally denied equal treatment by the challenged provision, regardless of any allegedly "stigmatic" message that may be conveyed by the provision's treatment of third parties. Plaintiffs do not dispute that the Proclamation does not even apply to them. As for plaintiffs' Due Process claims, those claims fail because plaintiffs have received all the process they may be due, a point they do not rebut. Regardless, they also provide no persuasive response to the plurality in *Kerry v. Din*, 135 S. Ct. 2128 (2015), which refutes their claimed constitutional liberty interest in the grant of a visa to a foreign national

relative. Nor can they rely on a liberty interest supposedly created by statute, because their only interest is in petitioning on behalf of a foreign national, and does not extend to determining whether the foreign national is actually eligible for a visa.

* * * *

b. Proclamation 9931: Suspension of Entry related to Venezuela

Proclamation 9931 of September 25, 2019 is entitled "Suspension of Entry as Immigrants and Nonimmigrants of Persons Responsible for Policies or Actions That Threaten Venezuela's Democratic Institutions." 84 Fed. Reg. 51,931 (Sep. 30, 2019). The President issued Proclamation 9931 based on the determination that "the unrestricted immigrant and nonimmigrant entry into the United States of persons described in section 1 of this proclamation would, except as provided for in section 4 of this proclamation, be detrimental to the interests of the United States." *Id*. Section 1 identifies those subject to the restrictions:

> (a) Members of the regime of Nicolas Maduro at the level of Vice Minister, or equivalent, and above;
> (b) All officers of the Venezuelan military, police, or National Guard at the rank of Colonel, or equivalent, and above;
> (c) All members of the organization known as the National Constituent Assembly of Venezuela;
> (d) All other aliens who act on behalf of or in support of the Maduro regime's efforts to undermine or injure Venezuela's democratic institutions or impede the restoration of constitutional government to Venezuela;
> (e) Aliens who derive significant financial benefit from transactions or business dealings with persons described in subsections (a) through (d) of this section; and
> (f) The immediate family members of persons described in subsections (a) through (e) of this section.

Id.

c. Proclamation 9932: Suspension of Entry of Senior Officials of the Government of Iran

Proclamation 9932 of September 25, 2019, entitled "Suspension of Entry as Immigrants and Nonimmigrants of Senior Officials of the Government of Iran," suspends the entry into the United States, as immigrants or nonimmigrants, of senior officials of the Government of Iran and their family members. 84 Fed. Reg. 51,935 (Sep. 30, 2019). The President based the proclamation on his finding that the unrestricted entry of these officials and their family into the United States would, with certain exceptions, be detrimental to the interests of the United States. See discussion in section 1.b., *supra*, of the D.C. district court decision in *Aboutalebi v. Department of State*, a case challenging the denial of a visa based on application of P.P. 9932.

d. Denial of Visas to PLO and Palestinian Authority Officials

On April 12, 2019, the State Department determined pursuant to section 604 of the Foreign Relations Authorization Act, Fiscal Year 2003 (Pub. L. 107–228) (the '"Act"), that the noncompliance by the Palestine Liberation Organization (PLO) or the Palestinian Authority with certain commitments warranted the imposition under the Act of visa sanctions. However, the Deputy Secretary also determined that it is in the national security interest of the United States to waive this sanction, pursuant to section 604(c) of the Act. 84 Fed. Reg. 22,222 (May 16, 2019).

e. Proclamation 9945: Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System

On October 4, 2019, the President issued Presidential Proclamation 9945 ("P.P. 9945") on the "Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System." 84 Fed. Reg. 53,991 (Oct. 9, 2019). A nationwide temporary restraining order has been issued by the U.S. District Court for the District of Oregon, halting implementation of P.P. 9945. See *Doe v. Trump*, 418 F.Supp.3d 573 (D. Or. 2019).

f. Visa Ineligibility on Public Charge Grounds

Effective October 15, 2019, the State Department issued an interim final rule regarding determinations of ineligibility for a visa for aliens likely to become a public charge. The summary of the rule published in the Federal Register follows. 84 Fed. Reg. 54,996 (Oct. 11, 2019). The effective date of the corresponding DHS rule regarding public charge grounds for inadmissibility was delayed due to preliminary injunctions issued by courts hearing challenges to the regulations.[*]

* * * *

This final rule amends Department of State ("Department") regulations by prescribing how consular officers will determine whether an alien is ineligible for a visa under the Immigration and Nationality Act ("INA"), because he or she is likely at any time to become a public charge. Aliens who seek a visa, application for admission, or adjustment of status must establish that they are not likely at any time to become a public charge, unless Congress has expressly exempted them from this ground of ineligibility or if the alien obtained a waiver. This interim final rule adds certain definitions, including definitions of public charge, public benefit, alien's household, and receipt of public benefit. This interim final rule reflects the Department's interpretation of the pertinent section of the INA as it applies to visa applicants. This rulemaking is also intended to align the Department's standards with those of the Department of Homeland Security, to avoid situations where a consular officer will evaluate an alien's circumstances and conclude that the alien is not likely at any time to become a public charge, only for the

[*] Editor's note: On January 27, 2020, the U.S. Supreme Court issued an order staying the preliminary injunctions. The new rule (both from the State Department and DHS) took effect February 24, 2020.

Department of Homeland Security to evaluate the same alien when he seeks admission to the United States on the visa issued by the Department of State and finds the alien inadmissible on public charge grounds under the same facts. The Department is also removing the reference to fee collection for review and assistance with submitting an affidavit of support at consular posts as consular posts do not collect this fee, and an obsolete process related to bonds.

* * * *

5. Visa Ineligibility Due to Unlawful Presence

On July 24, 2019, the U.S. District Court for the District of New Jersey issued its opinion in *Matulewsky v. Pompeo*, 18-cv-03370 (D.N.J.), a case challenging the State Department's guidance in the Foreign Affairs Manual ("FAM") (based on INA § 212(a)(9)(B)(i)(II)) that makes anyone who has been unlawfully present in the United States inadmissible for 10 years after departure even if the departure was pursuant to removal proceedings. Plaintiffs did not allege that the FAM had ever been applied to them through any decision on any visa application. The court agreed with the Department's main argument in its motion to dismiss that the challenge failed to identify any final agency action that could give rise to an APA claim. Excerpts follow from the court's opinion (with record citations omitted). The opinion is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

The plaintiffs are six individuals who are United States citizens and who bring a putative class action complaint on behalf of themselves, their non-citizen family relatives, and "all others who are similarly situated." … In essence, the Amended Complaint "challenges Defendants' rule … on unlawful presence departure" under "the Due Process Clause of the Fifth Amendment to the United States Constitution and the Administrative Procedure Act ('APA'), 5 U.S.C. § 706." More specifically, "Plaintiffs challenge the rule set forth in [9 FAM 302.11-2 ("the rule")]," which, they claim, "misconstru[es] and appl[ies] … INA § 212(a)(9)(B)(i)(II), to any and all departures made by aliens unlawfully in the United States." Hence the rule, Plaintiffs conclude, "incorrectly fails to exempt departures pursuant to removal proceeding orders;" "violates the statute[']s clear meaning;" and is ultra vires. Plaintiffs assert that the rule itself is a "final agency action" and thus "is reviewable."

With respect to purported injuries, Plaintiffs apparently allege that the consequences of their own anticipated litigation strategies would be "unnecessary" or "expensive." Plaintiffs also claim that Defendants' anticipated enforcement of the rule would "deprive[] them of an 'opportunity' for an 'immediate relative' permanent residence benefit or relief" or "will cause them to be . . . separated from their families for ten years."

Defendants, in response, submit that the Amended Complaint should be dismissed for lack of subject-matter jurisdiction. Among other arguments, Defendants contend that the rule itself is not a "final agency action" and "because there is no final agency decision by a consular officer on Plaintiffs' hypothetical visa application[s], the Court lacks subject matter jurisdiction under the APA." The Court agrees.

* * * *

6. Removals and Repatriations

The Department of State works closely with the Department of Homeland Security ("DHS") in effecting the removal of aliens subject to final orders of removal. It is the belief of the United States that every country has an international legal obligation to accept the return of its nationals whom another state seeks to expel, remove, or deport. Countries that are recalcitrant in accepting the return of their nationals subject to removal may be subject to "discontinuance" of visa issuance as a penalty under Section 243(d) of the INA.

On January 31, 2019, DHS announced Section 243(d) sanctions on Ghana. See DHS press release, available at https://www.dhs.gov/news/2019/01/31/dhs-announces-implementation-visa-sanctions-ghana. Beginning on February 4, 2019, the U.S. Embassy in Ghana discontinued issuing all non-immigrant visas (NIV) to domestic employees (A3 and G5) of Ghanaian diplomats posted in the United States, and began limiting the validity period and number of entries on new tourist and business visas (B1, B2, and B1/B2) for all Ghanaian executive and legislative branch employees, their spouses, and their children under 21 to one-month, single-entry visas.[**]

7. Agreements for the Sharing of Visa Information

On March 14, 2019 the United States-Argentina agreement for the exchange of visa information entered into force. The agreement is available at https://www.state.gov/argentina-19-314.

C. ASYLUM, REFUGEE, AND MIGRANT ISSUES

1. Temporary Protected Status

Section 244 of the Immigration and Nationality Act ("INA" or "Act"), as amended, 8 U.S.C. § 1254a, authorizes the Secretary of Homeland Security, after consultation with appropriate agencies, to designate a state (or any part of a state) for temporary protected status ("TPS") after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. The TPS designation means that

[**] Editor's note: On January 17, 2020, INA 243(d) sanctions were lifted for Ghana, and visa processing returned to the normal procedures. See U.S. Embassy in Ghana press release, available at https://gh.usembassy.gov/statement-on-the-end-of-u-s-non-immigrant-visa-restrictions-in-ghana/.

eligible nationals of the state (or stateless persons who last habitually resided in the state) can remain in the United States and obtain work authorization documents. For background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240-47; *Digest 2004* at 31-33; *Digest 2010* at 10-11; *Digest 2011* at 6-9; *Digest 2012* at 8-14; *Digest 2013* at 23-24; *Digest 2014* at 54-57; *Digest 2015* at 21-24; *Digest 2016* at 36-40; *Digest 2017* at 33-37; and *Digest 2018* at 38-44. In 2019, the United States extended TPS designations for South Sudan and Syria.

a. South Sudan

On April 5, 2019, the Department of Homeland Security ("DHS") provided notice of an 18-month extension of the designation of South Sudan for TPS, through November 2, 2020. 84 Fed. Reg. 13,688 (Apr. 5, 2019). The determination to extend TPS for South Sudan followed a review of conditions, which showed that the ongoing armed conflict and extraordinary and temporary conditions supporting South Sudan's TPS designation remain. *Id*.

b. Syria

On September 23, 2019, DHS announced the extension of the designation of Syria for TPS for 18 months, through March 31, 2021. 84 Fed. Reg. 49,751 (Sep. 23, 2019). The extension is based on the determination that the ongoing armed conflict and extraordinary and temporary conditions supporting Syria's TPS designation remain. *Id*.

c. **Ramos v. Nielsen** ***and other litigation***

As discussed in *Digest 2018* at 40-44, several courts have enjoined enforcement of the termination of TPS for Sudan, Nicaragua, Haiti, and El Salvador after denying motions to dismiss litigation against the U.S. government. On May 10, 2019, DHS published a notice in the Federal Register announcing its compliance with an injunction against termination of TPS for Honduras and Nepal in *Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019). 84 Fed. Reg. 20,647 (May 10, 2019). In November, DHS published notice of continued compliance with preliminary injunctions in *Ramos,* et al. v. *Nielsen,* et al., No. 18–cv–01554 (N.D. Cal. Oct. 3, 2018), *Saget,* et al., v. *Trump, et al.*, No. 18–cv–1599 (E.D.N.Y. Apr. 11, 2019), and *Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019) (''*Bhattarai*''). 84 Fed. Reg. 59,403 (Nov. 4, 2019). As such, beneficiaries under the TPS designations for El Salvador, Honduras, Nepal, Nicaragua, and Sudan retain their TPS while the preliminary injunction in *Ramos* remains in effect, provided that an alien's TPS is not withdrawn because of individual ineligibility. *Id*.

2. Deferred Enhanced Departure

On March 28, 2019, the President issued the "Memorandum on Extension of Deferred Enforced Departure for Liberians," extending the wind-down period for Liberian Deferred Enforced Departure ("DED") beneficiaries by an additional 12 months, through

March 30, 2020. 84 Fed. Reg. 13,064 (Apr. 3, 2019). The President acted "pursuant to my constitutional authority to conduct the foreign relations of the United States." *Id.* Excerpts below from the Memorandum explain the reasoning for the extension.

> The overall situation in West Africa remains concerning, and Liberia is an important regional partner for the United States. The reintegration of DED beneficiaries into Liberian civil and political life will be a complex task, and an unsuccessful transition could strain United States-Liberian relations and undermine Liberia's post-civil war strides toward democracy and political stability. Further, I understand that there are efforts underway by Members of Congress to provide relief for the small population of Liberian DED beneficiaries who remain in the United States. Extending the wind-down period will preserve the status quo while the Congress considers remedial legislation.
>
> The relationship between the United States and Liberia is unique. Former African-American slaves were among those who founded the modern state of Liberia in 1847. Since that time, the United States has sought to honor, through a strong bilateral diplomatic partnership, the sacrifices of individuals who were determined to build a modern democracy in Africa with representative political institutions similar to those of the United States.

As mentioned by the President in the Memorandum, Congress acted on Liberian DED beneficiaries in 2019. On December 20, 2019, Congress enacted Section 7611 of the 2020 National Defense Authorization Act, Pub. L. 116-92, providing Liberian nationals who had been in the United States since November 20, 2014 an opportunity to apply for permanent status. https://www.congress.gov/bill/116th-congress/senate-bill/1790.

3. Refugee Admissions

On September 26, 2019 the U.S. Departments of State, Homeland Security, and Health and Human Services, submitted the President's annual Report to Congress on Proposed Refugee Admissions for Fiscal Year 2020. See September 26, 2019 State Department media note, available at https://www.state.gov/report-to-congress-on-proposed-refugee-admissions-for-fy-2020/. On November 2, 2019, President Trump signed the Determination on Refugee Admissions for Fiscal Year 2020, providing for resettlement of up to 18,000 refugees. 84 Fed. Reg. 65,903 (Nov. 29, 2019). The November 2, 2019 State Department press statement on the determination, available at https://www.state.gov/presidential-determination-on-refugee-admissions-for-fiscal-year-2020/, also includes the following:

> Refugee resettlement is only one aspect of U.S. humanitarian-based immigration efforts. Since 1980, America has welcomed almost 3.8 million refugees and asylees, and our country hosts hundreds of thousands of people under other humanitarian immigration categories. This year's refugee resettlement program continues that legacy, with specific allocations for people who have suffered or fear persecution on the basis of religion; for Iraqis whose assistance to the United

States has put them in danger; and for legitimate refugees from El Salvador, Guatemala, and Honduras.

Also on September 26, 2019, the President issued Executive Order 13888, "Enhancing State and Local Involvement in Refugee Resettlement." 84 Fed. Reg. 52,355 (Oct. 1, 2019). The order creates a process for seeking consent from state and local governments to refugee resettlement in their localities. Sections 2(a) and 2(b) of E.O. 13888 follow.

> **Sec. 2**. *Consent of States and Localities to the Placement of Refugees.* (a) Within 90 days of the date of this order, the Secretary of State and the Secretary of Health and Human Services shall develop and implement a process to determine whether the State and locality both consent, in writing, to the resettlement of refugees within the State and locality, before refugees are resettled within that State and locality under the Program. The Secretary of State shall publicly release any written consents of States and localities to resettlement of refugees.
>
> (b) Within 90 days of the date of this order, the Secretary of State and the Secretary of Health and Human Services shall develop and implement a process by which, consistent with 8 U.S.C. 1522(a)(2)(D), the State and the locality's consent to the resettlement of refugees under the Program is taken into account to the maximum extent consistent with law. In particular, that process shall provide that, if either a State or locality has not provided consent to receive refugees under the Program, then refugees should not be resettled within that State or locality unless the Secretary of State concludes, following consultation with the Secretary of Health and Human Services and the Secretary of Homeland Security, that failing to resettle refugees within that State or locality would be inconsistent with the policies and strategies established under 8 U.S.C. 1522(a)(2)(B) and (C) or other applicable law. If the Secretary of State intends to provide for the resettlement of refugees in a State or locality that has not provided consent, then the Secretary shall notify the President of such decision, along with the reasons for the decision, before proceeding.

The State Department implemented E.O.13888 through its solicitation of funding proposals from the domestic resettlement agencies. See November 6, 2019 notice of funding opportunity, available at https://www.state.gov/fy-2020-notice-of-funding-opportunity-for-reception-and-placement-program/. The Department also created a website where it published the consent letters from state and local governments.[***]

[***] Editor's note: On January 15, 2020, a federal district court judge issued a decision in a lawsuit brought against the Department of State, enjoining the notice and funding opportunity. *HIAS, Inc. v. Trump*, 415 F.Supp.3d 669 (D. Md. 2020). The Department took down the website with the state and local consents. The case will be discussed in *Digest 2020.*

4. Conclusion of Negotiations with Mexico on Migration

On June 7, 2019, the United States and Mexico concluded negotiations of a Joint Declaration and Supplementary Agreement aimed at stemming illegal migration across the U.S.-Mexico border. See June 7, 2019 State Department press statement, available at https://www.state.gov/conclusion-of-negotiations-with-mexico/. The U.S.-Mexico Joint Declaration of June 7, 2019 is excerpted below and available as a State Department media note at https://www.state.gov/u-s-mexico-joint-declaration/. The June 7, 2019 Joint Declaration and Supplementary Agreement on migration between the United States and Mexico is also available at https://www.state.gov/mexico-19-607. The Supplementary Agreement commits to discussions for a binding bilateral agreement on burden- and responsibility-sharing for processing migrants' claims for refugee status.

* * * *

The United States and Mexico met this week to address the shared challenges of irregular migration, to include the entry of migrants into the United States in violation of U.S. law. Given the dramatic increase in migrants moving from Central America through Mexico to the United States, both countries recognize the vital importance of rapidly resolving the humanitarian emergency and security situation. The Governments of the United States and Mexico will work together to immediately implement a durable solution.

As a result of these discussions, the United States and Mexico commit to:

Mexican Enforcement Surge

Mexico will take unprecedented steps to increase enforcement to curb irregular migration, to include the deployment of its National Guard throughout Mexico, giving priority to its southern border. Mexico is also taking decisive action to dismantle human smuggling and trafficking organizations as well as their illicit financial and transportation networks.

Additionally, the United States and Mexico commit to strengthen bilateral cooperation, including information sharing and coordinated actions to better protect and secure our common border.

Migrant Protection Protocols

The United States will immediately expand the implementation of the existing Migrant Protection Protocols across its entire Southern Border. This means that those crossing the U.S. Southern Border to seek asylum will be rapidly returned to Mexico where they may await the adjudication of their asylum claims.

In response, Mexico will authorize the entrance of all of those individuals for humanitarian reasons, in compliance with its international obligations, while they await the adjudication of their asylum claims. Mexico will also offer jobs, healthcare and education according to its principles.

The United States commits to work to accelerate the adjudication of asylum claims and to conclude removal proceedings as expeditiously as possible.

Further Actions

Both parties also agree that, in the event the measures adopted do not have the expected results, they will take further actions. Therefore, the United States and Mexico will continue their discussions on the terms of additional understandings to address irregular migrant flows and asylum issues, to be completed and announced within 90 days, if necessary.

Ongoing Regional Strategy

The United States and Mexico reiterate their previous statement of December 18, 2018, that both countries recognize the strong links between promoting development and economic growth in southern Mexico and the success of promoting prosperity, good governance and security in Central America. The United States and Mexico welcome the Comprehensive Development Plan launched by the Government of Mexico in concert with the Governments of El Salvador, Guatemala and Honduras to promote these goals. The United States and Mexico will lead in working with regional and international partners to build a more prosperous and secure Central America to address the underlying causes of migration, so that citizens of the region can build better lives for themselves and their families at home.

* * * *

5. Executive Actions on Migration through the Southern Border

As discussed in *Digest 2018* at 45-46, Presidential Proclamation 9822 of November 9, 2018, in conjunction with an interim final rule ("Rule"), would have precluded asylum in the United States for any alien "subject to a presidential proclamation … suspending or limiting the entry of aliens" on the border. On February 7, 2019, Presidential Proclamation 9842 renewed for another 90 days the suspension and limitation on entry initiated on November 9, 2018. 84 Fed. Reg.3665 (Feb. 12, 2019). Proclamation 9842 acknowledges that a court injunction prevents the implementation of the Rule rendering aliens ineligible for asylum. *Id*. On May 8, 2019, Presidential Proclamation 9880 renewed the suspension and limitation for a further 90 days, once again acknowledging the injunction. 84 Fed. Reg. 21,229 (May 13, 2019).

On February 15, 2019, the President issued Proclamation 9844 declaring a national emergency concerning the southern border of the United States. 84 Fed. Reg. 4949 (Feb. 20, 2019). Excerpts follow from Proclamation 9844.

* * * *

NOW, THEREFORE, I, DONALD J. TRUMP, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 *et seq*.), hereby declare that a national emergency exists at the southern border of the United States, and that section 12302 of title 10, United States Code, is invoked and made available, according to its terms, to the Secretaries of the military departments concerned, subject to the direction of the Secretary of Defense in the case of the Secretaries of the Army, Navy, and Air Force. To provide additional authority to the Department of Defense to support the Federal Government's response to the emergency at the southern border, I hereby declare that this emergency requires use of the Armed Forces and, in accordance with section 301 of the National Emergencies Act (50 U.S.C. 1631), that the construction authority provided in section 2808 of title 10, United States Code, is invoked and made available, according to its terms, to the Secretary of Defense and, at the discretion of the Secretary of Defense, to the Secretaries of the military departments. I hereby direct as follows:

Section 1. The Secretary of Defense, or the Secretary of each relevant military department, as appropriate and consistent with applicable law, shall order as many units or

members of the Ready Reserve to active duty as the Secretary concerned, in the Secretary's discretion, determines to be appropriate to assist and support the activities of the Secretary of Homeland Security at the southern border.

Sec. 2. The Secretary of Defense, the Secretary of the Interior, the Secretary of Homeland Security, and, subject to the discretion of the Secretary of Defense, the Secretaries of the military departments, shall take all appropriate actions, consistent with applicable law, to use or support the use of the authorities herein invoked, including, if necessary, the transfer and acceptance of jurisdiction over border lands.

* * * *

6. Migration Protection Protocols ("MPP")

As discussed in *Digest 2018* at 46-47, on December 20, 2018, the Trump Administration announced new Migration Protection Protocols ("MPP"), directing (with some exceptions) that individuals arriving in the United States from Mexico—illegally or without proper documentation—be returned to Mexico for the duration of their immigration proceedings. On January 25, 2019, the Secretary of Homeland Security issued ''Policy Guidance for Implementation of the Migrant Protection Protocols.'' 84 Fed. Reg. 6811 (Feb. 28, 2019). The Department of Homeland Security also issued several other documents related to the Policy Guidance, all of which were made available on the Department's website. *Id*.

In April 2019, the district court in *Innovation Law Lab v. Nielsen*, 366 F.Supp.3d 1110 (N.D. Cal.), imposed a nationwide injunction preventing the MPP from taking effect. The U.S. Court of Appeals for the Ninth Circuit stayed the injunction, pending resolution of the appeal by the U.S. Government. On May 22, 2019, the U.S. Government filed its opening brief in the U.S. Court of Appeals for the Ninth Circuit, arguing that the district court's preliminary injunction should be vacated. *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir.). Excerpts follow from the summary of the argument in the U.S. brief.[****] The brief is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/2019.

* * * *

A. MPP is authorized by statute, as this Court recognized in staying the injunction. Stay Op. 11-14. The contiguous-territory-return authority in 8 U.S.C. § 1225(b)(2)(C) applies to all aliens arriving in the United States by land who are placed in full removal proceedings under 8 U.S.C. § 1225(b)(2)(A). It is undisputed that each of the individual Plaintiffs arrived by land from Mexico and was placed in full removal proceedings under section 1225(b)(2)(A). Section 1225(b)(2)(C) therefore authorized DHS to return the individual Plaintiffs to Mexico pending their immigration proceedings, as an alternative to subjecting them to the mandatory detention that section 1225(b)(2)(A) would otherwise require.

The district court concluded that MPP is not authorized by misreading 8 U.S.C. § 1225(b)(2)(B)(ii), which states that the requirements of 8 U.S.C. § 1225(b)(2)(A) "shall not

[****] Editor's note: On February 28, 2020, a panel of the Ninth Circuit Court of Appeals affirmed the district court's preliminary injunction. *Innovation Law Lab v. Wolf*, 951 F.3d 986 (9th Cir.).

apply to an alien" "to whom [8 U.S.C. § 1225(b)(1)] applies." But section 1225(b)(2)(B)(ii) merely clarifies that, if an alien is placed in expedited removal, he is not entitled to the full removal proceeding that section 1225(b)(2)(A) would otherwise afford him. The Secretary undisputedly possesses, and has exercised, prosecutorial discretion not to place aliens covered by MPP in expedited removal, and has instead elected to apply section 1225(b)(2)(A) and afford to those aliens full, "regular" removal proceedings under section 1229a. Order 15. Given that discretion, the exception in section 1225(b)(2)(B)(ii) is inapposite to aliens covered by MPP, because the expedited removal procedures in section 1225(b)(1) are not being "applie[d]" to them, even though those procedures could have been applied. Instead, section 1225(b)(2)(A) "applies" to all aliens subject to MPP—that is the very INA provision that authorizes a full removal proceeding for applicants for admission.

B. The district court also erred in enjoining MPP on the ground that the government violated the APA in how it addresses the United States' non-refoulement obligations. MPP satisfies all applicable non-refoulement requirements by providing that any alien who is "more likely than not" to "face persecution or torture in Mexico" will not be returned to Mexico. ER139. And as this Court concluded in granting a stay, MPP is a "general statement of policy" that the APA exempts from notice-and-comment procedures because "immigration officers designate applicants for return on a discretionary case-by-case basis." Stay Op. 14.

* * * *

7. Eligibility for Asylum

On July 16, 2019, the Department of Justice and the Department of Homeland Security published an interim final rule, making ineligible for asylum in the United States any aliens who enter or attempt to enter the United States across the southern border without applying for protection in a third country outside their country of citizenship, nationality, or last lawful habitual residence through which they transited en route. 84 Fed. Reg. 33,829 (July 16, 2019). Excerpts below from the Federal Register notice explain how the U.S. framework for asylum, as amended by the rule, comports with international treaty obligations. *Id*. at 33,834-35.

* * * *

The framework described above is consistent with certain U.S. obligations under the 1967 Protocol relating to the Status of Refugees ("Refugee Protocol"), which incorporates Articles 2-34 of the 1951 Convention relating to the Status of Refugees ("Refugee Convention"), as well as U.S. obligations under Article 3 of the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or] CAT. Neither the Refugee Protocol nor the CAT is self-executing in the United States. *See Khan v. Holder,* 584 F.3d 773, 783 (9th Cir. 2009) ("[T]he [Refugee] Protocol is not self-executing."); *Auguste v. Ridge,* 395 F.3d 123, 132 (3d Cir. 2005) (the CAT "was not self-executing"). These treaties are not directly enforceable in U.S. law, but some of their obligations have been implemented by domestic legislation. For example, the United States has implemented the non-refoulement provisions of these treaties—*i.e.,* provisions prohibiting the return of an individual to a country where he or she would face persecution or torture—through the withholding of removal provisions at section 241(b)(3) of the INA and the

CAT regulations, rather than through the asylum provisions at section 208 of the INA. *See Cardoza-Fonseca*, 480 U.S. at 440-41; Foreign Affairs Reform and Restructuring Act of 1998 at sec. 2242(b); 8 CFR 208.16(b)-(c), 208.17-208.18; 1208.16(b)-(c), 1208.17-1208.18. Limitations on the availability of asylum that do not affect the statutory withholding of removal or protection under the CAT regulations are consistent with these provisions. *See R–S–C*, 869 F.3d at 1188 & n. 11; *Cazun* v. *U.S. Att'y Gen.,* 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia* v. *Lynch*, 813 F.3d 240, 241 (5th Cir. 2016).

Courts have rejected arguments that the Refugee Convention, as implemented, requires that every qualified refugee receive asylum. For example, the Supreme Court has made clear that Article 34, which concerns the assimilation and naturalization of refugees, is precatory and not mandatory, and, accordingly, does not mandate that all refugees be granted asylum. *See Cardoza-Fonseca*, 480 U.S. at 441. Section 208 of the INA reflects that Article 34 is precatory and not mandatory, and accordingly does not provide that all refugees shall receive asylum. *See id.; see also R-S-C*, 869 F.3d at 1188; *Mejia v. Sessions*, 866 F.3d 573, 588 (4th Cir. 2017); *Cazun*, 856 F.3d at 257 & n. 16; *Garcia*, 856 F.3d at 42; *Ramirez-Mejia*, 813 F.3d at 241. As noted above, Congress has also recognized the precatory nature of Article 34 by imposing various statutory exceptions and by authorizing the creation of new bars to asylum eligibility through regulation.

Courts have likewise rejected arguments that other provisions of the Refugee Convention require every refugee to receive asylum. For example, courts have held, in the context of upholding the bar on eligibility for asylum in reinstatement proceedings under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5), that limiting the ability to apply for asylum does not constitute a prohibited "penalty" under Article 31(1) of the Refugee Convention. *Mejia*, 866 F.3d at 588; *Cazun*, 856 F.3d at 257 & n.16. Courts have also rejected the argument that Article 28 of the Refugee Convention, governing the issuance of international travel documents for refugees "lawfully staying" in a country's territory, mandates that every person who might qualify for statutory withholding must also be granted asylum. *R-S-C*, 869 F.3d at 1188; *Garcia*, 856 F.3d at 42.

* * * *

8. Asylum Cooperative Agreements

On October 16, 2019, the State Department notified Congress that it would resume foreign assistance for El Salvador, Guatemala, and Honduras after those countries took actions to reduce the flow of migrants coming to the U.S. border. See October 16, 2019 State Department press statement, available at https://www.state.gov/united-states-resumes-targeted-u-s-foreign-assistance-for-el-salvador-guatemala-and-honduras/. The three countries signed Asylum Cooperative Agreements ("ACAs"), among other actions. The resumed funding supports programs to mitigate illegal immigration to the United States. Under the ACAs, the United States may transfer to Guatemala, Honduras, or El Salvador persons requesting asylum or protection from torture after arriving at a U.S. port of entry, or crossing a U.S. border between ports of entry, on or after the date of entry into force of the ACAs. The recipient country is responsible for examining and adjudicating the transferred person's protection request in accordance with its domestic protection determination system. The ACAs do not apply to protection claimants who are citizens or nationals of the recipient country, to stateless persons whose last habitual

residence was the recipient country, to unaccompanied minors, to persons who arrived in the territory of the United States with a valid U.S.-issued admission document (other than for transit), or to persons not required to obtain a visa by the United States. In 2019, only the Guatemala ACA entered into force. The "Agreement on Cooperation Regarding the Examination of Protection Claims" with Guatemala is available at https://www.state.gov/guatemala-19-1115.

Cross References

Agreements on Preventing and Combating Serious Crime, **Ch. 3.A.5.**
Recognizing extended validity of Venezuelan passports, **Ch. 9.A.2.**

CHAPTER 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. *Avena*

On August 8, 2019, a panel of the U.S. Court of Appeals for the Ninth Circuit reversed the district court's denial of habeas relief on a claim of ineffective assistance of counsel at the penalty phase in *Avena v. Chappell*, 932 F.3d 1237 (9th Cir. 2019). Avena was convicted and sentenced to death by a California jury on two counts of first-degree murder. The Ninth Circuit's decision vacates the death penalty in the case, though not on grounds of lack of consular assistance, which was the basis for the decision by the International Court of Justice in the *Avena* case. See *Digest 2004 at 37-43; Digest 2005 at 29-30; Digest 2007 at 73-77; Digest 2008 at 35, 153, 175-215; Digest 2011 at 11-23; Digest 2012 at 15-16; Digest 2013 at 26- 29; and Digest 2014 at 68-69.*

2. Memorandum of Understanding on Consular Notification and Access

On September 13, 2019, the American Institute in Taiwan ("AIT") and the Taipei Economic and Cultural Representative Office in the United States ("TECRO") signed a Memorandum of Understanding ("MOU") Regarding Certain Consular Functions. See AIT press release, available at https://www.ait.org.tw/ait-and-tecro-sign-mou-regarding-certain-consular-functions/. The MOU extends the principles in Articles 36 and 37 of the Vienna Convention on Consular Relations for consular notification and access, and provides that the competent authorities in the territories of the authorities represented by AIT and TECRO are expected to perform certain consular functions and provide consular assistance. For example, Section 1 of the MOU details the expectation that the competent authorities in the territory of the authorities represented by TECRO will advise detained U.S. nationals that they may have a representative from AIT notified of their detention. Likewise, Section 2 states the expectation that competent authorities in the territory of the authorities represented by AIT will advise detained Taiwan passport holders that they may have a TECRO representative notified of their detention. The text of the MOU is available at https://www.ait.org.tw/wp-content/uploads/sites/269/AIT.TECRO_.Consular.Functions.MOU_.9.13.19-Merged.pdf.

B. CHILDREN

1. Adoption

In March 2019, the State Department released its Annual Report to Congress on Intercountry Adoptions. The Fiscal Year 2018 Annual Report, as well as past annual reports, can be found at https://travel.state.gov/content/adoptionsabroad/en/about-us/publications.html. The report includes several tables showing numbers of intercountry adoptions by country during fiscal year 2018, average times to complete adoptions, and median fees charged by adoption service providers.

2. Abduction

a. Annual Reports

As described in *Digest 2014* at 71, the International Child Abduction Prevention and Return Act ("ICAPRA"), signed into law on August 8, 2014, increased the State Department's annual Congressional reporting requirements pertaining to countries' efforts to resolve international parental child abduction cases. In accordance with ICAPRA, the Department submits an Annual Report on International Child Abduction to Congress each year and a report to Congress ninety days thereafter on the actions taken toward those countries cited in the Annual Report for demonstrating a pattern of noncompliance. See International Parental Child Abduction page of the State Department Bureau of Consular Affairs, https://travel.state.gov/content/childabduction/en/legal/compliance.html.

Annual reports on international child abduction are available at https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/for-providers/legal-reports-and-data/reported-cases.html.

b. Hague Abduction Convention Partners

On April 1, 2019, the 1980 Hague Convention on the Civil Aspects of International Child Abduction entered into force between the United States and Jamaica. See April 1, 2019 State Department media note, available at https://jm.usembassy.gov/united-states-and-jamaica-become-partners-under-the-hague-abduction-convention/. The United States had 79 partners under the Convention as of April 2019.

c. Hague Abduction Convention Cases

(1) Monasky v. Tagleri

On August 22, 2019, the United States filed a brief in the Supreme Court (in support of neither party) in *Monasky v. Tagleri*, No. 18-935. The case concerns an eight-week-old child's habitual residence under the Hague Abduction Convention. The petition was granted on two questions: 1) whether a district court's determination of habitual residence

should be reviewed de novo, or under a more deferential standard of review and 2) where an infant is too young to acclimate to her surroundings, whether a subjective agreement between the infant's parents is necessary to establish her habitual residence under the Convention. Excerpts follow from the discussion in the U.S. brief of the second question.*

* * * *

As explained below, the Convention requires courts determining a child's habitual residence to eschew formal or rigid legal requirements, and instead to conduct an inherently flexible and factbound inquiry. Accordingly, a subjective agreement between the child's parents, while potentially relevant in some cases, is not categorically necessary to such a determination. … Although the court of appeals here applied the correct standard of review, neither court below applied the correct substantive standard under the Convention for determining habitual residence. Accordingly, this Court should vacate the judgment below and remand for further proceedings.

I. A SUBJECTIVE AGREEMENT BETWEEN THE PARENTS IS NOT REQUIRED TO ESTABLISH AN INFANT'S HABITUAL RESIDENCE

As the court of appeals recognized, determining a child's habitual residence under the Convention is "a question of pure fact." … That factual inquiry must remain flexible and take into account all relevant circumstances in each case in light of the "paramount importance" under the Convention of "the interests of children." Convention preamble; see 22 U.S.C. 9001(a)(1). Accordingly, no single piece of evidence can, in the abstract, be deemed either necessary or dispositive to determining habitual residence. It follows that a subjective agreement between the parents regarding where an infant should live—like any other potentially relevant evidence—is not categorically required to establish the infant's habitual residence.

A. Determining A Child's Habitual Residence Requires A Flexible And Factbound Inquiry

The ordinary meaning of the Convention's text, its negotiating and drafting history, and case law from other contracting states all demonstrate that habitual residence is a flexible and factbound concept.

1. "The interpretation of a treaty, like the interpretation of a statute, begins with its text," *Abbott* v. *Abbott*, 560 U.S. 1, 10 (2010) (citation omitted), including "the context in which the written words are used," *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 699 (1988) (citations omitted). Here, the Convention, "[f]ollowing a long-established tradition of the Hague Conference," does not define habitual residence. *Explanatory Report* 53. But the term's ordinary meaning reflects its inherently factual nature. See *Abbott*, 560 U.S. at 11 (applying the ordinary meaning of "place of residence" in the Convention); cf. *Santovincenzo* v. *Egan*, 284 U.S. 30, 40 (1931).

The ordinary meaning of "habitual" is "[c]ustomary" or "usual." *Black's Law Dictionary* 640 (5th ed. 1979) (*Black's*); see 6 *Oxford English Dictionary* 996 (2d ed. 1989) ("existing as a settled practice or condition; constantly repeated or continued; customary"); *Webster's Third*

* Editor's note: On February 25, 2020, the Supreme Court issued its opinion. The Court ruled that the test to determine a child's habitual residence under the Convention is a totality of the circumstances test — essentially a fact-bound inquiry that should not be encumbered by rigid rules or presumptions. The Court also ruled that the standard of review for a habitual residence determination is clear error. The Court's opinion largely adopts the reasoning of the U.S. government in its amicus brief.

New International Dictionary 1017 (1976) (*Webster's*) (similar). And the ordinary meaning of "residence" is "[p]ersonal presence at some place of abode," *Black's* 1176, or "one's usual dwelling-place or abode," 13 *Oxford English Dictionary* 707 (2d ed. 1989), or "the act or fact of abiding or dwelling in a place for some time," *Webster's* 1931; see *ibid.* ("a temporary or permanent dwelling place, abode, or habitation"). It follows that an individual is habitually resident in the place or abode where he or she customarily or usually lives or dwells.

That ordinary meaning is reflected in other areas of law. For instance, setting aside some provisos not applicable here, Congress has defined "Habitual Residence" in the Compact of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, 48 U.S.C. 1901 note, to mean "a place of general abode or a principal, actual dwelling place of a continuing or lasting nature." Compact tit. IV, art. VI, § 461(g). The Department of Homeland Security has adopted that definition for purposes of certain immigration laws. See 8 C.F.R. 214.7(a)(4)(i). And for purposes of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, S. Treaty Doc. No. 51, 105th Cong., 2d Sess. (1998), 1870 U.N.T.S. 167, the Department of Homeland Security has promulgated regulations allowing a child adoptee to be deemed habitually resident in the country of his or her "actual residence" instead of his or her country of citizenship as long as "the child's status in that country is sufficiently stable for that country properly to exercise jurisdiction over the child's adoption or custody." 8 C.F.R. 204.303(b).

Consistent with those illustrations of the term's ordinary meaning in other contexts, determining an individual's "habitual residence" under the Convention is, at bottom, a question of pure fact. The physical location of someone's actual abode or dwelling is obviously factual in nature. So too is whether that individual usually or customarily lives in that location in a continuing or lasting or sufficiently stable manner. However framed, that inquiry resists further doctrinal explication or subdivision into component parts; the answer ultimately will depend on the circumstances in a given case. …

2. That the inquiry into habitual residence is inherently flexible and factbound is reinforced by the Convention's negotiation and drafting history. "Because a treaty ratified by the United States is 'an agreement among sovereign powers,' " courts should interpret it in light of "the negotiation and drafting history of the treaty." *Medellin* v. *Texas*, 552 U.S. 491, 507 (2008) (citation omitted). For the same reason, courts must "read the treaty in a manner 'consistent with the *shared* expectations of the contracting parties.' " *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 12 (2014) (citations omitted); see 22 U.S.C. 9001(b)(3).

Under the Convention, "the interests of children are of paramount importance." Convention preamble; see 22 U.S.C. 9001(a)(1). To that end, the Convention pursues the twin goals of "protect[ing] children internationally from the harmful effects of their wrongful removal" and "ensur[ing] their prompt return to the State of their habitual residence." Convention preamble. Both goals "correspond to a specific idea of what constitutes the 'best interests of the child.' " *Explanatory Report* 25. Even the Convention's various exceptions to its rule of prompt return—such as when "the child is now settled in its new environment," Convention art. 12, or when "there is a grave risk that his or her return would expose the child to" harm, Convention art. 13—are in service of the child's interests. See *Explanatory Report* 25, 29-31.

Importantly, the Convention does not purport to resolve any underlying custody or access dispute; instead, its remedy is limited to returning the child to her country of habitual residence, where the courts can adjudicate and resolve such disputes. See Convention arts. 16, 19;

Explanatory Report 36; 22 U.S.C. 9001(b)(4). Accordingly, such returns should be "prompt," Convention preamble; indeed, the Convention appears to contemplate decisions on whether to return a child to be rendered within six weeks of a petition's being filed, see Convention art. 11.

Both the negotiators' focus on the child's interests and the need for prompt resolution of petitions seeking a child's return are reflected in the choice of the flexible and fact-specific concept of habitual residence as the Convention's "connecting factor." In making that choice, the drafters rejected the two main alternatives: domicile and nationality. The Hague Conference had generally abandoned nationality as the connecting factor in its conventions in light of the rise of both stateless and multiple-nationality individuals. See Kurt H. Nadelmann, *Habitual Residence and Nationality as Tests at The Hague: The 1968 Convention on Recognition of Divorces*, 47 Tex. L. Rev. 766, 766-767 (1969).

Nationality had itself replaced domicile, see Nadelmann 767, which was regarded as too "technical" and a "term of art," Jeff Atkinson, *The Meaning of "Habitual Residence" Under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children*, 63 Okla. L. Rev. 647, 649 (2011) (citation omitted); see Nadelmann 768 (observing that domicile had a "different meaning * * * in different systems"); … Accordingly, the Hague Conference generally had settled on using habitual residence, which became "a well-established concept in the Hague Conference." *Explanatory Report*66.

The Convention here was no different. Because of their relative rigidity and inflexibility, both nationality and domicile were unsuited for the Convention and its goals. Professor Anton, the chairman of the commission that drafted the Convention, explained:

> The choice of the criterion of the habitual residence of the child was scarcely contested. It was clearly desirable to select a single criterion. That of the child's nationality seemed inappropriate because the State with the primary concern to protect a child against abduction is that of the place where he or she usually lives. In some systems the criterion of domicile would point to that place, but in others domicile has a technical character which was thought to make its choice inappropriate.

A. E. Anton, *The Hague Convention on International Child Abduction*, 30 Int'l & Comp. L.Q. 537, 544 (1981). The Convention's drafters thus chose habitual residence—"the place where [the child] usually lives," Anton 544—which they viewed "as a question of pure fact, differing in that respect from domicile." *Explanatory Report* ¶ 66. Using the factbound concept of habitual residence avoided dependence on "artificial jurisdictional links," *id.* ¶ 11, which would have been contrary to the Convention's goal of protecting the interests of the child by promptly "restor[ing] a child to its own environment," *ibid.* As commentators have observed, "[t]he strength of habitual residence in the context of family law is derived from the flexibility it has to respond to the demands of a modern, mobile society; a characteristic which neither domicile nor nationality can provide." Paul R. Beaumont & Peter E. McEleavy, *The Hague Conference on International Child Abduction* 89 (Oxford Univ. Press 1999). Habitual residence was thus "chosen precisely for its flexibility to deal with modern society." Erin Gallagher, *A House Is Not (Necessarily) a Home: A Discussion of the Common Law Approach to Habitual Residence*, 47 N.Y.U. J. Int'l L. & Pol. 463, 468 (2015).

That negotiation and drafting history confirms that habitual residence is a flexible and factbound concept that resists further legal rules. As Professor Anton observed, because habitual

residence is "a question of fact," further attempts to define it would be "otiose." Beaumont & McEleavy 89 (citation omitted). Indeed, "the Hague Conference has continually declined to" define the term precisely so the concept can "retain[] the maximum flexibility for which it [i]s so admired." *Id.* at 89-90.

3. The views of other contracting states confirm that habitual residence is a flexible and factbound concept. This Court has explained that " 'the postratification understanding' of signatory nations" is relevant to the interpretation of treaties. *Medellin*, 552 U.S. at 507 (citation omitted); see *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (explaining that "the opinions of our sister signatories [are] entitled to considerable weight") (citation omitted). That "principle applies with special force here, for Congress has directed that 'uniform international interpretation of the Convention' is part of the Convention's framework." *Abbott*, 560 U.S. at 16 (citation omitted); see 22 U.S.C. 9001(b)(3)(B). Consistent with the term's ordinary meaning as discussed above, courts of other contracting states have converged on the understanding that determining "habitual residence" requires a flexible and factbound inquiry.

For example, the Supreme Court of Canada recently explained that courts making determinations of habitual residence "must look to all relevant considerations arising from the facts of the case at hand." *Office of the Children's Lawyer* v. *Balev*, [2018] 1 S.C.R. 398, 421. In adopting that flexible, factbound standard, the Canadian high court expressly rejected approaches that would focus on either "the intention of the parents with the right to determine where the child lives" (what it deemed a "forward-looking parental intention model"), or "the child's acclimatization in a given country" (what it deemed a "backward-focused" approach), to the exclusion of the other. *Id.* at 419-420. Instead, *Balev* determined that a "hybrid" approach—one that "considers all relevant links and circumstances" in all cases—is the most appropriate under the Convention. *Id.* at 421. "Imposing * * * legal construct[s] onto the determination of habitual residence," the Canadian high court observed, would "detract[] from the task of the finder of fact, namely to evaluate all of the relevant circumstances in determining where the child was habitually resident at the date of wrongful retention or removal." *Id.* at 422 (citation omitted).

Likewise, the Court of Justice of the European Union has held that determining a child's place of habitual residence under the European Council regulations implementing the Convention for intra-European cases "reflects essentially a question of fact," and courts making such determinations therefore must "tak[e] account of all the circumstances of fact specific to each individual case." Case C-111/17, *OL* v. *PQ*, ¶ 42, 51, ECLI: EU:C:2017:436 (June 8, 2017). Of particular salience here, in *OL* the Court of Justice explained that even "[w]here the child in question is an infant," courts must consider a variety of evidence, including "the duration, regularity, conditions and reasons for" the custodial parent's presence in the country at issue, as well as "geographic and family origins and the family and social connections which [that parent] and child have with that" country. *Id.* ¶ 45. The Court of Justice emphasized that although the "intention of the parents to settle permanently with the child in a Member State * * * can also be taken into account, * * * the intention of the parents cannot as a general rule by itself be crucial to the determination of the habitual residence of a child." *Id.* ¶ 46-47. As the Court of Justice earlier had explained in Case C-497/10, *Mercredi* v. *Chaffe*, ECLI: EU:C:2010:829 (Dec. 22, 2010), "taking account of all the circumstances of fact specific to each individual case" is necessary to fulfill the Convention's purposes. *Id.* ¶ 47.

The Supreme Court of the United Kingdom likewise has rejected efforts to "overlay the factual concept of habitual residence with legal constructs." *In re A (Children)*, [2013] UKSC 60, ¶ 39. Instead, "habitual residence is a question of fact and not a legal concept such as domicile,"

and will "depend[] upon numerous factors, * * * with the purposes and intentions of the parents being merely one of the relevant factors." *Id.* ¶ 54. The high court reiterated that "[t]he essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce." *Ibid.*; see *AR* v. *RN*, [2015] UKSC 35, ¶ 17; *In re KL (A Child)*, [2013] UKSC 75, ¶ 20.

In *LCYP* v. *JEK*, [2015] 5 H.K.C. 293, the Hong Kong Court of Appeal of the High Court, citing *In re A* and other United Kingdom cases, agreed that "[h]abitual residence is a question of fact which should not be glossed with legal concepts." *Id.* ¶ 7.7 (citation omitted). The court explained that although "parental intent does play a part in establishing or changing the habitual residence of a child," it is not dispositive and instead "will have to be factored in, along with all the other relevant factors," in determining habitual residence. *Ibid.*

The Court of Appeal of New Zealand similarly rejected an exclusive shared-parental-intent approach in *Punter* v. *Secretary for Justice* [2007] 1 NZLR 40, emphasizing "the need to ensure that the concept of habitual residence remains a factual one not limited by presumptions or presuppositions" and reiterating that courts must consider "all of the relevant factual circumstances." *Id.* at 66 (¶ 106); see *id.* at 71 (¶ 130) (explaining that "the test is a factual one, dependent on the combination of circumstances in the particular case"); *id.* at 85 (¶ 189) ("Parental purpose should be treated as an important factor, but not decisive.").

Agreeing that the "approach described in [*Punter*] * * * should be followed," the High Court of Australia held that courts should undertake " 'a broad factual inquiry' into all factors relevant to determining the habitual residence of a child, of which the settled purpose or intention of the parents is an important but not necessarily decisive factor." *LK* v. *Director-General, Dep't of Cmty. Servs.* (2009) 237 CLR 582, 591, 600 (¶ 18, 45).

The point need not be belabored. As *Balev* observed, although there is not yet an "[a]bsolute consensus" among contracting states to the Convention, the "clear trend" from courts in those countries is to determine habitual residence using a flexible, factbound approach free from rigid legal or doctrinal requirements. [2018] 1 S.C.R at 423.

B. Under A Flexible And Factbound Inquiry, A Subjective Parental Agreement Is Not Categorically Necessary

Because the determination of habitual residence is inherently factbound and flexible, a subjective agreement between the parents is not necessary to that determination. Indeed, as explained above, even a shared parental intent is not necessary to that determination, so it follows *a fortiori* that an actual or subjective agreement between the parents … is not categorically required either. To the contrary, as with all questions of fact, courts may find a variety of evidence relevant to their consideration, as the district court here did. … A subjective agreement between the parents about where their child should live might in some cases be relevant to determining the child's habitual residence. For example, when a child has lived in several countries, an agreement (or other indicia of parental intent) may shed light on whether the particular dwelling from which the child was wrongfully removed was sufficiently stable, lasting, or continuing in nature for that dwelling (as opposed to one of the other dwellings) to be regarded as the place of habitual residence. … But a subjective parental agreement—or lack thereof—should not be dispositive; as the court of appeals observed, cases under the Convention frequently arise in situations when the "parents d[o] not see eye to eye on much of anything." …

Imposing a rigid requirement of a subjective agreement would contravene not only the flexible and factbound nature of the inquiry, but also the Convention's purposes. As the court of appeals observed, such a requirement would in practice leave many young children, especially

those who have resided in only one country, with *no* habitual residence at all, thereby "leaving the population most vulnerable to abduction the least protected" under the Convention. … That would undermine the Convention's goal to "deprive [the abducting parent's] actions of any practical or juridical consequences" by eliminating any benefit from unilaterally moving the child. *Explanatory Report* ¶ 16. To be sure, it might be possible to construe the Convention in such a way that in rare instances a very young child may lack a habitual residence under the Convention. … But courts should not *create* the need to confront whether (and if so when) the Convention contemplates that undesirable scenario by imposing rigid legal requirements or constructs on what should be a quintessentially flexible and factual inquiry under the Convention. That concern is particularly salient when, as here, a child has lived in only one country from birth to the wrongful removal.

Petitioner's suggestion … that an actual-agreement requirement would result in faster adjudications (when no such agreement exists) proves too much, for *any* rigid legal requirement would have the same effect. For instance, a requirement that a child have lived in a place for at least one year—as sometimes is required to establish domicile, see *Martinez* v. *Bynum*, 461 U.S. 321, 327 n.6 (1983)—or that the parents own or have a long-term lease for their dwelling also would result in rapid determinations in cases where those factors are absent. Yet applying such rigid requirements would be contrary to the flexible and factbound inquiry the Convention requires. …

Although the court of appeals here appeared to recognize the factual nature of a habitual-residence determination, … it nevertheless seemed to adhere to a binary view of considering *either* the child's acclimatization *or* the parent's shared intent—but not both, much less other considerations as well. … (Moore, J., dissenting) (agreeing with that binary standard). As explained above, that framework is incorrect; courts should consider all relevant evidence in all cases.

The Seventh Circuit's decision in *Redmond* v. *Redmond*, 724 F.3d 729 (2013), illustrates the correct approach to determining habitual residence under the Convention. There, the court refused to "overcomplicat[e] the issue of habitual residence with layers of rigid doctrine," and instead explained that, "in accordance with 'the ordinary and natural meaning of the two words it contains,' " determining a child's habitual residence "requires an assessment of the observable facts on the ground." *Id.* at 742-743 (citation omitted). *Redmond* rejected exclusive reliance on shared parental intent, explaining that although such intent can be "an important factor in the analysis," the "habitual-residence inquiry remains a flexible one, sensitive to the unique circumstances of the case and informed by common sense." *Id.* at 744. After reviewing various competing approaches in the courts of appeals—some of which focus on acclimatization, others of which focus on parental intent, see *id.* at 744-746—*Redmond* reiterated that both parental intent and acclimatization can be relevant, but that ultimately any determination of a child's habitual residence must "remain[] essentially factbound, practical, and unencumbered with rigid rules, formulas, or presumptions." *Id.* at 746.

That approach is consistent with the ordinary meaning of habitual residence, the negotiation and drafting history of the Convention, and the emerging case law from other contracting states described above. Under that approach, courts determining a child's habitual residence should consider the full range of admissible evidence relevant to that determination. Such evidence potentially may include evidence of the parents' intent (such as an actual agreement, expressed intent to remain in the country, parental employment, the purchase of a home or the signing of a long-term lease, moving household belongings, establishing local bank

accounts, or applying for driver's or professional licenses); the child's ties to the place (such as the length of residence, the child's language and assimilation, school or daycare enrollment, or participation in social activities); and any other relevant factors (such as immigration status, the reasons the child was in the country, or the existence of family and social networks), as they existed at the time of the wrongful removal or retention. See generally, *e.g.*, *Balev*, [2018] 1 S.C.R. at 414, 421, 423; *In re A*, *supra*, ¶ 48, 55; *Punter* [2007] 1 NZLR at 61-62 (¶ 88); Atkinson 654-657. Because the habitual-residence inquiry is factbound and flexible, the relative weight of any given evidence will vary from case to case and ultimately would be a matter of discretion for the trial court. Cf. *Anderson* v. *Bessemer City*, 470 U.S. 564, 574 (1985).

Importantly, the list above is intended to be illustrative, not mandatory or exhaustive; courts are free to consider any admissible evidence relevant to answering the ultimate factual inquiry: the location of the child's habitual residence. Conversely, the inquiry is not boundless. For instance, setting aside extraordinary circumstances (such as an infant born on an overseas vacation), a child's habitual residence likely cannot be in a country in which he or she has never been physically present. … That conclusion flows from the ordinary meaning of "habitual"; absent extraordinary circumstances, an individual cannot have *usually* resided somewhere if he or she has *never* resided there. In all cases, the touchstone is determining the location of the child's usual or customary dwelling or abode. …Courts should consider any and all admissible evidence relevant to making that purely factual determination.

Although the court of appeals recognized that the inquiry into habitual residence "is one of fact," … and although both the district court and the court of appeals correctly concluded that they could determine A.M.T.'s habitual residence without requiring proof of a subjective parental agreement, the district court made its determination without engaging in the flexible and factbound inquiry that the Convention requires. Instead, it appeared to focus on shared parental intent to the exclusion of other considerations. … This Court has repeatedly emphasized that it is a "court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *United States* v. *Stitt*, 139 S. Ct. 399, 407 (2018) (citation omitted). Accordingly, the Court should vacate the judgment below and remand the case so the lower courts have the opportunity to apply the correct legal standard to determine A.M.T.'s habitual residence in the first instance.

* * * *

(2) Abou-Haidar v. Vazquez

The United States submitted an amicus brief on December 18, 2019 in a Hague Abduction Convention case in the D.C. Circuit, *Abou-Haidar v. Sanin Vazquez*, 945 F.3d 1208 (D.C. Cir. 2019), in which habitual residence was one of the issues, as it was in *Monasky*, discussed *supra*. The D.C. Circuit also considered two additional issues:

> Whether a parent can retain a child within the meaning of Article 3 of the Convention prior to the expiration of a previously agreed-upon time to return the child to the country of the child's alleged habitual residence [so-called anticipatory retention]; and
>
> Whether a court may decide for itself the legal and factual questions related to a claim in a petition under the Convention, notwithstanding a Central

> Authority's decision to reject the same claim in a separate application [in this case, there was a decision by the French Central Authority].

The lower court decided that the child's habitual residence was France and ordered that the parent retaining the child in the United States (Vazquez) return her to France by December 31, 2019. The U.S. brief in *Abou-Haidar* (not excerpted herein) repeats the argument in the U.S. brief in *Monasky* in and addresses the two additional issues, stated *supra*.

On December 27, 2019, the D.C. Circuit issued its decision, affirming the lower court's judgment. The Court agreed with the U.S. brief on two of the issues, finding that the French Central Authority's decision carried little weight and that the case was one involving actual, and not anticipatory, retention. On the issue of habitual residence, the Court applied the standard on which the parties in this case had agreed (that used in the *Mozes* case). Excerpts follow from the opinion of the Court.

* * * *

Sanin Vazquez's primary contention is that the petition must be dismissed because the district court's retention date of May 7, 2019, precedes … the date through which the parties agreed the child would remain in the United States. Sanin Vazquez views this concern as jurisdictional… In her view, recognizing a retention date prior to December 31, 2019, would constitute an "anticipatory retention"—a type of claim that, she asserts, American courts have never previously recognized. …

We do not embrace Sanin Vazquez's effort to label her argument in jurisdictional terms; at bottom, her argument is simply about whether a retention occurred, and thus goes to the merits of Abou-Haidar's Hague Convention petition. In any event, we do not believe that the district court reached out to decide an unripe issue when it identified a retention of the child as of May 7, 2019—or, at the latest, May 23, 2019—because this case involves an actual, rather than anticipatory, retention. *See* U.S. Amicus Br. 25-29 (agreeing that this case involves an actual retention). No court has held that either of these retention dates would be premature. The circuits identify the date of retention as "the date consent was revoked" or when the "petitioning parent learned the true nature of the situation." *Palencia v. Perez*, 921 F.3d 1333, 1342 (11th Cir. 2019). For example, the Second Circuit has held that the date of retention is the date when the retaining parent advised the other that "she would not be returning with the [c]hildren" as originally planned. *Marks ex rel. S.M. v. Hochhauser*, 876 F.3d 416, 422 (2d Cir. 2017). Similarly, the Third Circuit identifies the retention date as the "date beyond which the noncustodial parent no longer consents to the child's continued habitation with the custodial parent and instead seeks to reassert custody rights, as clearly and unequivocally communicated through words, actions, or some combination thereof." *Blackledge v. Blackledge*, 866 F.3d 169, 179 (3d Cir. 2017). These cases also find support in the official commentary of the Convention. …

The circuits also agree that the parental actions that serve to identify such date need not be particularly formal. The withdrawal of consent to existing custody arrangements may be communicated through an in-person conversation, *Darin v. Olivero-Huffman*, 746 F.3d 1, 10 (1st Cir. 2014), or an email, *Marks*, 876 F.3d at 417-18, or a phone call, *Palencia*, 921 F.3d at 1337. More formal actions would also certainly qualify, including unilaterally filing for custody, *Mozes*, 239 F.3d at 1070, or filing a petition under the Hague Convention for the child's return, *Blackledge*, 866 F.3d at 179.

Guided by these analyses, the district court correctly found that Sanin Vazquez retained the child at the earliest on May 7, 2019, when she informed Abou-Haidar of her Superior Court filing seeking "primary physical custody," … or at the latest by May 23, 2019, when Abou-Haidar filed his answer and counterclaim making clear that he opposed the proposed change to his custody rights…. If there were any doubt as to the precise date, other events further support the district court's conclusion that, by the end of May 2019, both parents understood they disputed the exercise of custody over the child: Sanin Vazquez informed Abou-Haidar on May 10 that she did not intend to return the child to France at the end of the year…; Sanin Vazquez's counsel wrote a letter to Abou-Haidar on May 31 reiterating that Abou-Haidar was not welcome in the Washington apartment where the child was living with her mother…; and, on June 10, Abou-Haidar filed his petition for the child's return to France…. Given the temporal concentration of these events and the lack of any material effect on the analysis of choosing one date over another, we need not isolate one definitive act of retention. Under any circuit's existing law on the point, one or more of these actions suffices to identify a retention. *See generally Redmond*, 724 F.3d at 739 n.5 (noting that an '"abduction' might have occurred on one of several dates; the question is always whether there was *any* date on which a wrongful removal or retention occurred").

* * * *

IV.

Having resolved the heart of Sanin Vazquez's claim, we now turn to her abbreviated challenge to the district court's conclusion of the second question. This question asks: "Immediately prior to the removal or retention, in which state was the child habitually resident?" *Mozes*, 239 F.3d at 1070. Here the district court concluded, based on detailed factfinding, that France is the child's habitual residence. Sanin Vazquez contends on appeal that the "factual findings made by the District Court, when applied to the law of and interpreting the Convention, could not possibly yield a ruling that habitual residence was still France." …

A preliminary question is what framework we should apply to determine the child's habitual residence. All the circuits to have addressed the question agree that two important considerations are: (1) the parents' shared intent for where the child should reside, and (2) the child's acclimatization to a particular place. *See, e.g.*, *Redmond*, 724 F.3d at 746 ("In substance, all circuits—ours included—consider *both* parental intent *and* the child's acclimatization."). To the extent the circuits' approaches diverge, they "differ[] only in their emphasis." *Id.* Under the prevailing approach, again represented by *Mozes*, the primary focus is on the parent's shared intent. 239 F.3d at 1078-79. After ascertaining shared intent, the court also considers acclimatization, but a child's acclimatization to a new place of residence overcomes contrary parental intent only where the court "can say with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would now be tantamount to taking the child 'out of the family and social environment in which its life has developed.'" *Id.* at 1081 (quoting Pérez-Vera Report ¶ 11). The Sixth Circuit, and to some extent the Third Circuit, place primary emphasis on the child's acclimatization, treating shared parental intent as a "back-up inquiry for children too young or too disabled to become acclimatized." *Taglieri v. Monasky*, 907 F.3d 404, 407 (6th Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 2691 (June 10, 2019) (No. 18-935); *see also Ahmed v. Ahmed*, 867 F.3d 682, 688 (6th Cir. 2017); *Whiting v. Krassner*, 391 F.3d 540, 550 (3d Cir. 2004); *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995).

These differing emphases affect the framing of the standard of review on appeal. Under *Mozes*, the habitual-residence determination is a "mixed question of law and fact." 239 F.3d at 1073. The factual ingredients of the inquiry, *i.e.*, those "founded on the application of the fact-finding tribunal's experience with the mainsprings of human conduct," are reviewed for clear error, while legal aspects of the question, *i.e.*, those that require "judgment about the values that animate legal principles," are reviewed de novo. *Id.* (internal quotation marks and citations omitted). The Sixth Circuit does not identify any legal overlay subject to de novo review, so treats the habitual-residence determination as purely a "question of fact subject to clear-error review." *Monasky*, 907 F.3d at 409.

We have no occasion to decide as a legal matter which of these frameworks is correct because the parties agreed both here and in the district court to application of the *Mozes* framework. …

In line with the *Mozes* framework, we first examine the district court's findings regarding the parents' shared intent, and then its findings regarding the child's acclimatization.

A.

The district court found, and Sanin Vazquez concedes, that France was the family's habitual residence before they came to Washington, D.C. … Under *Mozes*, a determination that shared parental intent has changed requires a finding that the parties had a "settled purpose" to establish a new habitual residence. 239 F.3d at 1074. Courts look at a variety of factors to determine whether the parents had a shared intent to change the child's habitual residence, including "parental employment in the new country of residence; the purchase of a home in the new country and the sale of a home in the former country; marital stability; the retention of close ties to the former country; the storage and shipment of family possessions; the citizenship status of the parents and children; and the stability of the home environment in the new country of residence." *Maxwell v. Maxwell*, 588 F.3d 245, 252 (4th Cir. 2009). Courts have held parents cannot establish a new habitual residence without forsaking their existing one. A "person cannot acquire a new habitual residence without 'forming a settled intention to abandon the one left behind.'" *Darin*, 746 F.3d at 11 (quoting *Mozes*, 239 F.3d at 1075).

Crucially, *Mozes* tells us that "[w]hether there is a settled intention to abandon a prior habitual residence is a question of fact as to which we defer to the district court." 239 F.3d at 1075-76. Here, the district court canvassed all of the record evidence and found that the parties intended to remain in Washington, D.C. for the eighteen months of Sanin Vazquez's initial contract, but that any plans to stay beyond that period were "aspirational and contingent." … The district court's detailed, record-based factual findings fully support that determination. …

On appeal, Sanin Vazquez has not articulated why any of these factual findings is clearly erroneous. … But the district court took those facts into account. … Sanin Vazquez also claims that the district court erred in crediting Abou-Haidar's testimony and the corroborating testimony of his friends, rather than the testimony of her friends and family, as to the parties' stated intentions upon departure from France. … But our review is at its most deferential when it comes to reexamining the district court's credibility determinations. *See, e.g.*, *Maxwell*, 588 F.3d at 253.

To the extent that Sanin Vazquez suggests that the district court made a mistake of law, her primary argument is that the district court "erroneously imposed a requirement that the parties supplant the former habitual residence of Paris with Washington, D.C., in order to effectively abandon Paris." … *Mozes* recognizes a conceptual difference between abandoning a habitual residence and establishing a new one: a person can abandon a habitual residence "in a single day if he or she leaves it with a settled intention not to return to it," but an "appreciable

period of time and a settled intention will be necessary to enable him or her to become" habitually resident in a new country. *Mozes*, 239 F.3d at 1074-75 (internal quotation marks and citation omitted). The district court explicitly acknowledged this conceptual difference, and held only that the parents did *not* have a settled intention to abandon France, regardless of their intentions with respect to Washington, D.C. … The district court's factual finding of the absence of settled intention to abandon France suffices to support its habitual-residence holding. We see no legal error in its analysis of the point.

B.

The second inquiry, subsidiary under the parties' stipulated *Mozes* framework, is the child's acclimatization to the new country. "Evidence of acclimatization is not enough to establish a child's habitual residence in a new country when contrary parental intent exists." *Darin*, 746 F.3d at 12 (citing *Mozes*, 239 F.3d at 1078-79). *Mozes* further counsels that courts should "be slow to infer from [a child's contacts] that an earlier habitual residence has been abandoned" in the absence of shared parental intent to do so. 239 F.3d at 1079. Courts view a variety of factors as relevant to acclimatization, including "school enrollment, participation in social activities, the length of stay in the relative countries, and the child's age." *Maxwell*, 588 F.3d at 254.

Here, Sanin Vazquez has not identified any error in the district court's findings regarding the child's acclimatization. The district court recognized that the child had adjusted to a new school, made friends, and participated in extracurricular activities in the ten months she spent in the United States prior to the retention in May 2019. … But, until the sojourn in Washington, the child's life was based almost entirely in Paris: her parents married there, she was born there, and she attended nursery school there.

Sanin Vazquez has not argued that the district court committed any legal error in applying the *Mozes* framework to its findings relating to the parents' shared intentions and the child's acclimatization. She does not urge us to adopt any other court's approach (nor the approach the government describes). And she does not argue that any of the district court's factual findings, including its findings supporting its shared parental intent determination, were clearly erroneous. In these circumstances, the district court reasonably determined that "[e]vidence of acclimatization over such a short period of time for such a young child is not enough to overcome the parties' lack of intent to abandon France," or any of the other factual indicia showing that France was their daughter's habitual residence. …

***

We conclude that Sanin Vazquez's arguments regarding the date of retention and the child's habitual residence lack merit. Because the parties chose the *Mozes* framework, and Sanin Vazquez has not challenged the district court's findings under the remaining questions or asserted any defenses, we affirm the district court's judgment granting Abou-Haidar's petition for return.

* * * *

Cross References

Children, **Chapter 6.C.**
IACHR petition of José Trinidad Loza Ventura (consular notification), **Ch. 7.D.3.b.**
Enhanced consular immunities, **Chapter 10.C.2.**

CHAPTER 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. Extradition Treaties

As discussed in *Digest 2018* at 5 (editor's note), the U.S. extradition treaties with Serbia and Kosovo entered into force on April 23, 2019 and June 13, 2019, respectively, after the parties exchanged instruments of ratification.

2. Extradition Treaty and MLAT with Croatia

On December 10, 2019, the United States and Croatia signed bilateral extradition and mutual legal assistance agreements in Washington, D.C. See Department of Justice press release, available at https://www.justice.gov/opa/pr/united-states-and-croatia-sign-bilateral-agreements-enhancing-law-enforcement-cooperation. Attorney General William P. Barr signed on behalf of the United States and said, "The instruments will further strengthen our bilateral law-enforcement relationship, improving the ability to extradite fugitives and exchange evidence needed for prosecutions." *Id*. The press release further explains:

> The new agreements enhance bilateral relations by affording both nations with better information-sharing and cooperative capabilities. The new extradition agreement modernizes the extradition relationship between the countries, which had been governed by a 1901 treaty. The instrument provides a dual-criminality basis for extradition, and it streamlines the procedures to be followed in pursuing extradition. The mutual legal assistance instrument, the first such bilateral instrument between the countries, will better enable prosecutors to exchange information facilitating the prevention, investigation, and prosecution of crime. It will improve cooperation in the fight against terrorism, organized crime, corruption, cybercrime, and other serious transnational criminal offenses.
>
> The instruments stem from the legal framework of the U.S.-European Union Agreements on Extradition and Mutual Legal Assistance signed on June 25, 2003, prior to Croatia entering the EU.

3. Extradition of Syrian General Jamil Hassan

On March 5, 2019, the State Department issued a press statement expressing support for Germany's request for Lebanon to extradite Syrian General Jamil Hassan. See March 5, 2019 press statement, available at https://www.state.gov/support-for-germanys-request-for-lebanon-to-extradite-syrian-general-jamil-hassan/. The press statement elaborates on U.S. support generally for accountability for atrocities committed in Syria and on the actions of General Hassan:

> The United States continuously seeks to shed light on abuses committed by the Assad regime, including its use of torture, and calls for the regime to allow for unhindered access of independent monitoring organizations to detention centers. Moreover, the United States supports effective mechanisms for holding those responsible for atrocities in Syria accountable. To that end, the United States would welcome any decision by the Government of Lebanon that would facilitate the lawful extradition of Syrian General Jamil Hassan to Germany, in compliance with the Government of Germany's extradition request and consistent with applicable law.
>
> General Hassan serves as the chief of Syria's Air Force Intelligence Directorate and is notorious for his alleged involvement in the extensive use of torture in Syrian detention centers. The German federal prosecutor issued an arrest warrant against the General in June 2018 for committing crimes against humanity based on a complaint filed by Syrian refugees residing in Germany. The Government of Germany requested the Government of Lebanon to extradite General Hassan, who is reportedly visiting Lebanon to receive medical care. Moreover, the European Union and the United States have previously sanctioned General Hassan due to his support to the Assad regime per Executive Order 13573.

4. Extradition Case: *Aguasvivas v. Pompeo*

On September 18, 2019, a federal district court in Rhode Island granted habeas relief to Cristian Aguasvivas. *Aguasvivas v. Pompeo*, 405 F. Supp. 3d 347 (D.R.I. 2019). A federal district court in Massachusetts had previously certified Aguasvivas's extradition on charges of murder, aggravated robbery, and illegal firearms possession, in accordance with the bilateral extradition treaty between the United States and the Dominican Republic, putting before the Secretary of State the decision of whether to extradite Aguasvivas. *In re Aguasvivas*, Misc. No. 17-mj-04218 (D. Mass. 2017). The Rhode Island district court granted the habeas petition before the Secretary of State had made a decision on extradition. The court found the extradition request was deficient for including only an arrest warrant with no separate charging document. The court also took into consideration the asylum claim of Mr. Aguasvivas, based on the UN Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 ("CAT"), alleging that he would face torture in the Dominican Republic. The U.S. brief on appeal from the habeas decision is excerpted

below and available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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* * * *

B. The Dominican Republic Met the Treaty Requirement that It Submit the Document Setting Forth the Charges

1. The Treaty's Flexible Language Should Be Given Effect "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellin v. Texas*, 552 U.S. 491, 506 (2008); *see also, e.g., Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("It is well established that, when the statutory language is plain, we must enforce it according to its terms."). Pursuant to Article 7.3 of the Treaty, the Dominican Republic was required to submit, *inter alia*, "a copy of the warrant or order of arrest or detention issued by a judge or other competent authority," and "a copy of the document setting forth the charges against the person sought." *See* Add. 90 (Treaty, Art. 7.3(a), (b)). The plain text of Article 7.3(b) of the Treaty does not specify that any particular type of document is required, only that the document "setting forth the charges" against the subject of the extradition request must be provided.

By including an adaptable and non-specific requirement—that the requesting country provide the document setting forth the charges against the person sought for extradition—the Treaty recognizes that different types of documents may be provided to fulfill this requirement. Prosecuting authorities who are seeking the return of fugitives may employ varying procedures to initiate criminal proceedings, and if the parties to the Treaty had intended to require the submission of a specific type of document, such as an "indictment" or "charge sheet," they could have so required. *See, e.g., Matter of Assarsson*, 635 F.2d 1237, 1243 (7th Cir. 1980) ("If the parties had wished to include the additional requirement that a formal document called a charge be produced, they could have so provided."); *Emami v. U.S. Dist. Ct. for N. Dist. Of Cal.*, 834 F.2d 1444, 1448 (9th Cir. 1987) ("grafting such a [formal charge] requirement as Emami proposes on to the treaty in the instant case is inadvisable").

Moreover, the flexible language of Article 7.3(b) comports with the Treaty as a whole. *See, e.g., U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("Over and over we have stressed that in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (cleaned up). For example, in describing the parties' extradition obligations, Article 1 of the Treaty refers to persons "sought by the Requesting Party from the Requested Party for prosecution," rather than only persons who have been formally charged. *See* Add. 87 (Treaty, Art. 1).

Conversely, the Treaty reflects that the parties knew how to require a specific document when they so intended. For example, in cases where the fugitive is wanted to serve a sentence, Article 7.4(a) requires "the judgment of conviction, or, if a copy is not available, a statement by a judicial or other competent authority that the person has been convicted or found guilty." *See* Add. 90 (Treaty, Art. 7.4(a)). Thus, Article 7.4(a) is rigid: The requesting country must submit a specific type of document—the judgment of conviction—if it is available. Article 7.3(b) does not impose a similar constraint; any document that sets forth the charges may satisfy the provision.

The Dominican arrest warrant thus satisfies the plain terms of Article 7.3(b) of the Treaty. It describes the criminal acts that Aguasvivas is alleged to have committed and lists the Dominican statutes that Aguasvivas is alleged to have violated. *See* App. 23. It therefore qualifies as "the document setting forth the charges against the person sought." *See* Add. 90 (Treaty, Art. 7.3(b)).

2. Both Parties to the Treaty Agree that the Documentary Requirement Was Met in this Case

Another independent reason that this Court should find that the Dominican warrant satisfies the Treaty's documentary requirement is that doing so accords with the U.S. Department of State's interpretation of the Treaty, as well as that of the Dominican Republic. As the Supreme Court has explained, "[w]hen the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). Such is the case here.

The State Department's view, as set forth in a supplemental declaration from its Assistant Legal Adviser for the Office of Law Enforcement and Intelligence, is that a requesting country is not required to submit separate documents in order to satisfy Articles 7.3(a) and 7.3(b) of the Treaty. *See* App. 209. Accordingly, the State Department takes the position that the warrant issued for Aguasvivas's arrest satisfies both requirements. App. 211. The State Department's interpretation of the Treaty requirements, and their application to this case, is entitled to great weight. *See, e.g.*, *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight.") (internal quotation marks and citation omitted); *United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000) (en banc) ("We first consult the United States Department of State's interpretation of the two treaties, to which we accord substantial deference.").

While the view of the State Department is entitled to significant deference on its own, such deference is particularly warranted when its view is consistent with that of the treaty partner, as is the case here. *See, e.g.*, *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *cf. Arias Leiva v. Warden*, 928 F.3d 1281, 1288 (11th Cir. 2019) (holding that the U.S.-Colombia extradition treaty is in full force and effect because, *inter alia*, both the United States and Colombia understand it to be in effect). Here the Dominican Republic, through an affidavit by Prosecutor Arias, has confirmed its similar view that the "Treaty does not state as a requirement for grant[ing] or deny[ing] extradition, the prior existence of an indictment against the person required in extradition." *See* App. 213. The Court should give deference to the parties' mutual understanding of the Treaty terms—that a separate charging document is not required to satisfy Article 7.3(b).

The parties' intent not to require a formal charging document is further evidenced by the Dominican Republic's criminal procedure. *See, e.g.*, *United States v. Stuart*, 489 U.S. 353, 369 (1989) ("The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed."). As described in the extradition request, when a criminal suspect is located abroad, the Dominican Republic may first seek an arrest warrant from a court that states the charges against the fugitive, and the prosecution may obtain a separate charging document *after* the fugitive is arrested and interviewed. *See* App. 15. The Dominican Republic followed these procedures when initiating criminal proceedings against Aguasvivas. *See* App. 214 ("In the case of [Aguasvivas],

the Prosecutor wants to know the version of the accused of how and why he perpetrated the facts imputed to him … *prior [to] filing an indictment against him*.") (emphasis added).

Given this procedure, the district court's determination that a separate charging document is required under Article 7.3(b) of the Treaty has potentially far-reaching consequences, as the Dominican Republic could find itself unable to satisfy the treaty requirements in other cases where the fugitive has similarly fled prior to arrest. It is nonsensical that the Dominican Republic would have negotiated and agreed to a treaty term that it may be unable to fulfill, thereby providing safe haven to criminals who have fled to the United States, and frustrating a fundamental purpose of the extradition treaty.

3. Canons of Construction Demand that the Treaty Be Interpreted Liberally in Favor of Extradition

Even if there were any ambiguity as to what Article 7.3(b) requires, an extradition treaty much be construed liberally in favor of extradition. As the Supreme Court articulated in *Factor v. Laubenheimer*, "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." 290 U.S. 276, 293-94 (1933); *see also, e.g.*, *Grin v. Shine*, 187 U.S. 181, 184 (1902) (extradition treaties should be "interpreted with a view to fulfil our just obligations to other powers"). This Court, as well as numerous sister circuits, have observed that *Factor* demands that ambiguities in an extradition treaty be construed in favor of the state signatories—that is, in favor of surrendering a fugitive to the requesting country. *Kin-Hong*, 110 F.3d at 110 ("[E]xtradition treaties, unlike criminal statutes, are to be construed liberally in favor of enforcement."); *see also, e.g.*, *In re Extradition of Howard*, 996 F.2d at 1330-31; *Martinez v. United States*, 828 F.3d 451, 463 (6th Cir. 2016) (en banc) (same). Accordingly, to the extent that the Court finds the documentary requirement ambiguous, it must liberally interpret the provision and find that the Dominican warrant fulfills it.

Similarly, the district court's determination is at odds with the longstanding principle that defenses "savor[ing] of technicality" are particularly inappropriate in extradition proceedings. *Bingham v. Bradley*, 241 U.S. 511, 517 (1916); *see also, e.g.*, *Fernandez*, 268 U.S. at 312 ("Form is not to be insisted upon beyond the requirements of safety and justice."); *Skaftouros v. United States*, 667 F.3d 144, 160 (2d Cir. 2011) ("[A]rguments that savor of technicality are peculiarly inappropriate in dealings with a foreign nation.") (internal quotation marks and citation omitted). In this case, the Dominican arrest warrant fulfills the function of making Aguasvivas aware of the charges against him. To require something more would improperly elevate form over substance.

4. The District Court's Reasons for Imposing an Extra-Textual Requirement of a Formal Charging Document Are Unsupported

The district court's reasons for concluding that Article 7.3(b) "refers to a formal charging document," Add. 54, are flawed for a number of reasons. *First*, contrary to the district court's finding, the requirement that the requesting country support its extradition request with "*the* document setting forth the charges" rather than "*a* document setting forth the charges" does not demand submission of a formal charging document. *See id.* Any document, such as a warrant, that presents the criminal charges can serve as "*the* document setting forth the charges," just as much as it can serve as "*a* document setting forth the charges."

Second, the Treaty's requirement that the requesting country submit an arrest warrant, Article 7.3(a), is not "surplusage" if an arrest warrant also satisfies Article 7.3(b). Rather, the Treaty simply recognizes that, in some cases, the arrest warrant may not set forth the charges. In

such circumstances, submission of an arrest warrant is still required under Article 7.3(a) to prove that the foreign country has the power to bring the fugitive into custody upon return, but a separate charging document may also be required to satisfy Article 7.3(b). Nothing, however, precludes an arrest warrant from satisfying both requirements, as is the case here. By way of example, if a treaty required the submission of "the document manifesting the views of Judge A" and "the document manifesting the views of Judge B," a single judicial opinion written by Judge A, but also joined by Judge B, would plainly fulfill both of these requirements.

Third, courts have repeatedly held that a foreign arrest warrant may also be considered a charging document. *See, e.g.*, *Sainez v. Venables*, 588 F.3d 713, 717 (9th Cir. 2009) ("We agree that for the purpose of a civil proceeding such as an extradition, a Mexican arrest warrant is the equivalent of a United States indictment … . "); *In re Extradition of Sarellano*, 142 F. Supp. 3d 1182, 1186 n.2 (W.D. Okla. 2015) (finding that a Mexican judge's "arrest warrant 'is a charging document' in the sense that 'it identifies the offense in the criminal code, sets out the essential facts of the alleged crime, and details the evidentiary basis for the charge'") (alteration omitted); *United States v. Nolan*, 651 F. Supp. 2d 784, 795 (N.D. Ill. 2009) (concluding that an arrest warrant from Costa Rica was sufficient to satisfy the treaty's requirement of "the charging document, or any equivalent document issued by a judge or judicial authority"). By contrast, the district court did not cite any cases supporting its conclusion that a separate, formal charging document is required, even where the submitted arrest warrant sets forth the charges.

In sum, the district court erred in reaching the unprecedented conclusion that the Dominican Republic was required to submit a separate, formal charging document even though such an interpretation is not supported by the plain language of the Treaty, is contrary to the intent of the parties to the Treaty, is inconsistent with Dominican criminal procedure, and disregards Supreme Court guidance that favors liberal constructions of extradition treaties.

II. PURSUANT TO THE RULE OF NON-INQUIRY AND TWO CONGRESSIONAL ENACTMENTS, THE DISTRICT COURT WAS BARRED FROM REVIEWING PETITIONER'S CAT CLAIM, AND ITS APPLICATION OF RES JUDICATA WAS ERRONEOUS

The district court was the first court ever to exercise habeas jurisdiction to deny extradition based on a fugitive's CAT claim. In doing so, the court erred in a number of respects. It erroneously concluded that it had habeas jurisdiction to review a CAT claim, when such jurisdiction has never existed in extradition, as Congress has at least twice made clear. Moreover, even if the district court did otherwise have jurisdiction, Aguasvivas's claim was not ripe for the court's consideration because the Secretary has not yet rendered a decision on his surrender. And regardless, the district court's application of res judicata ignored that immigration and extradition are separate proceedings, and one is not preclusive on the other.

A. Standard of Review

While the scope of habeas review in extradition is narrow, *see supra* 17, issues of jurisdiction, justiciability, ripeness, and res judicata are reviewed de novo. *See, e.g.*, *United States v. Santiago-Colon*, 917 F.3d 43, 49 (1st Cir. 2019); *Reddy v. Foster*, 845 F.3d 493, 501 (1st Cir. 2017); *Stern v. U.S. Dist. Court for the Dist. ofMass.*, 214 F.3d 4, 10 (1st Cir. 2000); *Universal Ins. Co. v. Office of Ins. Com'r*, 755 F.3d 34, 37 (1st Cir. 2014).

B. The District Court Was Precluded from Reviewing Petitioner's CAT Claim

1. Courts Have Long Recognized that It Is the Secretary of State's Responsibility to Evaluate Claims Regarding the Treatment a Fugitive May Face in a Requesting Country

Pursuant to 18 U.S.C. § 3186, following certification, the Secretary "determine[s] whether or not the [fugitive] should actually be extradited." *Kin-Hong*, 110 F.3d at 109; *see also, e.g.*, *Hilton v. Kerry*, 754 F.3d 79, 84 (1st Cir. 2014). As this Court has recognized, the Secretary may "decline to surrender the relator on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations." *Kin-Hong*, 110 F.3d at 109.

In light of this legal framework, the Supreme Court, this Court, and myriad other courts have recognized, under the longstanding rule of non-inquiry, that "questions about what awaits the [fugitive] in the requesting country" are reserved for the Secretary and are not judicially reviewable. *Id.* at 111; *see Munaf v. Geren*, 553 U.S. 674, 700 (2008) ("Habeas corpus has been held not to be a valid means of inquiry into the treatment the [fugitive] is anticipated to receive in the requesting state.") (internal quotations and citation omitted); *see also, e.g.*, *Hoxha v. Levi*, 465 F.3d 554, 563 (3d Cir. 2006) ("Under the traditional doctrine of 'non-inquiry' … humanitarian considerations are within the purview of the executive branch and generally should not be addressed by the courts in deciding whether a petitioner is extraditable."); *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990) ("It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds.").

As this Court has stated, "the rule of non-inquiry tightly limits the appropriate scope of judicial analysis in an extradition proceeding." *Kin-Hong*, 110 F.3d at 110. Pursuant to the rule, "courts refrain from investigating the fairness of a requesting nation's justice system, and from inquiring into the procedures or treatment which await a surrendered fugitive in the requesting country." *Id.* (internal quotations and citation omitted). "The rule of non-inquiry, like extradition procedures generally, is shaped by concerns about institutional competence and by notions of separation of powers." *Id.* That rule respects the unique province of the Executive Branch to evaluate claims of possible future mistreatment at the hands of a foreign state, its ability to obtain assurances of proper treatment (if warranted), and its capacity to provide for appropriate monitoring overseas of a fugitive's treatment. Thus, "[i]t is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed." *Id.* at 111.

The origins of the rule of non-inquiry date back well over a century. *See, e.g.*, *Neely v. Henkel*, 180 U.S. 109, 122-23 (1901). In *Neely*, the Supreme Court held that habeas corpus was not available to defeat the extradition of an American citizen to Cuba despite the petitioner's claim that Cuba's laws violated the U.S. Constitution. *Id.* The fact that the petitioner would be subjected to "such modes of trial and to such punishment as the laws of [Cuba] may prescribe for its own people" was not a claim for which "discharge on habeas corpus" could issue. *Id.* at 123, 125.

Neely has stood the test of time and was reaffirmed by the Court in *Munaf*, 553 U.S. at 695-703. There, the habeas petitioners contended that a federal court should enjoin their transfer to Iraqi authorities to face trial in Iraqi courts "because their transfer to Iraqi custody is likely to result in torture." *Munaf*, 553 U.S. at 700. Relying on principles announced in extradition cases, the Court held that "[s]uch allegations are of course a matter of serious concern, but in the present context that concern is to be addressed by the political branches, not the Judiciary." *Id.* The Court explained that, even where constitutional rights are concerned, "it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." *Id.* at 700-01.

The *Munaf* Court noted that the government had represented that "it is the policy of the United States not to transfer an individual in circumstances where torture is likely to result," and that such determinations rely on "the Executive's assessment of the foreign country's legal system and the Executive's ability to obtain foreign assurances it considers reliable." *Id.* at 702 (cleaned up). The Court concluded that "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Id.* "In contrast," the Court explained, "the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Id.* The Court rejected the view that the government would be indifferent to that prospect, concluding instead that "the other branches possess significant diplomatic tools and leverage the judiciary lacks." *Id.* at 702-03 (internal quotations omitted).

2. The CAT, the FARR Act, and the REAL ID Act Also Leave No Doubt that Federal Courts Cannot Exercise Habeas Jurisdiction to Review CAT Claims in Extradition Cases

Against the historical backdrop in which the rule of non-inquiry has been consistently and repeatedly applied in extradition cases, the United States undertook international legal obligations under the CAT. The CAT did not alter the longstanding rule of non-inquiry. The Treaty is not self-executing, and Congress has twice made clear that federal courts may not review CAT claims other than in the immigration context.

a. The CAT Is Not Self-Executing

The CAT was adopted by the United Nations General Assembly in 1984. Article 3 of the CAT provides, in relevant part, that no state party shall "extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." That article directs the "competent authorities" responsible for evaluating torture claims to "take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." CAT, Art. 3.

The Senate gave its advice and consent to the CAT subject to the declaration that "Articles 1 through 16 of the Convention are not self-executing." 136 Cong. Rec. 36,198. Thus, "[t]he reference in Article 3 to 'competent authorities' appropriately refers in the United States to the competent administrative authorities who make the determination whether to extradite, expel, or return…. Because the Convention is not self-executing, the determinations of these authorities will not be subject to judicial review in domestic courts." S. Exec. Rep. No. 101-30, at 17-18 (1990).

b. The FARR Act Does Not Provide for Court Review of CAT Claims in Extradition Cases

Congress implemented Article 3 of the CAT by enacting Section 2242 of the FARR Act. Section 2242(a) states that it is the "policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."

Section 2242(b) of the FARR Act directs the "heads of the appropriate agencies" to prescribe regulations implementing Article 3 of the CAT. The Secretary of State has promulgated regulations providing that, when appropriate, "the Department considers the question of whether a person facing extradition from the U.S. 'is more likely than not' to be tortured in the State requesting extradition." 22 C.F.R. § 95.2(b); *see also* 22 C.F.R. § 95.1(b)

(defining torture). The regulations expressly state that the Secretary's surrender decisions are "matters of executive discretion not subject to judicial review." 22 C.F.R. § 95.4. The regulations also make clear that the provisions in the FARR Act providing for judicial review in the context of immigration removal proceedings are "not applicable to extradition proceedings." *Id.*

Critically, Section 2242(d) of the FARR Act clarifies that the statute does not confer courts with jurisdiction to review claims under the CAT outside the context of a final order of removal entered in an immigration case. It states:

> Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), ... *nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the* [*CAT*] *or this section,* or any other determination made with respect to the application of the policy set forth in subsection (a), *except as part of the review of a final order of removal* pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

FARR Act § 2242(d), 112 Stat. 2681-822 (8 U.S.C. § 1231 note) (emphasis added).

c. The REAL ID Act Makes Doubly Clear that Courts May Not Review CAT Claims in Extradition Cases

Congress again addressed judicial review of claims under the CAT when it enacted 8 U.S.C. § 1252(a)(4) as part of the REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(B), 119 Stat. 231, 310. That provision states:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28 or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

8 U.S.C. § 1252(a)(4). The CAT is therefore not self-executing, the FARR Act does not create jurisdiction for judicial review of claims under the CAT except in certain immigration proceedings, and the REAL ID Act makes doubly clear that specified immigration proceedings "shall be the sole and exclusive means for judicial review of any cause or claim under the [CAT]." *See* FARR Act § 2242(d); 8 U.S.C. § 1252(a)(4). Thus, the CAT did nothing to alter the historical rule of non-inquiry; if anything, its implementing legislation cemented the fact that federal courts may not consider extradition CAT claims.

d. No Court Has Ever Exercised Habeas Jurisdiction to Deny Extradition Based on a CAT Claim

Consistent with the rule of non-inquiry and these congressional enactments, the case law amply supports the conclusion that courts may not exercise habeas jurisdiction to deny extradition based on a CAT claim. In *Hoxha*, 465 F.3d 554, for example, the petitioner sought to block his extradition to Albania on the grounds that it would violate the CAT and the FARR Act. *See Hoxha*, 465 F.3d at 564. The Third Circuit rejected the claim and held that the CAT is "not self-executing" and "therefore does not in itself create judicially enforceable rights." *Id.* at 564 n.15. The *Hoxha* court held that the CAT's implementing legislation, the FARR Act, "does not *create* court jurisdiction." *Id.* at 564 (emphasis in original). It also held that the rule of non-

inquiry continued to apply and the district court "correctly declined to consider Petitioner's humanitarian claims." *Id.*

Similarly, in *Mironescu v. Costner*, the petitioner asserted a CAT claim in an effort to bar his extradition to Romania. 480 F.3d 664, 674 (4th Cir. 2007). But the Fourth Circuit held that Section 2242(d) of the FARR Act "plainly conveys that although courts may consider or review CAT or FARR Act claims as part of their review of a final removal order, they are otherwise precluded from considering or reviewing such claims." *Id.*; *see also id.* at 677 ("Thus, in light of the absence of any other plausible reading, we interpret § 2242(d) as depriving the district court of jurisdiction to consider Mironescu's claims.").

The D.C. Circuit reached the same conclusion in *Omar v. McHugh*, holding that "[b]y its terms, the FARR Act provides a right to judicial review of conditions in the receiving country only in the immigration context, for aliens seeking review of a final order of removal." 646 F.3d 13, 17 (D.C. Cir. 2011) (Kavanaugh, J.). The D.C. Circuit also noted that "[t]he REAL ID Act states that *only* immigration transferees have a right to judicial review of conditions in the receiving country, during a court's review of a final order of removal." *Id.* at 18 (emphasis added).

The Ninth Circuit's decision in *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 957 (2012) (en banc) (per curiam), represents the outermost bounds to which a circuit court has ever exercised jurisdiction in the extradition habeas context to address a fugitive's CAT claim. There, the Ninth Circuit held that the State Department may be required to confirm that it has complied with its regulations implementing the FARR Act; namely, that the Secretary considered the fugitive's torture claims and did not find it "more likely than not" that the fugitive would face torture upon surrender to the requesting country. *See id.* (internal quotations omitted). The *Trinidad* court made clear that if the State Department provides such confirmation, "the court's inquiry shall have reached its end." *Id.* That is because the "doctrine of separation of powers and the rule of non-inquiry block any inquiry into the substance of the Secretary's declaration." *Id.*

In short, the CAT did not displace the rule of non-inquiry and confer a habeas court with jurisdiction to review humanitarian arguments against extradition. To the contrary, the laws and regulations implementing the CAT unambiguously preclude judicial review of CAT claims in the extradition context.

3. The District Court's Contrary Conclusion Is Unsupported and Incorrect

In reaching its contrary conclusion, the district court violated the rule of non-inquiry and incorrectly determined that the Constitution's Suspension Clause required it to review Aguasvivas's CAT claim.

a. The District Court Improperly Disregarded the Longstanding Rule of Non-Inquiry in Becoming the First Court Ever to Deny Extradition on Humanitarian Grounds

When it found that the CAT barred Aguasvivas's extradition, the district court noted that the rule of non-inquiry is not jurisdictional in nature or absolute, applies only "when the petitioner questions the *wisdom* of the Secretary of State's decision to extradite," rather than the "*legality* of the extradition," and does not apply because the BIA has made a CAT determination. Add. 61-62 (emphasis in original). No court has ever cast aside the well-established doctrine on such grounds, and the court here erred in doing so for a number of reasons.

First, whether the rule of non-inquiry divests the court of jurisdiction to consider Aguasvivas's humanitarian claims or renders such claims non-justiciable makes no practical difference, as the import is the same: The Secretary is responsible for assessing humanitarian claims against extradition rather than the courts.

Second, contrary to the district court's finding, the rule of non-inquiry is routinely applied in cases where the petitioner challenges the legality of his extradition as opposed to its wisdom. *See, e.g.*, *Munaf*, 553 U.S. at 700-01 ("Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments."); *see also supra* 27-29.

Third, while some courts have recognized a theoretical exception to the rule of non-inquiry in an extreme case, as this Court has noted, "[n]o court has yet applied such a theoretical … exception." *Hilton*, 754 F.3d at 87. Notably, the Supreme Court has never endorsed such an exception and did not entertain its application in *Munaf*, where the petitioners claimed they would be tortured in an Iraqi prison. Regardless, it would be particularly inappropriate to apply such a theoretical exception in this case, where the Secretary has not yet even reviewed Aguasvivas's claims and considered whether any torture concerns could be mitigated through conditions, assurances, and diplomatic leverage.

Fourth, the BIA's CAT determination does not eviscerate the rule of non-inquiry.

As discussed below, *see infra* 45-52, while the Secretary may certainly consider the events in Aguasvivas's separate immigration proceedings, he is not bound by their resolution. In rendering his extradition decision, the Secretary will carefully consider any CAT claims or other arguments against extradition that Aguasvivas chooses to make, and he will not extradite Aguasvivas if he ultimately determines that Aguasvivas is more likely than not to be tortured if surrendered to the Dominican Republic. However, pursuant to the rule of non-inquiry, "[t]he Judiciary is not suited to second-guess" the Secretary's extradition decision. *Munaf*, 553 U.S. at 702.

b. The Suspension Clause Does Not Require the Court to Review a CAT Claim in Extradition

Notwithstanding the rule of non-inquiry, the district court found that it must review Aguasvivas's CAT claim in habeas proceedings because of the "Suspension Clause questions that would arise if the Court construed the provision to divest it of habeas jurisdiction." *See* Add. 59-60, 65. This erroneous conclusion is based on the flawed premise that federal courts historically had jurisdiction to adjudicate CAT claims in extradition proceedings. The writ of habeas corpus cannot be deemed "suspended" because, as a matter of history and practice, the role of the habeas court in extradition cases has never been to adjudicate humanitarian or CAT claims.

The Suspension Clause provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. At a minimum, the Clause "protects the writ as it existed when the Constitution was drafted and ratified." *Boumediene v. Bush*, 553 U.S. 723, 746 (2008). The Supreme Court has not yet decided whether the Suspension Clause protects only the right of habeas corpus as it existed in 1789, or whether the Clause's protections have grown with the expansion of the writ. *Id*. But under either view, the Clause does not require review of Aguasvivas's CAT claim.

The habeas corpus right that existed in 1789 cannot plausibly be extended to the Secretary's surrender decision in extradition proceedings. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention …." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). The historical writ covered "detentions based on errors of law, including the erroneous application or interpretation of statutes." *Id*. at 302. But courts have

traditionally "recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *Id*. at 307. The Secretary of State's surrender decision has historically fallen into the latter category, which is "not a matter of right" that can be judicially enforced through habeas. *Id*. at 308 (quoting *Jay v. Boyd*, 351 U.S. 345, 354 (1956)). The Secretary's decision is thus not subject to habeas review under the writ as it existed when the Constitution was ratified.

Nor has the Supreme Court expanded habeas review of extradition decisions in the years since. As stated, the Supreme Court has consistently held that the treatment a fugitive might receive in the requesting country is not a proper basis for habeas relief to prevent extradition. In *Munaf*, the Supreme Court "examined the relevant history and held that … a right to judicial review of conditions in the receiving country before [the petitioner] is transferred[ ]is not encompassed by the Constitution's guarantee of habeas corpus." *Omar*, 646 F.3d at 23 n.10 (citing *Munaf*, 553 U.S. at 700-03); *see also Munaf*, 553 U.S. at 700 ("Habeas corpus has been held not to be a valid means of inquiry into the treatment the [fugitive] is anticipated to receive in the requesting state.") (internal quotations and citation omitted); *Neely*, 180 U.S. at 123.

While the role of a habeas court in extraditions has not extended to reviewing humanitarian claims, the habeas court has historically had the limited role of determining whether the magistrate judge "had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez*, 268 U.S. at 312. Aguasvivas had full and fair opportunity to litigate these issues, and therefore the writ was not suspended. *See Ye Gon v. Dyer*, 651 Fed. App'x 249, 252 (4th Cir. 2016) (per curiam) (unpublished) (rejecting petitioner's Suspension Clause argument and noting that he "has clearly had the full benefit of habeas review of the extradition request under [the *Fernandez*] standard.") (quoting the district court's decision).

The district court erred in reaching the contrary conclusion that the Suspension Clause necessitated its review of Aguasvivas's CAT Claim. To support its finding that a CAT claim "fell within the historical ambit of habeas," it principally relied on this Court's decision in *Saint Fort v. Ashcroft*, 329 F.3d 191 (1st Cir. 2003), an immigration case. *See* Add. 60. That case, however, is inapposite. In *Saint Fort*, the Court held that a criminal alien subject to an immigration order of removal had a right to habeas review of a CAT claim because there would be a violation of the Suspension Clause if that right was not available. Critically, however, the Court's historical findings that undergirded its Suspension Clause analysis did not encompass the dispositive issue here: Whether fugitives historically had a right to judicial review of the treatment they anticipate receiving in the foreign country in connection with a habeas challenge to extradition. Because the answer to this question is clearly no, there cannot be a Suspension Clause issue in extradition cases.

In *Saint Fort*, the Court emphasized that "[h]istory is important here because the Suspension Clause's protections are at their greatest height when guarding usages of the writ that date to the founding." 329 F.3d at 202. In the immigration context, the Court noted that "[b]efore 1996, aliens had a *broad right* to judicial review in the courts of appeal," and they could also "challenge a final order of deportation through employing the writ of habeas corpus." *Id.* at 197 (emphasis added). The Court also relied heavily on *St. Cyr*, where the Supreme Court declined to interpret certain other immigration statutes as repealing habeas jurisdiction because "to conclude that the writ is no longer available in this context would represent a departure from historical practice *in immigration law*." *Id.* at 199 (quoting *St. Cyr*, 533 U.S. at 305) (emphasis added). In

short, the "weight of historical precedent supporting continued habeas review in immigration cases" was instrumental to the Court's holding that the FARR Act did not "repeal" habeas jurisdiction in that particular immigration context. *Id.* at 200-01.

The Court's recognition in *Saint Fort* that aliens historically had a "broad right to judicial review" in immigration cases contrasts sharply with what this Court, the Supreme Court, and myriad other courts have found to be the case with habeas review in the extradition context, which has always been narrowly construed and where the rule of non-inquiry precludes courts from "inquiring into the procedures or treatment which await a surrendered fugitive in the requesting country." *Kin-Hong*, 110 F.3d at 110 (internal quotations and citation omitted); *see also, e.g.*, *Omar*, 646 F.3d at 19 ("[A]pplying what has been known as the rule of non-inquiry, courts historically have refused to inquire into conditions an extradited individual might face in the receiving country."). Fugitives have never had a right to challenge their extradition based on the type of claim asserted by Aguasvivas, and thus the FARR Act and the REAL ID Act did not repeal or suspend any preexisting rights. Therefore, *Saint Fort* and its predicate, *St. Cyr*, do not support the district court's conclusion. *See, e.g.*, *Omar*, 646 F.3d at 23 n.10 (distinguishing *St. Cyr* on the grounds that it only "protected and enforced what it determined to be the historical scope of the writ") (citing *St. Cyr*, 533 U.S. at 300-05); *Trinidad*, 683 F.3d at 1013 (Kozinski, C.J., dissenting in part) (distinguishing *Saint Fort* from extradition cases where "there's no preexisting 'habeas review' to 'bar'").

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5. Agreements on Preventing and Combating Serious Crime

On January 5, 2019, the U.S.-Japan Agreement on Enhancing Cooperation in Preventing and Combating Serious Crime entered into force. T.I.A.S. No. 19-105. The agreement was signed in 2014. The full text of the agreement is available at https://www.state.gov/19-105/. For background on these agreements ("PCSC agreements"), which provide a mechanism for the parties' law enforcement authorities to exchange personal data—including biometric (fingerprint) information—for use in detecting, investigating, and prosecuting terrorists and other criminals, see *Digest 2008* at 80–83, *Digest 2009* at 66, *Digest 2010* at 57-58, and *Digest 2011* at 52.

On June 12, 2019, the United States and Poland signed, in Washington D.C., a PCSC agreement. T.I.A.S. No. 19-903. The text of the agreement, with annex, is available at https://www.state.gov/poland-19-903. The agreement entered into force on September 3, 2019.

B. INTERNATIONAL CRIMES

1. Terrorism

a. Determination of Countries Not Fully Cooperating with U.S. Antiterrorism Efforts

On May 29, 2019, Deputy Secretary of State John J. Sullivan issued the determination and certification, pursuant to, *inter alia*, section 40A of the Arms Export Control Act (22 U.S.C. § 2781), that certain countries "are not cooperating fully with United States antiterrorism efforts." 84 Fed. Reg. 24,856 (May 29, 2019). The countries are: Iran, Democratic People's Republic of Korea, Syria, and Venezuela.

b. Country Reports on Terrorism

On November 1, 2019 the Department of State released the 2018 Country Reports on Terrorism. The annual report is submitted to Congress pursuant to 22 U.S.C. § 2656f, which requires the Department to provide Congress a full and complete annual report on terrorism for those countries and groups meeting the criteria set forth in the legislation. The report covers the 2018 calendar year and provides: policy-related assessments; country-by-country breakdowns of foreign government counterterrorism cooperation; and information on state sponsors of terrorism, terrorist safe havens, foreign terrorist organizations, and the global challenge of chemical, biological, radiological, and nuclear terrorism. The annual reports for 2016-18 are available at https://www.state.gov/country-reports-on-terrorism-2/. On November 1, 2019, Acting Under Secretary for Civilian Security, Democracy, and Human Rights Nathan A. Sales provided a briefing on the report, which is available at https://www.state.gov/counterterrorism-coordinator-ambassador-nathan-sales-on-the-release-of-the-country-reports-on-terrorism-2018/, and excerpted below.

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* * * *

The Country Reports on Terrorism offers the most detailed look that the Federal Government offers on the global terrorist landscape. Today, I'm going to highlight three key trends that we saw in the 2018 report.

First, in 2018, the United States and our coalition partners nearly completed the destruction of the so-called ISIS caliphate while increasing pressure on the terror group's global networks. Second, the Islamic Republic of Iran remained the world's worst state sponsor of terrorism, and the administration continued to subject the regime to unrelenting diplomatic and economic pressure. Third, the world saw a rise in racially or ethnically motivated terrorism—a disturbing trend that the administration highlighted in our 2018 National Counterterrorism Strategy.

In addition to these three broad trends, I will also highlight some important steps the United States and our partners took in 2018 to counter terrorist threats.

Before getting into the report itself, however, I'd like to give you some overall numbers. In 2018, most terrorist incidents around the world were concentrated in three regions: the Middle East, South Asia, and Sub-Saharan Africa. These three regions experienced about 85 percent of all terrorist incidents. The 10 countries with the greatest number of terrorist incidents in 2018 contributed 75 percent of the overall number.

And as for those three broad trends, first, the United States and our partners made major strides to defeat and degrade ISIS. In 2017 and 2018, we liberated 110,000 square kilometers of territory in Syria and Iraq, and freed roughly 7.7 million men, women, and children from ISIS's brutal rule. Those successes laid the groundwork for continued action in 2019, including the total destruction of the physical caliphate and last week's raid that resulted in the death of Abu Bakr al-Bahgdadi.

As the false caliphate collapsed, we saw ISIS's toxic ideology continue to spread around the globe in 2018. ISIS recognized new regional affiliates in Somalia and in East Asia. Foreign terrorist fighters headed home or traveled to third countries to join ISIS branches there, and homegrown terrorists—people who have never set foot in Syria or Iraq—also carried out attacks. We saw ISIS-directed or inspired attacks outside the core in places like Paris, Quetta, and Berlin, among others. Many of these attacks targeted soft targets and public spaces, like hotels, tourist resorts, and cultural sites.

Having destroyed the so-called caliphate, we are now taking the fight to ISIS branches around the world. In 2018, the State Department sanctioned eight ISIS affiliates, including in Southeast Asia, West Africa, and North Africa.

Second, in 2018, the Islamic Republic of Iran retained its standing as the world's worst state sponsor of terrorism, as it has every year since 1984. The regime, often through its Islamic Revolutionary Guard Corps, or IRGC, has spent nearly a billion dollars a year to support terrorist groups that serve as its proxies and promote its malign influence around the region—groups like Hizballah and Hamas and Palestinian Islamic Jihad.

But the Iranian threat is not confined to the Middle East; it's truly global. In 2018, that threat reached Europe in a big way. In January, Germany investigated 10 suspected IRGC Quds Force operatives. In the summer, authorities in Belgium, France, and Germany thwarted an Iranian plot to bomb a political rally near Paris. In October, an Iranian operative was arrested for planning an assassination in Denmark. And in December, Albania expelled two Iranian officials for plotting terrorist attacks there.

Countering Iran-backed terrorism is and has been a top priority for this administration. That's why in December of 2018 we hosted the first ever Western Hemisphere Counterterrorism Ministerial to focus on threats close to home, particularly the threats posed by Hizballah, Iran's terrorist proxy.

In addition, to give a sneak preview of one of the highlights we'll see in next year's report, in April of this year, the State Department designated Iran's IRGC as a foreign terrorist organization. This was the first time we've ever so designated a state actor.

Third, in 2018, we saw an alarming rise in racially or ethnically motivated terrorism, including here in the United States with the Pittsburgh synagogue shooting. Similar to Islamist terrorism, this breed of terrorism is inspired by a hateful, supremacist, and intolerant ideology. Make no mistake; we will confront all forms of terrorism no matter what ideology inspires it.

In 2018, the administration's National Counterterrorism Strategy specifically highlighted racially and ethnically motivated terrorism as a top national security priority. This was the first such strategy to ever address this threat.

In addition, here at the State Department, we are combatting this threat with our Countering Violent Extremism, or CVE, authorities. We're using the Strong Cities Network to address radicalization and recruitments. In addition, we're working with tech companies to counter racially or ethnically motivated extremism by developing positive narratives and building resilience to hateful messages.

Let me move on to describe some of the key lines of effort we've pursued to protect our homeland and to protect our interest from these threats.

We made major strides to defeat and degrade terrorist groups in 2018, and I'd like to draw your attention to three particular lines of effort: securing our borders and defeating terrorist travel; second, using sanctions to cut off money; and third, the disposition of captured foreign terrorist fighters, or FTFs.

Restricting terrorist travel remained a top priority last year. We continue to pursue arrangements to share terrorist watch lists with other countries pursuant to Homeland Security Presidential Directive 6, or HSPD 6. We signed a number of new arrangements in 2018 and now have over 70 on the books. In addition, our border security platform, known as PISCES—that stands for Personal Identification Secure Comparison and Evaluation System—grew to include 227 ports of entry in 23 countries. Our partners use it every day to screen more than 300,000 travelers.

Second, the United States continued to use our sanctions and designations authorities to deny terrorists the resources they need to commit attacks. In all, the State Department completed 51 terrorism designations in 2018, and the Treasury Department likewise completed 157 terrorism designations. Significant State Department designations in 2018 include ISIS-West Africa, al-Qaida affiliates in Syria such as the al-Nusrah Front, and JNIM, which is al-Qaida's affiliate in Mali. We also designated Jawad Nasrallah, the son of Hizballah's leader, who recruited individuals to carry out terrorist attacks against Israel.

Third, as the President has made clear, all countries have an obligation to repatriate and prosecute their FTFs for any crimes they've committed. The United States has led by example by repatriating our own citizens. To date, we've brought back and prosecuted six adult fighters or ISIS supporters, and we've also returned 14 children who are now being rehabilitated and reintegrated. In addition, the United States has facilitated the returns of hundreds of FTFs and family members to their countries of origin while also sharing evidence that our soldiers captured on the battlefield to enable effective prosecutions. Again, we urge other countries to follow our lead and take their citizens back.

* * * *

c. U.S. Actions Against Terrorist Groups

(1) General

Designations of Foreign Terrorist Organizations ("FTOs") under § 219 of the Immigration and Nationality Act ("INA"), as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638 (2004), expose

and isolate the designated terrorist organizations, deny them access to the U.S. financial system, and create significant criminal and immigration consequences for their members and supporters. U.S. designations complement the law enforcement actions of other governments. On August 21, 2019, the Department of State issued a statement by Secretary Pompeo welcoming the designations of terrorist organizations by the government of Paraguay. The statement, available at https://www.state.gov/paraguays-designation-of-hizballah-as-a-terrorist-organization/, identifies Hizballah, al-Qa'ida, ISIS, and Hamas as terrorist organizations recognized by Paraguay. Further, the statement notes that other nations had recently designated Hizballah, including Argentina, Kosovo, and the United Kingdom, joining Australia, Canada, the Gulf Cooperation Council, and the Arab League in doing so.

(2) Foreign Terrorist Organizations

(i) New Designation

In 2019, the Secretary of State designated one additional organization and its associated aliases as an FTO. On April 8, 2019, the Secretary of State announced his intent to designate the Islamic Revolutionary Guard Corps ("IRGC"), including its Qods Force, as an FTO. See April 8, 2019 State Department media note, available at https://www.state.gov/intent-to-designate-the-islamic-revolutionary-guards-corps-as-a-foreign-terrorist-organization/. The designation was effective on April 15, 2019. 84 Fed. Reg. 15,278 (Apr. 15, 2019). The media note explains:

> The IRGC provides funding, equipment, training, and logistical support to a broad range of terrorist and militant organizations, totaling approximately one billion dollars annually in assistance. The IRGC has also been directly involved in terrorist plotting, malign activity and outlaw behavior in many countries, including Germany, Bosnia, Bulgaria, Kenya, Bahrain, and Turkey, among others.
>
> This designation will have a significant impact. It is the first time that the United States has designated a part of another government as an FTO. This action underscores that the Iranian regime's use of terrorism makes it fundamentally different from any other government. Iran employs terrorism as a central tool of its statecraft; it is an essential element of the regime's foreign policy. This designation also gives the United States Government additional tools to counter Iranian-backed terrorism. It will increase the financial pressure and isolation of Iran, and starve the government of resources it could devote to its terrorist pursuits.
>
> Other governments and the private sector will also be on notice about the full scope of the IRGC's malign activities. The IRGC is integrally woven into the Iranian economy, operating front companies and institutions around the world that engage in both licit and illicit business activity. The profits from what appear to be legitimate business deals could end up unwittingly supporting Iran's terrorist agenda.

On April 8, 2019, the Department issued a fact sheet on the designation of the IRGC. The fact sheet is excerpted below and available at https://www.state.gov/designation-of-the-islamic-revolutionary-guard-corps/.

* * * *

- On April 15, the IRGC will be added to the State Department's FTO list, which includes 67 other terrorist organizations including Hizballah, Hamas, Palestinian Islamic Jihad, Kata'ib Hizballah, and al-Ashtar Brigades.
- The IRGC FTO designation highlights that Iran is an outlaw regime that uses terrorism as a key tool of statecraft and that the IRGC, part of Iran's official military, has engaged in terrorist activity or terrorism since its inception 40 years ago.
- The IRGC has been directly involved in terrorist plotting; its support for terrorism is foundational and institutional, and it has killed U.S. citizens. It is also responsible for taking hostages and wrongfully detaining numerous U.S. persons, several of whom remain in captivity in Iran today.
- The Iranian regime has made a clear choice not only to fund and equip, but also to fuel terrorism, violence, and unrest across the Middle East and around the world at the expense of its own people.
- The Iranian regime is responsible for the deaths of at least 603 American service members in Iraq since 2003. This accounts for 17% of all deaths of U.S. personnel in Iraq from 2003 to 2011, and is in addition to the many thousands of Iraqis killed by the IRGC's proxies.
- This action is a significant step forward in our maximum pressure campaign against the Iranian regime. We will continue to increase financial pressure and raise the costs on the Iranian regime for its support of terrorist activities until Tehran abandons this unacceptable behavior.

The IRGC, with the support of the Iranian government, has engaged in terrorist activity since its inception 40 years ago.

- The IRGC—most prominently through its Qods Force—has the greatest role among Iran's actors in directing and carrying out a global terrorist campaign.
    - In recent years, IRGC Qods Force terrorist planning has been uncovered and disrupted in many countries, including Germany, Bosnia, Bulgaria, Kenya, Bahrain, and Turkey.
    - The IRGC Qods Force in 2011 plotted a brazen terrorist attack against the Saudi Ambassador to the U.S. on American soil. Fortunately, this plot was foiled.
    - In September 2018, a U.S. federal court found Iran and the IRGC liable for the 1996 Khobar Towers bombing which killed 19 Americans.
    - In 2012, IRGC Qods Force operatives were arrested in Turkey for plotting an attack and in Kenya for planning a bombing.
    - In January 2018, Germany uncovered ten IRGC operatives involved in a terrorist plot in Germany, and convicted another IRGC operative for surveilling a German-Israeli group.

- The IRGC continues to provide financial and other material support, training, technology transfer, advanced conventional weapons, guidance, or direction to a broad range of terrorist organizations, including Hizballah, Palestinian terrorist groups like Hamas and Palestinian Islamic Jihad, Kata'ib Hizballah in Iraq, al-Ashtar Brigades in Bahrain, and other terrorist groups in Syria and around the Gulf.
- In addition to its support of proxies and terrorist groups abroad, Iran also harbors terrorists within its own borders, thereby facilitating their activities. Iran continues to allow Al Qaeda (AQ) operatives to reside in Iran, where they have been able to move money and fighters to South Asia and Syria. In 2016, the U.S. Treasury Department identified and sanctioned three senior AQ operatives residing in Iran and noted that Iran had knowingly permitted these AQ members, including several of the 9/11 hijackers, to transit its territory on their way to Afghanistan for training and operational planning.

* * * *

Also on April 8, 2019, Secretary Pompeo gave remarks to the press regarding the designation of the IRGC. His remarks (not excerpted herein) are available at https://www.state.gov/remarks-to-the-press-9/. The designation of the IRGC as an FTO appeared in the Federal Register on April 15, 2019. 84 Fed. Reg. 15,278 (Apr. 15, 2019).

(ii) Amendments of FTO Designations

During 2019, the State Department amended the designations of several FTOs to include additional aliases. The designation of the Islamic State of Iraq and Syria ("ISIS") was amended to add additional aliases (Amaq News Agency, Al Hayat Media Center, and others). 84 Fed. Reg. 10,882 (Mar. 22, 2019). The designation of Jundallah was amended to reflect its new primary name Jaysh al-Adi and additional aliases. 84 Fed. Reg. 31,656 (July 2, 2019); see also July 2, 2019 media note, available at https://www.state.gov/terrorist-designations-of-balochistan-liberation-army-and-husain-ali-hazzima-and-amendments-to-the-terrorist-designations-of-jundallah/. The designation of al-Shabaab was amended to include the following new aliases: al-Hijra, Al Hijra, Muslim Youth Center, MYC, Pumwani Muslim Youth, Pumwani Islamist Muslim Youth Center. 84 Fed. Reg 37,708 (Aug. 1, 2019).

(iii) Reviews of FTO Designations

During 2019, the Secretary of State continued to review designations of entities as FTOs, consistent with the procedures for reviewing and revoking FTO designations in § 219(a) of the INA. See *Digest 2005* at 113–16 and *Digest 2008* at 101–3 for additional details on the IRTPA amendments and review procedures.

The Secretary reviewed each FTO individually and determined that the circumstances that were the basis for the designations of the following FTOs have not changed in such a manner as to warrant revocation of the designations and that the national security of the United States does not warrant revocation:

- Kurdistan Workers' Party ("PKK") (84 Fed. Reg. 8150 (Mar. 6, 2019)); see also March 1, 2019 State Department media note, available at https://www.state.gov/state-department-maintains-foreign-terrorist-organization-fto-designation-of-the-kurdistan-workers-party-pkk/;
- ISIS (with amendment, discussed *supra*) (84 Fed. Reg. 10,882 (Mar. 22, 2019));
- Shining Path (84 Fed. Reg. 27,390 (June 12, 2019));
- Jundallah (with amendment, discussed *supra*) (84 Fed. Reg. 31,656 (July 2, 2019));
- al-Murabitoun (al-Mulathamun Battalion and Other Aliases) (84 Fed. Reg. 70,260 (Dec. 20, 2019));
- Al-Qa'ida in the Islamic Maghreb (84 Fed. Reg. 70,261 (Dec. 20, 2019));
- Ansar al-Dine (84 Fed. Reg. 70,260 (Dec. 20, 2019));
- Harakat ul-Jihad-i-Islami/Bangladesh (84 Fed. Reg. 70,260 (Dec. 20, 2019));
- Revolutionary People's Liberation Party/Front (84 Fed. Reg. 70,260 (Dec. 20, 2019)).

(3) Rewards for Justice Program

On February 28, 2019, the State Department announced a Rewards for Justice ("RFJ") program reward offer of up to $1 million for information on Hamza bin Laden, a key al-Qa'ida leader, who was previously designated pursuant to Executive Order ("E.O.") 13224. The media note, available at https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-al-qaida-key-leader-hamza-bin-laden/, includes the following background:

> Hamza bin Laden is the son of deceased former AQ leader Usama bin Laden and is emerging as a leader in the AQ franchise. Since at least August 2015, he has released audio and video messages on the Internet calling on his followers to launch attacks against the United States and its Western allies, and he has threatened attacks against the United States in revenge for the May 2011 killing of his father by U.S. service members.

On April 22, 2019, the State Department announced in a media note, available at https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-hizballahs-financial-networks/, that the RFJ program was offering a reward of up to $10 million for information leading to the disruption of the financial mechanisms of the Hizballah foreign terrorist organization. The media note provides the following background:

> Hizballah is a Lebanon-based terrorist organization that receives weapons, training, and funding from Iran, which the Secretary of State designated as a state sponsor of terrorism in 1984. Hizballah generates about a billion dollars a year from a combination of direct financial support from Iran, international businesses and investments, donor networks, and money laundering activities.

The announcement also identifies three individuals as key Hizballah financiers or facilitators about whom the RFJ program seeks information. The media note provides background on these individuals:

> **Adham Tabaja** is a Hizballah member who maintains direct ties to senior Hizballah organizational elements, including the group's operational component, Islamic Jihad. Tabaja also holds properties in Lebanon on behalf of the group and conducts business throughout the Middle East and West Africa. He is majority owner of the Lebanon-based real estate development and construction firm Al-Inmaa Group for Tourism Works. The Treasury Department designated Tabaja, Al-Inmaa Group for Tourism Works, and its subsidiaries as SDGTs in June 2015.
>
> **Mohammad Ibrahim Bazzi** is a key Hizballah financier who has provided millions of dollars to Hizballah generated from his business activities in Europe, the Middle East, and Africa. He owns or controls Global Trading Group NV, Euro African Group LTD, Africa Middle East Investment Holding SAL, Premier Investment Group SAL Offshore, and Car Escort Services S.A.L. Off Shore. The Treasury Department designated Bazzi and his affiliated companies as SDGTs in May 2018.
>
> **Ali Youssef Charara** is a key Hizballah financier as well as Chairman and General Manager of Lebanon-based telecommunications company Spectrum Investment Group Holding SAL, and has extensive business interests in the telecommunications industry in West Africa. Charara has received millions of dollars from Hizballah to invest in commercial projects that financially support the terrorist group. The Treasury Department designated Charara and Spectrum Investment Group as SDGTs in January 2016.

On July 19, 2019, the State Department announced, in a media note available at https://www.state.gov/reward-offer-for-information-on-hizballah-key-leader-salman-raouf-salman/, that the RFJ program was offering a reward of up to $7 million for information on Salman Raouf Salman, a key leader of Hizballah. Salman was concurrently designated pursuant to E.O. 13224. See Chapter 16. The media note includes the following background on Salman:

> Salman is most well-known for his prominent role in the July 18, 1994, bombing of the Argentine Jewish Mutual Aid Society (AMIA), a Jewish community center in Buenos Aires, Argentina, which resulted in the deaths of 85 innocent civilians.
>
> Salman is a leader of Hizballah's External Security Organization (ESO), which is responsible for planning, coordinating, and executing Hizballah terrorist attacks around the globe. Not only does he direct and support Hizballah terrorist activities in the Western Hemisphere, he has been involved in plots worldwide.

On August 21, 2019, the State Department announced an RFJ reward offer of up to $5 million for information on key ISIS leaders Amir Muhammad Sa'id Abdal-Rahman al-Mawla, Sami Jasim Muhammad al-Jaburi, and Mu'taz Numan 'Abd Nayif Najm al-

Jaburi. See media note, available at https://www.state.gov/rewards-for-justice-reward-offer-for-information-leading-to-identification-or-location-of-isis-deputies-2/.

On September 4, 2019, a State Department media note announced an RFJ reward offer of up to $15 million for information leading to the disruption of the financial mechanisms of Iran's Islamic Revolutionary Guard Corps ("IRGC") and its branches, including the IRGC-Qods Force ("IRGC-QF"). The media note, available at https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-the-financial-mechanisms-of-irans-islamic-revolutionary-guard-corps-and-its-branches-including-the-irgc-qods-force/, lists the types of information sought. Special Representative for Iran and Senior Advisor to the Secretary Brian Hook provided a briefing on September 4 regarding the reward offer in the context of the maximum pressure campaign against the Islamic Republic of Iran. The briefing is available at https://www.state.gov/special-representative-for-iran-and-senior-advisor-to-the-secretary-brian-hook/. Mr. Hook's statement includes the following:

> Today's announcement is historic. It's the first time that the United States has offered a reward for information that disrupts a government entity's financial operations. We have taken this step because the IRGC operates more like a terrorist organization than it does a government. The IRGC and the Qods Force were designated as a foreign terrorist organization in April, and this put them in the same category as many of the terrorist groups that they actively support, such as Hizballah and Hamas.
>
> The IRGC trains, funds, and equips proxy organizations across the Middle East. Iran wants these groups to extend the borders of the regime's revolution and sow chaos and sectarian violence. We are using every available diplomatic and economic tool to disrupt these operations.
>
> In addition to announcing individual rewards of up to $15 million against the IRGC and the Qods Force, the United States today is also taking sweeping action against an IRGC/QF oil-for-terror network. The IRGC has been running an illicit petroleum shipping network over the last several months. This network has moved hundreds of millions of dollars' worth of illicit oil. That money is then used to fund terrorism.

On October 4, 2019, the State Department announced an RFJ program reward offer of up to $5 million for information on Adnan Abu Walid al-Sahrawi, leader of the Islamic State in the Greater Sahara ("ISIS-GS"), a designated FTO. The media note announcing the reward, available at https://www.state.gov/rewards-for-justice-reward-offer-for-those-involved-in-the-2017-tongo-tongo-ambush-in-niger/, states, among other things, that, "ISIS-GS claimed responsibility for the October 2017 ambush of a joint U.S.-Nigerien patrol near the village of Tongo Tongo, Niger, which resulted in the deaths of four U.S. soldiers."

On November 7, 2019, the State Department announced an RFJ program reward offer of up to $6 million and $4 million, respectively, for information on Sa'ad bin Atef al-Awlaki and Ibrahim Ahmed Mahmoud al-Qosi, two senior al-Qa'ida in the Arabian Peninsula ("AQAP") leaders. The media note making the announcement, which is

available at https://www.state.gov/reward-offers-for-information-on-senior-leaders-of-al-qaida-in-the-arabian-peninsula/, also includes the following background:

> Al-Awlaki is the emir of Shabwah, a province in Yemen. He has publicly called for attacks against the United States and our allies. Al-Qosi, also known as Sheikh Khubayb al-Sudani and Mohammad Salah Ahmad, is part of the leadership team that assists the current "emir" of AQAP. Since 2015, he has appeared in AQAP recruiting materials and encouraged lone wolf attacks against the United States in online propaganda. Al-Qosi was born in Sudan. He joined AQAP in 2014, but has been active in al-Qa'ida for decades and worked directly for Usama bin Laden for many years. Al-Qosi was captured in Pakistan in December 2001 before being transferred to Guantanamo Bay. He pleaded guilty in 2010 before a military commission to conspiring with al-Qa'ida and providing material support to terrorism. The United States released al-Qosi and returned him to Sudan in 2012 pursuant to a pretrial agreement.

More information about these reward offers is available on the Rewards for Justice website at www.rewardsforjustice.net.

2. Narcotics

a. Majors List Process

(1) International Narcotics Control Strategy Report

On March 28, 2019, the Department of State submitted the 2019 International Narcotics Control Strategy Report ("INCSR"), an annual report to Congress required by § 489 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2291h(a). The report describes the efforts of foreign governments to address all aspects of the international drug trade in calendar year 2018. Volume 1 of the report covers drug and chemical control activities and Volume 2 covers money laundering and financial crimes. The full text of the 2019 INCSR is available at https://www.state.gov/2019-international-narcotics-control-strategy-report/.

(2) Major Drug Transit or Illicit Drug Producing Countries

On August 8, 2019, the White House issued Presidential Determination No. 2019–22 "Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2020." 84 Fed. Reg. 44,679 (Aug. 27, 2019). In this year's determination, the President named 22 countries as countries meeting the definition of a major drug transit or major illicit drug producing country: Afghanistan, The Bahamas, Belize, Bolivia, Burma, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, India, Jamaica, Laos, Mexico, Nicaragua, Pakistan, Panama, Peru, and Venezuela. A country's presence on the "Majors List" is not necessarily an adverse reflection of its government's

counternarcotics efforts or level of cooperation with the United States. The President determined that Bolivia and the Maduro regime in Venezuela "failed demonstrably" during the last twelve months to make sufficient or meaningful efforts to adhere to their obligations under international counternarcotics agreements. Simultaneously, the President determined that support for programs that support the legitimate interim government in Venezuela are vital to the national interests of the United States, thus ensuring that such U.S. assistance would not be restricted during fiscal year 2020 by virtue of § 706(3) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1424.

b. Interdiction Assistance

On July 19, 2019, the President of the United States again certified, with respect to Colombia (Presidential Determination No. 2019-14, 84 Fed. Reg. 38,109 (Aug. 5, 2019)), that (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) Colombia has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which includes effective means to identify and warn an aircraft before the use of force is directed against the aircraft. President Trump made his determination pursuant to § 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended, 22 U.S.C. §§ 2291–4. For background on § 1012, see *Digest 2008* at 114.

c. U.S. Participation in Multilateral Actions

(1) UN Commission on Narcotic Drugs

At the 62nd session of the UN Commission on Narcotic Drugs, the participating government representatives adopted a declaration on "Strengthening our actions at the national, regional and international levels to accelerate the implementation of our joint commitments to address and counter the world drug problem." The statement follows up on the 2009 Political Declaration and Plan of Action and the 2016 Thirtieth UN General Assembly Special Session on the World Drug Problem. Excerpts follow from the 2019 ministerial declaration.

* * * *

We reaffirm our shared commitment to effectively address and counter the world drug problem, which requires concerted and sustained action at the national and international levels, including accelerating the implementation of existing drug policy commitments;

We reaffirm our commitment to effectively address and counter the world drug problem in full conformity with the purposes and principles of the Charter of the United Nations, international law and the Universal Declaration of Human Rights, with full respect for the sovereignty and territorial integrity of States the principle of non-intervention in the internal

affairs of States, all human rights, fundamental freedoms, the inherent dignity of all individuals and the principles of equal rights and mutual respect among States;

We reaffirm further our determination to address and counter the world drug problem and to actively promote a society free of drug abuse in order to help to ensure that all people can live in health, dignity and peace, with security and prosperity, and *reaffirm* our determination to address public health, safety and social problems resulting from drug abuse;

We reiterate our commitment to respecting, protecting and promoting all human rights, fundamental freedoms and the inherent dignity of all individuals and the rule of law in the development and implementation of drug policies;

We underscore that the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, the Convention on Psychotropic Substances of 1971, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and other relevant instruments constitute the cornerstone of the international drug control system, *welcome* the efforts made by States parties to comply with the provisions and ensure the effective implementation of those conventions, and *urge* all Member States that have not yet done so to consider taking measures to ratify or accede to those instruments;

We emphasize that the 2009 Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem, the Joint Ministerial Statement of the 2014 high-level review by the Commission on Narcotic Drugs of the implementation by Member States of the Political Declaration and Plan of Action and the outcome document of the thirtieth special session of the General Assembly on the world drug problem, entitled "Our joint commitment to effectively addressing and countering the world drug problem", represent the commitments made by the international community over the preceding decade to addressing and countering, in a balanced manner, all aspects of demand reduction and related measures, supply reduction and related measures and international cooperation identified in the 2009 Political Declaration, as well as additional issues elaborated and identified in the UNGASS 2016 outcome document, and *recognize* that those documents are complementary and mutually reinforcing;

We recognize that there are persistent, new and evolving challenges that should be addressed in conformity with the three international drug control conventions, which allow for sufficient flexibility for States parties to design and implement national drug policies according to their priorities and needs, consistent with the principle of common and shared responsibility and applicable international law;

We reaffirm our commitment to a balanced, integrated, comprehensive, multi-disciplinary and scientific evidence-based approach to the world drug problem, based on the principle of common and shared responsibility and recognize the importance of appropriately mainstreaming a gender and age-perspective in drug-related policies and programmes, and that appropriate emphasis should be placed on individuals, families, communities and society as a whole, with a particular focus on women, children and youth, with a view to promoting and protecting health, including access to treatment, safety and well-being of all humanity;

We reaffirm the principal role of the Commission on Narcotic Drugs as the policymaking body of the United Nations with prime responsibility for drug control matters, and our support and appreciation for the efforts of the relevant United Nations entities, in particular those of the United Nations Office on Drugs and Crime as the leading entity in the United Nations system for addressing and countering the world drug problem, and further reaffirm the treaty-mandated roles of the International Narcotics Control Board and the World Health Organization;

We reiterate our resolve, in the framework of existing policy documents, to, inter alia, prevent, significantly reduce and work towards the elimination of the illicit crop cultivation, production, manufacture, trafficking in and abuse of narcotic drugs and psychotropic substances, including synthetic drugs and new psychoactive substances, as well as to prevent, significantly reduce and work towards the elimination of the diversion of and illicit trafficking in precursors, and money-laundering related to drug-related crimes; to ensure the access and availability of controlled substances for medical and scientific purposes, including for the relief of pain and suffering, and address existing barriers in this regard, including affordability; to strengthen effective, comprehensive, scientific evidence-based demand reduction initiatives, covering prevention, early intervention, treatment, care, recovery, rehabilitation and social re-integration measures on a non-discriminatory basis, as well as, in accordance with national legislation, initiatives and measures aimed at minimizing the adverse public health and social consequences of drug abuse; to address drug-related socioeconomic issues related to the illicit crop cultivation, production and manufacture of and trafficking in drugs, including through the implementation of long-term comprehensive and sustainable development-oriented and balanced drug control policies and programmes; to promote, consistent with the three international drug control conventions and domestic law, and in accordance with national, constitutional, legal and administrative systems, alternative or additional measures with regard to conviction or punishment in cases of appropriate nature;

We express deep concern at the high price paid by society and by individuals and their families as a result of the world drug problem, and pay special tribute to those who have sacrificed their lives, and those who dedicate themselves to addressing and countering the world drug problem;

We underscore the important role played by all relevant stakeholders, including law enforcement, judicial and health-care personnel, civil society, the scientific community and academia, as well as the private sector, supporting our efforts to implement our joint commitments at all levels, and underscore the importance of promoting relevant partnerships;

We reiterate that efforts to achieve the Sustainable Development Goals and to effectively address the world drug problem are complementary and mutually reinforcing;

STOCK TAKING

Bearing in mind the biennial reports of the Executive Director of the United Nations Office on Drugs and Crime on progress made by Member States with the implementation of the 2009 Political Declaration and Plan of Action, the annual World Drug Reports, the annual reports of the International Narcotics Control Board, and highlighting the experiences, lessons learnt, and good practices in the implementation of the joint commitments shared by Member States and other stakeholders during its annual sessions as well as the thematic sessions held during the 60th and 61st session of the Commission on Narcotic Drugs;

We acknowledge that tangible progress has been achieved in the implementation of the commitments made over the past decade, in addressing and countering the world drug problem including with regard to an improved understanding of the problem; the development, elaboration and implementation of national strategies, enhanced sharing of information, as well as enhanced capacity of national competent authorities;

We note with concern persistent and emerging challenges related to the world drug problem, including the following: that both the range of drugs and drugs markets are expanding and diversifying; that the abuse, as well as the illicit cultivation and production of narcotic drugs and psychotropic substances, as well as the illicit trafficking in those substances and in

precursors have reached record levels, and that the illicit demand for and domestic diversion in precursor chemicals is on the rise; that increasing links between drug trafficking, corruption and other forms of organized crime, including trafficking in persons, trafficking in firearms, cybercrime and money-laundering, and, in some cases, terrorism, including money-laundering in connection with the financing of terrorism, are being observed; that the value of confiscated proceeds of crime related to money laundering arising from drug trafficking at the global level remains low, that the availability of internationally controlled substances for medical and scientific purposes, including for the relief of pain and palliative care, remains low to non-existent in many parts of the world; that drug treatment and health services continue to fall short of need, and deaths related to drug use have increased; and that the rate of transmission of HIV, HCV and other blood borne diseases associated with drug use, including injecting drugs, in some countries, remains high; that the adverse health consequences and risks associated with new psychoactive substances have reached alarming levels; synthetic opioids, and the non-medical use of prescription drugs present increasing risks to public health and safety, as well as with scientific, legal and regulatory challenges, including in scheduling of substances; that the criminal misuse of information and communications technologies for illicit drug-related activities is increasing; and that the geographical coverage and availability of reliable data on the various aspects on the world drug problem requires improvement; and that responses not in conformity with the three international drug control conventions and not in conformity with applicable international human rights obligations represent a challenge to the implementation of joint commitments based on the principle of common and shared responsibility; and to that end:

WAY FORWARD

We commit to safeguard our future and ensure that no one affected by the world drug problem is left behind by enhancing our efforts to bridge the gaps in addressing the persistent and emerging trends and challenges through the implementation of balanced, integrated, comprehensive, multi-disciplinary and scientific evidence-based responses to the world drug problem, placing the safety, health and well-being of all members of society, in particular of our youth and children, at the centre of our efforts;

We commit to accelerate, based on the principle of common and shared responsibility, the full implementation of the 2009 Political Declaration and Plan of Action, the 2014 Joint Ministerial Statement and the 2016 UNGASS outcome document, aimed at achieving all commitments, operational recommendations and aspirational goals set therein;

We commit to strengthen further cooperation and coordination among national authorities, particularly in the health, education, social, justice and law enforcement sectors, and between governmental agencies and other relevant stakeholders, including the private sector, at all levels, including through technical assistance;

We commit to strengthen bilateral, regional and international cooperation, and promote information sharing, in particular among judiciary and law enforcement authorities to respond to the serious challenges posed by the increasing links between drug trafficking, corruption and other forms of organized crime, including trafficking in persons, trafficking in firearms, cybercrime and money laundering, and, in some cases, terrorism, including money-laundering in connection with the financing of terrorism; as well as to effectively identify, trace, freeze, seize, and confiscate assets and proceeds of drug-related crime and ensure their disposal, including sharing, in accordance with the 1988 Convention, and, as appropriate, their return, consistent with the UNCAC and UNTOC;

We commit to continue to mobilize resources, including for the provision of technical assistance and capacity-building at all levels, to ensure that all Member States can effectively address and counter emerging and persistent drug related challenges;

We commit to increase the provision of technical assistance and capacity-building to Member States, upon request in particular those most affected by the world drug problem, including by illicit cultivation and production, transit and consumption;

We commit to support the Commission on Narcotic Drugs to continue, within its mandate as the principal policymaking body of the UN with prime responsibility for drug control matters, including but not limited to, foster broad, transparent and inclusive discussions within the CND, involving, as appropriate, all relevant stakeholders, such as, law enforcement, judicial and health care personnel, civil society, academia, and relevant UN entities, on effective strategies to address and counter the world drug problem at all levels, including through sharing of information, best practices and lessons learnt;

We commit to strengthen the work of CND with WHO and INCB, within their treaty-based mandates, as well as with UNODC, to continue to facilitate informed scheduling decisions on the most persistent, prevalent, and harmful substances, including synthetic drugs and new psychoactive substances, precursors, chemicals and solvents, while ensuring their availability for medical and scientific purposes; as well as strengthen the dialogue of the CND with the INCB on the implementation of the three international drug control conventions and with relevant international organizations;

We commit to ensure that the CND-led follow-up on the implementation of all commitments to address and counter the world drug problem made since 2009 is done in a single track, which entails,

- devoting a single standing agenda item at each regular session of the Commission on the implementation of all commitments;
- ensuring that collection of reliable and comparable data, through strengthened and streamlined ARQ, reflects all commitments; and
- requesting the Executive Director of the United Nations Office on Drugs and Crime to adapt the existing biennial report into a single report, on a biennial basis, within existing resources, and based on the responses provided by MS to the strengthened and streamlined ARQ, on progress made to implement all commitments at the national, regional and international levels, the first of which should be submitted for consideration by the Commission, at its 65th session in 2022*;*

We commit to promote and improve the collection, analysis and sharing of quality and comparable data, in particular through targeted, effective and sustainable capacity building, in close cooperation with, INCB, WHO, as well as UNODC and other relevant partners, including through the cooperation between the CND and the Statistical Commission, with a view to strengthening national data collection capacity in order to improve response rate and expand the geographical and thematic reporting of related data in accordance with all commitments; *We request* the United Nations Office on Drugs and Crime, in close cooperation with Member States, to continue, in an inclusive manner, expert level consultations on strengthening and streamlining existing annual reporting questionnaire and reflect on possibilities to review other existing drug control data collection and analysis tools as deemed necessary to reflect and assess progress made in the implementation of all commitments, included in the Political Declaration and Plan of Action 2009, the 2014 Joint Ministerial Statement and the UNGASS 2016 outcome document, and to submit an improved and streamlined annual reporting questionnaire for

consideration at the 63rd session of the Commission, subject to the availability of extrabudgetary resources;

We request the United Nations Office on Drugs and Crime to continue to provide enhanced technical and substantive support to the Commission on Narcotic Drugs in supporting the implementation of and conducting follow-up to all commitments, subject to the availability of extrabudgetary resources;

We further request the United Nations Office on Drugs and Crime, to enhance technical assistance and capacity building for the implementation of all commitments in consultation with requesting Member States and in cooperation with other relevant United Nations entities and stakeholders and invite existing and emerging donors to provide extrabudgetary resources for this purpose;

We encourage further contributions of relevant United Nations entities, international financial institutions and relevant regional and international organizations, within their respective mandates, to the work of the Commission and the efforts of Member States to address and counter the world drug problem, upon their request, to strengthen international and inter-agency cooperation, and also encourage them to make available relevant information to the Commission in order to facilitate its work and to enhance coherence within the United Nations system at all levels with regard to the world drug problem;

Following-up to this Ministerial Declaration, *we resolve*, to review in the Commission on Narcotic Drugs in 2029 our progress in implementing all our international drug policy commitments, with a mid-term review in the Commission on Narcotic Drugs in 2024;

* * * *

3. Trafficking in Persons

a. Trafficking in Persons Report

In June 2019, the Department of State released the 2019 Trafficking in Persons Report pursuant to § 110(b)(1) of the Trafficking Victims Protection Act of 2000 ("TVPA"), Div. A, Pub. L. No. 106-386, 114 Stat. 1464, as amended, 22 U.S.C. § 7107. The report covers the period April 2018 through March 2019 and evaluates the anti-trafficking efforts of countries around the world. Through the report, the Department determines the ranking of countries as Tier 1, Tier 2, Tier 2 Watch List, or Tier 3 based on an assessment of their efforts with regard to the minimum standards for the elimination of trafficking in persons as set out by the TVPA, as amended. The 2019 report lists 21 countries as Tier 3 countries, making them subject to certain restrictions on assistance in the absence of a Presidential national interest waiver. For details on the Department of State's methodology for designating states in the report, see *Digest 2008* at 115–17. The report is available at https://www.state.gov/reports/2019-trafficking-in-persons-report/. Chapter 6 in this *Digest* discusses the determinations relating to child soldiers.

On June 20, 2019 Secretary Pompeo delivered remarks at the 2019 ceremony announcing the release of the 2019 Trafficking in Persons Report. Secretary Pompeo's remarks are excerpted below and available at https://www.state.gov/secretary-of-state-michael-r-pompeo-at-the-2019-trafficking-in-persons-report-launch-ceremony/.

* * * *

… [O]ur report reveals the grim reality: there are 25 million adults and children suffering from labor and sex trafficking all over the world—including in the United States and, indeed, in this very city in which we're sitting here today.

It's a strain. Human trafficking is a stain as well on all of humanity. We detest it because it flagrantly violates the unalienable rights that belong to every human being.

Every person, everywhere, is inherently vested with profound, inherent, equal dignity. America was founded on a promise to defend those rights—including life, liberty, and the pursuit of justice. But too often we've fallen short, and we cannot fall short on this challenge.

Human rights trafficking is not a natural disaster. It's caused by man. And therefore, we have the capacity to solve this. And I hope that this report helps each us know the way to achieve this.

You'll see that the focus of the 2019 TIP Report is to encourage governments to address forms of human trafficking occurring within their country's own borders.

That may seem surprising to many of you. Indeed, I think one of the biggest misperceptions about human trafficking is it's always transnational. It's not the case. Every individual and every individual country must confront this challenge on its own sovereign territory. Because in reality said traffickers exploit an estimated 77 percent of victims in their own home country.

Human trafficking is a local and a global problem. Shockingly, many victims never leave their hometowns. I think the focus of this report appropriately reflects that challenge.

National governments must empower local communities to identify and address trafficking in specific forms prevalent in the areas in which they live.

The report identifies a few success stories too, like Senegal, where the government identified a growing problem of child begging rings, ran campaigns to raise awareness among the public, convicted perpetrators, and provided care to many, many victims.

The report commends those countries that have taken action, nations like Senegal, as well as Mongolia, the Philippines, Tajikistan, and others. But we also call out those nations that aren't doing enough.

Tier 3 designations—the lowest possible designation—were given once again to China, Iran, North Korea, Russia, Syria, and Venezuela, among others. A few countries were added to the Tier 3 list, including Cuba.

Some of these governments allow human traffickers to run rampant, and other governments are human traffickers themselves.

In North Korea, the government subjects its own citizens to forced labor both at home and abroad and then uses proceeds to fund nefarious activities.

In China, authorities have detained more than a million members of ethnically Muslim minority groups in internment camps. Many are forced to produce garments, carpets, cleaning supplies, and other goods for domestic sale.

These designations—Tier 1, 2, 3—aren't just words on paper. They carry consequences. Last year, President Trump restricted certain types of assistance to 22 countries that were ranked for Tier 3 in our 2018 TIP Report.

* * * *

b. Presidential Determination

Consistent with § 110(c) of the Trafficking Victims Protection Act, as amended, 22 U.S.C. § 7107, the President annually submits to Congress notification of one of four specified determinations with respect to "each foreign country whose government, according to [the annual Trafficking in Persons report]—(A) does not comply with the minimum standards for the elimination of trafficking; and (B) is not making significant efforts to bring itself into compliance." The four determination options are set forth in § 110(d)(1)–(4).

On October 18, 2019, the President issued a memorandum for the Secretary of State, "Presidential Determination With Respect to the Efforts of Foreign Governments Regarding Trafficking in Persons." 84 Fed. Reg. 59,521 (Nov. 4, 2019). The President's memorandum conveys determinations concerning the countries that the 2019 Trafficking in Persons Report lists as Tier 3 countries. See Chapter 3.B.3.a., *supra*, for discussion of the 2019 report.

4. Money Laundering

On October 30, 2019, the State Department issued a press statement welcoming actions by the Financial Action Task Force ("FATF") regarding Iran's money laundering and financing of terrorism. The State Department had previously welcomed earlier FATF actions requiring increased supervision of Iran-based financial institutions, in a June 21, 2019 statement, available at https://www.state.gov/statement-on-the-imposition-of-financial-countermeasures-on-iran/, not excerpted herein. The October 30, 2019 State Department press statement is available at https://www.state.gov/u-s-welcomes-fatf-measures-to-protect-international-financial-system-from-iranian-threats/ and includes the following:

> The United States welcomes the Financial Action Task Force's (FATF) recent re-imposition of additional countermeasures on Iran for its failure to uphold international anti-money laundering and countering the financing of terrorism (AML/CFT) standards. Iran has shown a willful failure to address its systemic AML/CFT deficiencies, deliberately ensuring there is no transparency in its economy so it can continue to export terrorism. The Islamic Revolutionary Guard Corps (IRGC) continues to engage in large-scale, illicit, financing schemes to fund its malign activities. This includes support for U.S.-designated terrorist groups like Hizballah and Hamas. The IRGC's illicit financing schemes are facilitated at the highest levels of Iran's government. The IRGC controls much of Iran's economy, and companies around the world should err on the side of caution to avoid financing Iran's malign activities.
>
> The international community has made clear that Iran must live up to its commitments to behave like a normal nation. The FATF warned Iran that it must ratify the Palermo and Terrorist Financing Conventions in line with FATF standards by February 2020, or the FATF will fully re-impose countermeasures. We support FATF's decision to protect the international financial system and call

on FATF members to hold Iran fully accountable for its serious and continuing acts of terrorism and terror finance.

Effective November 14, 2019, the Department of the Treasury issued a rule prohibiting the opening or maintaining of correspondent accounts in the United States for, or on behalf of, Iranian financial institutions, and the use of foreign financial institutions' correspondent accounts at covered U.S. financial institutions to process transactions involving Iranian financial institutions. 84 Fed. Reg. 59,302 (Nov. 4, 2019). Treasury's Financial Crimes Enforcement Network ("FinCEN") issued the final rule pursuant to Section 311 of the USA PATRIOT Act, Pub. L. 107-56, based on finding the Islamic Republic of Iran to be a "Jurisdiction of Primary Money Laundering Concern." *Id*. The FinCEN measures imposed by the United States in November 2019 make reference to FATF steps, discussed *supra*, and both FinCEN and FATF were responding to the same failures by the government of Iran. Excerpts follow (with footnotes omitted) from the Federal Register notice announcing FinCEN's imposition of the measure, specifically, the section summarizing the finding of Iran to be a "Jurisdiction of Primary Money Laundering Concern." *Id*. at 59,304-10. For discussion of the humanitarian mechanism regarding Iran to increase transparency of permissible support for the Iranian people, which was announced by the U.S. State and Treasury departments concurrently with the FinCEN finding regarding Iran, see Chapter 16.

* * * *

Based on information available to FinCEN, including both public and non-public reporting, and after considering the factors listed in the 311 statute and performing the requisite interagency consultations with the Secretary of State and Attorney General as required by 31 U.S.C. 5318A(c)(1), FinCEN finds that reasonable grounds exist for concluding that Iran is a jurisdiction of primary money laundering concern. …

Iran's Abuse of the International Financial System

Iran has developed covert methods for accessing the international financial system and pursuing its malign activities, including misusing banks and exchange houses, operating procurement networks that utilize front or shell companies, exploiting commercial shipping, and masking illicit transactions using senior officials, including those at the Central Bank of Iran (CBI). Iran has also used precious metals to evade sanctions and gain access to the financial system, and may in the future seek to exploit virtual currencies. These efforts often serve to fund the Islamic Revolutionary Guard Corps (IRGC), its Islamic Revolutionary Guard Corps Qods Force (IRGC–QF), Lebanese Hizballah (Hizballah), Hamas, the Taliban and other terrorist groups.

Factor 1…

a. Role of CBI Officials in Facilitating Terrorist Financing

Senior CBI officials have played a critical role in enabling illicit networks, using their official capacity to procure hard currency and conduct transactions for the benefit of the IRGC–QF and its terrorist proxy groups. The CBI has been complicit in these activities, including providing billions of U.S. dollars (USD) and euros to the IRGC–QF, Hizballah and other terrorist organizations. Since at least 2016, the CBI has provided the IRGC–QF with the vast majority of

its foreign currency. During 2018 and early 2019, the CBI transferred several billion USD and euros from the Iranian National Development Fund (NDF) to the IRGC–QF.

In September 2019, Treasury designated the CBI and NDF under its counterterrorism authority, Executive Order (E.O.) 13224, as amended by E.O. 13886. The Iranian government established the NDF to serve the welfare of the Iranian people by allocating revenues from oil and gas sales to economic investments, but has instead used the NDF as a slush fund for the IRGC–QF, for years disbursing hundreds of millions of USD in cash to the IRGC–QF. In coordination with the CBI, the NDF provided the IRGC–QF with half a billion USD in 2017 and hundreds of millions of USD in 2018.

In November 2018, Treasury designated nine persons—including two CBI officials—involved in an international network through which Iran provided millions of barrels of oil to Syria via Russian companies, in exchange for Syria's facilitation of the movement of hundreds of millions of USD to the IRGC–QF, for onward transfer to Hizballah and Hamas. The designations highlighted, as the Secretary stated, that "[CBI] officials continue to exploit the international financial system, and in this case even used a company whose name suggests a trade in humanitarian goods as a tool to facilitate financial transfers supporting this oil scheme."

The scheme was centered on Syrian national Mohammad Amer Alchwiki and his Russia-based company, Global Vision Group. Global Vision worked with Russian state-owned company Promsyrioimport to facilitate shipments of Iranian oil to Syria. To assist the Bashar Al-Assad regime in paying Russia for this service, Iran sent funds to Russia through Alchwiki and Global Vision. To conceal its involvement, the CBI made payments to Mir Business Bank using Iran-based Tadbir Kish Medical and Pharmaceutical Company. Following the CBI's transfer of funds from Tadbir Kish to Global Vision, Global Vision transferred payments to Promsyrioimport.

CBI senior officials were crucial to the scheme's success. CBI International Department Director Rasul Sajjad and CBI Vice Governor for International Affairs Hossein Yaghoobi both assisted in facilitating Alchwiki's transfers. First Deputy Director of Promsyrioimport Andrey Dogaev worked closely to coordinate the sale of Iranian crude oil to Syria with Yaghoobi, who has a history of working with Hizballah in Lebanon and has coordinated financial transfers to Hizballah with IRGC–QF and Hizballah personnel. Using this scheme, the network exported millions of barrels of Iranian oil into Syria, and funneled millions of USD between the CBI and Alchwiki's Mir Bank account in Russia.

Separately, in May 2018, in connection with a scheme to move millions of USD for the IRGC–QF, Treasury designated the then-governor of the CBI, Valiollah Seif, the assistant director of CBI's international department, Ali Tarzali, Iraq-based al-Bilad Islamic Bank, Aras Habib, Al-Bilad's Chairman and Chief Executive, and Muhammad Qasir, a Hizballah official. Treasury designated them as Specially Designated Global Terrorists (SDGTs) pursuant to E.O. 13224. Treasury stated that Seif had covertly funneled millions of USD on behalf of the IRGC–QF through al-Bilad Bank to support Hizballah's radical agenda, an action that undermined the credibility of his commitment to protecting CBI's integrity.

Also in May 2018, Treasury, in a joint action with the United Arab Emirates (UAE), designated nine Iranian individuals and entities involved in an extensive currency exchange network that was procuring and transferring millions in USD-denominated bulk cash to the IRGC–QF to fund its malign activities and regional proxy groups. The CBI was complicit in the IRGC–QF's scheme, actively supported the network's currency conversion, and enabled it to access funds that it held in its foreign bank accounts.

The CBI and senior CBI officials have a history of using exchange houses to conceal the origin of funds and procure foreign currency for the IRGC–QF. During periods of heightened sanctions pressures, Iran has relied heavily on third-country exchange houses and trading companies to move funds to evade sanctions. Iran uses them to act as money transmitters in processing funds transfers through the United States to third-country beneficiaries, in support of business with Iran that is in violation of U.S. sanctions targeting Iran. These third-country exchange houses or trading companies frequently lack their own U.S. Dollar accounts and instead rely on the correspondent accounts of their regional banks to access the U.S. financial system.

Additionally, according to information provided to FinCEN, in 2017, the CBI coordinated with Hizballah to arrange a single EUR funds transfer to a Turkish bank worth over $50 million USD.

b. IRGC's Abuse of the International Financial System

Iran is the world's leading state sponsor of terrorism, providing material support to numerous Treasury-designated terrorist groups, including Hizballah, Hamas, and the Taliban, often via its IRGC–QF. The IRGC–QF is an elite unit within the IRGC, the military and internal security force created after the Islamic Revolution. IRGC–QF personnel advise and support pro-Iranian regime factions worldwide, including several which, like Hizballah, Hamas, and the Taliban, the United States has similarly designated as terrorists.

Treasury has designated the IRGC pursuant to several E.O.s: E.O. 13382 in connection with its support to Iran's ballistic missile and nuclear programs; E.O. 13553 for serious human rights abuses by the Iranian government; E.O. 13606 in connection with grave human rights abuses; E.O. 13224 for global terrorism, and consistent with the Countering America's Adversaries Through Sanctions Act, for its support of the IRGC–QF. Treasury has designated the IRGC–QF pursuant to E.O. 13224 for providing material support to terrorist groups, including the Taliban, E.O. 13572 for support to the Syrian General Intelligence Directorate, the Assad regime's civilian intelligence service, and E.O. 13553 for serious human rights abuses by the Iranian government.

In April 2019, the State Department designated the IRGC, including the IRGC–QF, as a Foreign Terrorist Organization (FTO). It was the first time that the United States designated a part of another government as an FTO—an action that highlighted Iran's use of terrorism as a central tool of its statecraft and an essential element of its foreign policy. The IRGC is integrally woven into the Iranian economy, operating institutions and front companies worldwide, so that the profits from seemingly legitimate business deals may actually fund Iranian terrorism.

The IRGC–QF's misuse of the international financial system to enable its nefarious activities include numerous examples that have occurred in the United States. In May 2018, the United States and the UAE took joint action to disrupt an extensive currency exchange network that was procuring and transferring millions in USD- denominated bulk cash to the IRGC–QF to fund its malign activities and regional proxy groups. Treasury designated nine Iranian individuals and entities, and noted that key CBI officials supported the transfer of funds.

On November 5, 2018, in connection with the re-imposition of U.S. nuclear-related sanctions that had been lifted or waived under the JCPOA, Treasury sanctioned over 700 individuals, entities, aircraft, and vessels in its largest ever single-day action targeting Iran. The action included the designations of more than 70 Iran-linked financial institutions and their foreign and domestic subsidiaries. Bank Melli was among those banks designated pursuant to E.O. 13224 for assisting in, sponsoring, or providing financial, material, or technological support

for, or other services to or in support of, the IRGC–QF. As of 2018, the equivalent of billions of USD in funds had transited IRGC–QF controlled accounts at Bank Melli. Moreover, Bank Melli had enabled the IRGC and its affiliates to move funds into and out of Iran, while the IRGC–QF, using Bank Melli's presence in Iraq, had used Bank Melli to pay Iraqi Shia militant groups. On November 20, 2018, Treasury designated nine individuals and entities in an international network through which the Iranian regime worked with Russian companies to provide millions of barrels of oil to the Assad regime in Syria. The Assad regime, in turn, facilitated the movement of hundreds of millions of USD to the IRGC–QF for onward transfer to Hamas and Hizballah.25

In March 2019, Treasury took action against 25 individuals and entities, including a network of Iran, UAE, and Turkey-based front companies that transferred over a billion USD and euros to the IRGC, IRGC–QF and Iran's Ministry of Defense and Armed Forces Logistics (MODAFL). The action included a designation of Ansar Bank, an Iranian bank controlled by the IRGC, and its currency exchange arm, Ansar Exchange, for providing banking services to the IRGC–QF.

In June 2019, Treasury designated an Iraq-based IRGC–QF financial conduit, South Wealth Resources Company (SWRC), which trafficked hundreds of millions of U.S. dollars' worth of weapons to IRGC–QF-backed militias. SWRC and its two Iraqi associates covertly facilitated the IRGC–QF's access to the Iraqi financial system to evade sanctions, while also generating profits in the form of commission payments for a Treasury-designated advisor to the IRGC–QF's commander, Qasem Soleimani. Soleimani has run weapons smuggling networks, participated in bombings of Western embassies, and attempted assassinations in the region.

Iran's activities include acts of attempted violence in the United States. In October 2011, pursuant to E.O. 13224, Treasury designated four senior IRGC–QF officers and Mansoor Arbabsiar, a naturalized U.S. citizen, for plotting to assassinate the Saudi Arabian Ambassador to the United States. In an example that laid bare the risks financial institutions take when transacting with Iran, payment for the assassination reached Arbabsiar from Tehran via two wire transfers totaling approximately $100,000 USD, sent from a non-Iranian foreign bank to a U.S. bank.

c. Iranian Support to Terrorists Hizballah

Despite its attempts to portray itself as a legitimate political entity, Hizballah is first and foremost a terrorist organization, responsible for the most American deaths by terrorism prior to the September 11, 2001 terrorist attacks. …Iran provides upwards of $700 million USD annually toward Hizballah's estimated $1 billion USD budget.

Hizballah is listed in the annex to E.O. 12947 from January 1995, "Prohibiting Transactions With Terrorists Who Threaten to Disrupt The Middle East Peace Process." The State Department designated Hizballah in October 1997 as an FTO and in October 2001 as an SDGT pursuant to E.O. 13224. Treasury issued additional sanctions against Hizballah in August 2012 pursuant to E.O. 13582 (which targets the government of Syria and its supporters) specifically in connection with Hizballah's efforts to coordinate with the IRGC–QF in support of the Assad regime. At the request of the IRGC–QF, Hizballah has deployed thousands of fighters into Syria in support of the Assad regime.

As recently as September 2019, Treasury took action against a large shipping network directed by and financially supporting both the IRGC–QF and Hizballah. In the past year, the IRGC–QF has moved Iranian oil worth at least hundreds of millions of USD through the network for the benefit of the Assad regime and other illicit actors. The sprawling network uses dozens of

ship managers, vessels, and other facilitators and intermediaries to enable the IRGC–QF to obfuscate its involvement; to broker associated contracts, it also relies heavily on front companies and Hizballah officials (including Muhammad Qasir, designated by Treasury in November 2018 in connection with the illicit Russia-Iran oil network supporting Assad, Hizballah, and Hamas). Pursuant to E.O. 13224, Treasury identified several vessels as property in which blocked persons have an interest, and pursuant to E.O. 13224, designated 16 entities and 10 individuals, including senior IRGC–QF official and former Iranian Minister of Petroleum Rostam Qasemi, who oversees the network. Treasury Under Secretary for Terrorism and Financial Intelligence Sigal Mandelker noted that the designations demonstrated Iran's economic reliance on the terrorist groups IRGC–QF and Hizballah as financial lifelines.

In July 2019, Treasury designated key Hizballah political and security figures—two members of Lebanon's Parliament and one Hizballah security official—who were leveraging their positions to facilitate Hizballah's agenda and do Iran's bidding. … Also in July 2019, Treasury designated Salman Raouf Salman pursuant to E.O. 13224. Salman, a senior member of an Hizballah organization dedicated to carrying out attacks outside Lebanon, coordinated the devastating attack in 1994 against the AMIA Jewish community center in Buenos Aires, Argentina, and has been directing terrorist operations in the Western Hemisphere ever since. The designation of Salman marked over 50 Hizballah-linked designations by Treasury since 2017.

Hizballah is a global terrorist organization, active in Syria, Iraq, and Yemen, and Hizballah plots have been thwarted in South America, Asia, Europe, and the United States. …

According to information available to FinCEN, in early 2015, the IRGC–QF provided approximately $20 million USD to Hizballah, over half of which was to be used for ballistic missile expenses. In 2017, the CBI coordinated with Hizballah to arrange a single EUR funds transfer to a Turkish bank worth over $50 million USD.

More recently, and as noted in the previous section, in November 2018, Treasury designated nine persons involved in an international network through which Iran provided millions of barrels of oil to Syria via Russian companies …

Also as noted previously, in May 2018, in connection with a scheme to move millions of USD for the IRGC–QF, Treasury designated a network that included Valiollah Seif, Iran's then-governor of the CBI, Iraq-based al-Bilad Islamic Bank, and Muhammad Qasir, a Hizballah official. …

Hamas

Iran also has a history of supporting Hamas. …

Iran provides Hamas with funds, weapons, and training. During periods of substantial Iran-Hamas collaboration, Iran's support to Hamas has been estimated to be as high as $300 million USD per year, but at a baseline amount, is widely assessed to be in the tens of millions per year. …

According to information available to FinCEN, in March 2015, Hamas expressed gratitude for Iran's previous financial support, and requested that Iran resume providing aid. In January 2016, Hamas officials in Gaza were awaiting monetary payments from the IRGC–QF. The Hamas officials expected the Iranian government to transfer money to the IRGC–QF in Beirut, who would then transfer it onward to them. Additionally, in 2016, Hamas had received a significant sum of IRGC–QF funding via financiers in Turkey.

In August 2019, Treasury, in partnership with the Sultanate of Oman, designated financial facilitators who funneled tens of millions of USD between the IRGC–QF and Hamas's operational arm, the Izz-Al-Din Al-Qassam Brigades, for terrorist attacks originating from Gaza.

The Izz-Al-Din Al-Qassam Brigades is a designated FTO and SDGT. … The IRGC–QF transferred over $200 million USD to the Izz-Al-Din Al-Qassam Brigades in the past four years.

In September 2019, in an action targeting a wide range of terrorists and their supporters using enhanced counterterrorism sanctions authorities, Treasury designated two Iran-linked Hamas officials.

Taliban

Iran seeks influence in Afghanistan in a number of ways, including by offering economic assistance and engaging the central government—but also by arming Taliban fighters and supporting pro-Iranian groups. In October 2010, then-President Hamid Karzai admitted that Iran was providing about $2 million USD annually in cash payments to his government. Treasury designated the Taliban as an SDGT in 2002.

In October 2018, the seven member nations of the Terrorist Financing Targeting Center (TFTC), designated nine Taliban-associated individuals, including those facilitating Iranian support to bolster the Taliban. The Secretary described Iran's provision of support to the Taliban as yet another example of its support for terrorism, and its utter disregard for United Nations Security Council Resolutions (UNSCRs) and other international norms. Treasury noted that the action's inclusion of IRGC–QF members supporting Taliban elements highlighted the scope of Iran's regionally destabilizing behavior.

Among those designated were Mohammad Ebrahim Owhadi, an IRGC–QF officer, and Abdullah Samad Faroqui, the Taliban Deputy Shadow Governor for Herat Province. In 2017, Owhadi and Faroqui reached an agreement for the IRGC–QF's provision of military and financial assistance to Faroqui, in exchange for Faroqui's forces attacking the Afghan government in Herat. Also designated were Esma'il Razavi, who was in charge of the training center at the IRGC–QF base in Birjand, Iran, which as of 2014, provided training, intelligence, and weapons to Taliban forces in Farah, Ghor, Badhis, and Helmand Provinces, Afghanistan. In 2008, as the senior IRGC–QF official in Birjand, Razavi's base supported anti-coalition militants in Farah and Herat. Also designated by the TFTC were Naim Barich, previously Treasury- and UN-sanctioned, who as of late 2017 was the Taliban Shadow Minister of Foreign Affairs managing Taliban relations with Iran, and Sadr Ibrahim, the leader of the Taliban's Military Commission, whom Iranian officials agreed to provide with financial and training support in order to build the Taliban's tactical and combat capabilities.

d. Entities Involved in the Proliferation of WMD or Missiles

Under UNSCR 2231 (2015), … the sale, supply, or transfer to Iran of Nuclear Suppliers Group (NSG) 45-controlled items requires advance approval by the UNSC. Despite this, in July 2019, Treasury identified and acted against a network of front companies and agents involved in procuring sensitive materials— including NSG-controlled materials— without UNSC approval for sanctioned elements of Iran's nuclear program. Treasury designated seven entities and five individuals in Iran, China, and Belgium, for acting as a procurement network for Iran's Centrifuge Technology Company, which plays a crucial role in Iran's uranium enrichment through the production of centrifuges for Atomic Energy Organization of Iran facilities.

Additionally, in August 2019, Treasury designated two Iranian regime-linked networks pursuant to E.O. 13382 for engaging in covert procurement activities benefiting multiple Iranian military organizations. One network has used a Hong Kong-based front company to evade U.S. and international sanctions and procure tens of millions of dollars' worth of U.S. technology and electronic components on behalf of the IRGC and Iran's missile program. The other network has procured NSG-controlled aluminum alloy products on behalf of MODAFL subsidiaries.

Iran's ongoing pursuit of ballistic missile technology is well known. …

In January 2018, two Iranian nationals tried to buy Kh-31 missile components in Kiev, Ukraine, which would have been a violation of the UN arms embargo on Iran. Ukraine's security service detained the men while they were in possession of the missile parts and technical documents on their use. Ukraine subsequently deported the men, one of whom was a military attaché at Iran's Embassy in Kiev.

According to information available to FinCEN, Iran's Shahid Bakeri Industrial Group (SBIG) and Shahid Hemmat Industrial Group (SHIG), respectively its solid and liquid propellant ballistic missile producers, utilize foreign entities and networks to procure missile-related materials and technology and disguise their involvement in the process. SBIG and SHIG are listed in the annex to E.O. 13382, which targets proliferators of WMD and their supporters. Among the targets in Treasury's August 2019 designation action was the Iranian firm Ebtekar Sanat Ilya, which helped procure more than one million dollars' worth of export-controlled, military-grade electronic components for Iranian military clients—including both SBIG and SHIG.

In February 2017, Treasury designated entities and individuals that were part of the Abdollah Asgharzadeh network in connection with their procurement of dual-use and other goods on behalf of organizations involved in Iran's ballistic missile program. The network coordinated procurement through intermediary companies that obfuscated the true end-user of the goods, and relied on the assistance of trusted brokers based in China.

Factor 2…

The endemic corruption of Iran's government is well-known. According to information available to FinCEN, in late 2017, IRGC officials were aware of corruption and mismanagement at an IRGC economic development firm. The officials estimated the cost of the corruption to be approximately $5.5 billion USD—a figure which represented losses, debts, and funds required for a capital injection to facilitate the firm's dissolution.

* * * *

Factor 3…

For more than a decade, the international community has been concerned about the deficiencies in Iran's anti-money laundering/countering the financing of terrorism (AML/CFT) program. As far back as October 11, 2007, the Financial Action Task Force (FATF) issued a statement on Iran's lack of a comprehensive AML/CFT regime, noting it represented a significant vulnerability in the international financial system. …

In June 2016, due to Iran's adoption of, and high-level political commitment to, an Action Plan to address its strategic AML/CFT deficiencies, the FATF agreed to suspend counter-measures for 12 months in order to monitor Iran's progress in implementing its Action Plan. At the same time however, the FATF expressed its continuing concern with the terrorist financing risk emanating from Iran and the threat this posed to the international financial system, and called for financial institutions to continue applying enhanced due diligence with respect to Iran-related business relationships and transactions. …

In its June 2019 and October 2019 Public Statements, the FATF noted that Iran's Action Plan had expired in January 2018 and that major items remained outstanding …

Due to these critical deficiencies, in June 2019, the FATF decided to call upon its members and urge all jurisdictions to increase supervisory examination for branches and subsidiaries of financial institutions based in Iran. …

A number of public statements from senior Iranian government officials suggest that Iran has no real intention of adhering to international norms, including the FATF standards. …

Factor 4…

The United States and Iran have not had a substantive relationship since the hostage-taking of U.S. Embassy personnel by Iranians in November 1979, and subsequent severing of diplomatic relations in April 1980.

… [N]o MLAT is in force with Iran. Additionally, the Egmont Group is an international organization through which many countries' financial intelligence units (FIUs) share invaluable financial and other information useful in law enforcement and regulatory investigations. As the U.S. FIU, FinCEN is the U.S. representative to the Egmont Group. No Iranian government entity is, nor ever has been, a member of the Egmont Group.

…[T]he level of U.S.-Iran cooperation on AML/CFT matters is nonexistent. As a result, U.S. law enforcement and regulatory officials have an extremely limited ability to obtain information about transactions originating in or routed through Iran.

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5. Organized Crime

See Chapter 16 for a discussion of sanctions related to transnational organized crime.

6. International Crime Issues Relating to Cyberspace

a. UK CLOUD Agreement

In 2019, the United States concluded its first agreement under the Clarifying Lawful Overseas Use of Data Act ("CLOUD Act"), which was signed into law as part of the Consolidated Appropriations Act, 2018, Div. V, Pub. L. 115-141, 132 Stat. 348. The Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland on Access to Electronic Data for the Purpose of Countering Serious Crime (the "Agreement") was signed at Washington on October 3, 2019. The Agreement, upon its entry into force, would facilitate lawful access by the United States or the United Kingdom for purposes of countering serious crime to certain electronic communications data stored by or accessible to a communications service provider and subject to the laws of the other country. It would eliminate the main source of potential conflicting legal obligations between U.S. and UK law that might otherwise arise when a communications service provider is served with a lawful order issued by one party to the Agreement that requires the production of electronic communications data—such as content, metadata, or traffic data—stored by or accessible to the communications service provider and subject to the law of the other party. It would also commit the United States and the United Kingdom to ensuring that their domestic laws permit communication service providers to preserve electronic communications data upon request and disclose subscriber information data outside of the Agreement.

In order to bring the Agreement into force, the CLOUD Act requires the Attorney General, with the concurrence of the Secretary of State, to determine that the United Kingdom satisfies the CLOUD Act's demanding requirements with respect to human

rights and rule of law protections and that the Agreement itself meets the rigorous requirements of the CLOUD Act. The Attorney General must submit a written certification of such determination to Congress. The Agreement must also be presented to Congress for a 180-day review period, after which it may be brought into force unless a joint Congressional resolution of disapproval is enacted into law during the mandatory review period.* The Agreement is available at https://www.justice.gov/ag/page/file/1207496/download. The Department of Justice issued a press release on the signing of the agreement, which is available at https://www.justice.gov/opa/pr/us-and-uk-sign-landmark-cross-border-data-access-agreement-combat-criminals-and-terrorists.

b. UN General Assembly

On December 19, 2019, a State Department official with expertise in cyber policy provided a briefing on multilateral cyber efforts. The briefing is transcribed at https://www.state.gov/state-department-official-on-multilateral-cyber-efforts/ and excerpts follow. The UN General Assembly resolution discussed below was adopted on December 27, 2019. U.N. Doc. G.A. Res. 74/247 (Dec. 27, 2019),

* * * *

On November 18th in the third committee of the UN General Assembly, a Russian-sponsored resolution on cyber crime was passed. And that resolution is now before the entire UN General Assembly with a vote imminently, expected by Christmas Eve. And …we have very serious concerns about that resolution in particular because it calls for the formation of a group that would look at creating a new cyber crime treaty. And that emphasis that Russia has been sponsoring is the reflection of kind of decades-long effort that they have been at to get enough supporters to push forward their vision of what this new cyber crime treaty would look like.

Our problems with it are that, one, we already have a cyber crime treaty in existence, the Budapest Convention. We also have … various international fora, including the UN, to handle this type of thing. Also the Russians clearly are interested in pushing their vision of what the internet should look like in the future, and that's conflating this idea of cyber crime with cyber security and cyber controls. So they're interested in a treaty that would give them the type of control over the internet space that they're interested in and that stand against fundamental American freedoms.

And in addition to all of this, we see the greatest need right now in the cyber crime area as building capacity among the nations of the world so that they can tackle this with greater alacrity, so that they can go after bad guys with more ease, so that we can trade information with a little bit more ease. And again, we have the existing mechanisms to do that. This Russian effort would take resources and time away from building that capacity among the states of the world, the countries of the world, and focus it more on putting together a treaty which … we don't think is necessary ….

* Editor's note: On January 16, 2020, the Department of Justice transmitted to Congress notification that the Attorney General, with the concurrence of the Secretary of State, had certified that the requirements of the CLOUD Act are satisfied.

* * * *

…[W]e have an issue with what they're proposing because based on previous language, based on previous resolutions they've passed, based on previous records of behavior, what Russia wants out of the internet space is a form of lockdown on information; a fundamental curtailment of those freedoms that the United States fully embraces and wants to see represented in the internet space, not curtailed.

* * * *

China is absolutely a supporter. Just to go back to what I was saying before, … the title of [the resolution] is, "Countering the Use of Information and Communications Technologies for Criminal Purposes." And obviously, there's a grave difference, particularly in that arena, with what Russia describes as a criminal purpose and what the United States would describe as a criminal purpose.

And again, I keep citing Russia because they're the originator of the resolution, but there are countries like China and … others … who are interested in that result. In other words, that type of governance of the internet space. However, we believe there are also countries that are not exactly sure what a new cyber crime treaty means and they're perhaps not aware of this more malign intent. And so our efforts have been along the lines of trying to educate as well as point out that many of the things Russia claims are needed in … a new cyber crime treaty … are already existent under the Budapest Convention, under the intergovernmental experts group that works out of Vienna that's part of the UN system that is also handling this, and has specifically been charged by the United Nations to cover this issue and come up with an assessment on it.

* * * *

…So if we look at the Budapest Convention, for example, there are 64 member-states that are members of it, and over 130 countries use it as the basis for how they govern cyber crime. And in those fundamentals, I think you see an embrace of the values that we like.

* * * *

I can try to give two results that might occur from an adoption of the cyber crime treaty.

First, going back to this point of resources, so if nations and the United Nations system is devoting resources, time, and energy to the negotiation of a new cyber crime treaty, that's, by definition, money that nations and the United Nations are not devoting to building the capacity of X Country to try and handle cyber crime or to try to understand it or to try to liaise with other law enforcement bodies around the world or international law enforcement bodies to come to some sort of better capacity, better ability to handle this type of stuff.

In addition, if Russia is able to codify in a United Nations treaty that internet controls are necessary and able to even detail what those controls should be, that's inimical to the United States interests because that doesn't tally with the fundamental freedoms we see as necessary across the globe. That's not commensurate with our vision of democracy.

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C. INTERNATIONAL TRIBUNALS AND OTHER ACCOUNTABILITY MECHANISMS

1. International Criminal Court

a. General

On March 15, 2019, Secretary Pompeo delivered remarks to the press on several topics, including the International Criminal Court ("ICC"). Excerpts follow from Secretary Pompeo's remarks, which are available in full at https://www.state.gov/remarks-to-the-press-6/.

* * * *

In a speech last year in Brussels, I made clear that the Trump administration believes reforming international institutions, refocusing them back on their core missions, and holding them accountable when they fail to serve the people that they purport to help. We seek to partner with responsible nations to make sure that international bodies honor the principles of liberty, sovereignty, and the rule of law. Nation-states come together to form these institutions, and it's only with their consent that these institutions exist.

Since 1998, the United States has declined to join the ICC because of its broad, unaccountable prosecutorial powers and the threat it poses to American national sovereignty. We are determined to protect the American and allied military and civilian personnel from living in fear of unjust prosecution for actions taken to defend our great nation. We feared that the court could eventually pursue politically motivated prosecutions of Americans, and our fears were warranted.

November of 2017, the ICC prosecutor requested approval to initiate investigation into, quote, "the situation in Afghanistan," end of quote. That could illegitimately target American personnel for prosecutions and sentencing. In September of 2018, the Trump administration warned the ICC that if it tried to pursue an investigation of Americans there would be consequences. I understand that the prosecutor's request for an investigation remains pending.

Thus today, persistent to existing legal authority to post visa restrictions on any alien, quote, "whose entry or proposed activities in the United States would have potentially serious adverse foreign policy consequences," end of quote, I'm announcing a policy of U.S. visa restrictions on those individuals directly responsible for any ICC investigation of U.S. personnel. This includes persons who take or have taken action to request or further such an investigation. These visa restrictions may also be used to deter ICC efforts to pursue allied personnel, including Israelis, without allies' consent. Implementation of this policy has already begun. Under U.S. law, individual visa records are confidential, so I will not provide details as to who has been affected and who will be affected.

But you should know if you're responsible for the proposed ICC investigation of U.S. personnel in connection with the situation in Afghanistan, you should not assume that you will still have or will get a visa, or that you will be permitted to enter the United States. The United States will implement these measures consistent with applicable law, including our obligations under the United Nations Headquarters Agreement. These visa restrictions will not be the end of

our efforts. We are prepared to take additional steps, including economic sanctions if the ICC does not change its course.

The first and highest obligation of our government is to protect its citizens and this administration will carry out that duty. America's enduring commitment to the rule of law, accountability, and justice is the envy of the world, and it is the core—at the core of our country's success. When U.S. service members fail to adhere to our strict code of military conduct, they are reprimanded, they're court-martialed, and sentenced if that's what's deserved. The U.S. Government, where possible, takes legal action against those responsible for international crimes. The United States directs foreign aid to strengthen foreign nations' domestic justice systems, the first and best line of defense against impunity.

The United States also supports international hybrid legal mechanisms when they operate effectively and are consistent with our national interest. These would include, for example, the mechanism handling Rwandan and Yugoslav atrocities and international evidence collection efforts in both Syria and Burma. But the ICC is attacking America's rule of law. It's not too late for the court to change course and we urge that it do so immediately.

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On October 9, 2019, the State Department issued a statement regarding U.S. policy on the ICC. The statement is available at https://www.state.gov/u-s-policy-on-the-international-criminal-court-remains-unchanged/. See *Digest 2018* at 88-89 for discussion of the new U.S. policy on the ICC announced in 2018. The October 9, 2019 press statement follows.

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In April, the International Criminal Court (ICC) resoundingly rejected the ICC Prosecutor's request to open an investigation into Afghanistan, including allegations against U.S. personnel. More recently, the ICC Prosecutor asked the judges for permission to appeal aspects of that rejection. On September 17, the Court partially granted the Prosecutor's request, allowing a limited appeal to proceed. Last week, the ICC Prosecutor submitted a brief to appeal the April decision. In the meantime, the earlier decision stands, rejecting any Afghanistan investigation.

The United States remains committed to protecting its personnel from the ICC's wrong-headed efforts spearheaded by a few grandstanders. The judges were right to reject the Prosecutor's outrageous request to investigate U.S. personnel on April 12, and the appeal process is pointless as far as we are concerned. The United States is not a party to the ICC's Rome Statute and has consistently voiced its unequivocal objections to any attempts to assert ICC jurisdiction over U.S. personnel. An investigation by the ICC of U.S. personnel would be unjustified and unwarranted, and any ICC effort to re-open this case would be a waste of its time and resources—something the ICC judges recognized when they stated in their decision that such an investigation would be "inevitably doomed to failure."

As previously stated, the United States will take all necessary steps to defend its sovereignty and protect U.S. and allied personnel from unjust investigation and prosecution by the ICC. On March 15, we announced a policy restricting issuance of visas to any and all ICC officials determined to be directly responsible for an ICC investigation of U.S. personnel, or of allied personnel without our allies' consent. We will remain vigilant in applying this policy. The United States respects the decision of those nations that have chosen to join the ICC, and in turn,

we expect that our decision not to join and not to place our people under the court's jurisdiction will also be respected.

* * * *

John Giordano of the U.S. delegation to the UN provided the U.S. explanation of position ("EOP") on the report of the ICC on November 4, 2019. The EOP is excerpted below and available at https://usun.usmission.gov/explanation-of-position-of-the-united-states-report-of-the-international-criminal-court-agenda-item-73/.

* * * *

The United States has historically been, and will continue to be, a strong supporter of meaningful accountability and justice for victims of atrocities through appropriate mechanisms. Perpetrators of atrocity crimes must face justice, but we must also be careful to recognize the right tool for each situation.

I must reiterate our continuing and longstanding principled objection to any assertion of ICC jurisdiction over nationals of States that are not parties to the Rome Statute, including the United States and Israel, absent a UN Security Council referral or the consent of such a State. We also wish to reiterate our serious and fundamental concerns with the ICC Prosecutor's proposed investigation of U.S. personnel in the context of the conflict in Afghanistan.

The United States remains a leader in the fight to end impunity and supports justice and accountability for international crimes, including war crimes, crimes against humanity, and genocide. The United States respects the decision of those nations that have chosen to join the ICC, and, in turn, we expect that our decision not to join and not to place our citizens under the court's jurisdiction will also be respected.

Accordingly, the United States dissociates itself from consensus on this resolution.

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b. Israel

On December 20, 2019, the State Department issued a press statement by Secretary Pompeo expressing U.S. opposition to the decision of the ICC to continue to pursue a case on the "situation in Palestine." The press statement, available at https://www.state.gov/the-international-criminal-court-unfairly-targets-israel/, is excerpted below.

* * * *

Today, the Prosecutor of the International Criminal Court (ICC), Fatou Bensouda, announced that she has concluded her preliminary examination into the so-called "situation in Palestine" and asked the ICC judges to confirm that the Court may exercise jurisdiction over the West Bank, East Jerusalem, and Gaza. By taking this action, the Prosecutor expressly recognized that there are serious legal questions about the Court's authority to proceed with an investigation.

We firmly oppose this and any other action that seeks to target Israel unfairly. As we made clear when the Palestinians purported to join the Rome Statute, we do not believe the

Palestinians qualify as a sovereign state, and they therefore are not qualified to obtain full membership, or participate as a state in international organizations, entities, or conferences, including the ICC.

The United States also reiterates its longstanding objection to any assertion of ICC jurisdiction over nationals of States that are not parties to the Rome Statute, including the United States and Israel, absent a referral from the UN Security Council or the consent of such a State.

The United States respects the decision of those nations that have chosen to join the ICC, and in turn, we expect that the decision on the part of the United States and Israel not to join and not to place our personnel under the court's jurisdiction will also be respected.

The United States remains deeply, firmly, and consistently committed to achieving a comprehensive and lasting peace between Israel and the Palestinians. The only realistic path forward to end this conflict is through direct negotiations.

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c. Libya

On May 8, 2019, Ambassador Jonathan Cohen, Acting U.S. Permanent Representative to the UN, delivered remarks at a UN Security Council meeting on Libya and the ICC. Ambassador Cohen's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-meeting-on-libya-and-the-icc/.

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* * * *

Eight years ago, the UN Security Council referred the situation in Libya to the International Criminal Court. The resolution addressed a dangerous moment in Libya's history. Qadhafi's horrific abuses stunned the world.

Now, as then, we stand against impunity, and support efforts to bring to justice those responsible for atrocities in Libya. We reiterate our call for Saif Al-Islam Qadhafi and Al-Tuhamy Mohamed Khaled, the former head of Libya's notorious Internal Security Agency, to be held to account for alleged crimes against humanity, for torture, and for the murder and persecution of hundreds of civilians in 2011. We also renew our call for Libyan authorities to hold Mahmoud al-Werfalli to account for alleged unlawful killings.

The United States is deeply concerned by instability in Tripoli, which is endangering innocent civilians. Lasting peace and stability can only come through a political solution.

All parties should rapidly return to UN political mediation, the success of which depends upon a ceasefire in and around Tripoli.

We support the ongoing efforts of UN Special Representative Salamé and the UN Support Mission in Libya to help avoid further escalation and chart a path forward that provides security and prosperity for all Libyans.

This briefing is an important reminder that accountability not only provides justice for victims of past violations and abuses, but it also signals that future violations and abuses will not be tolerated.

We remain concerned about abuses that human traffickers and smugglers have perpetrated against migrants, refugees, and asylum-seekers in Libya. We support efforts to hold these individuals, including government officials found to be complicit, accountable. The United States will continue to work to end impunity for human rights abuses, including the persistent problem of human smuggling and trafficking that has plagued the region.

We strongly condemn attempts by terrorists, including ISIS-Libya and AQIM, to use violence against innocent Libyans and key institutions to sow chaos. They must not be allowed to succeed, and we will continue to work to defeat these groups.

The United States has historically been, and will continue to be, a strong supporter of meaningful accountability and justice for the victims of atrocities through appropriate mechanisms. Perpetrators of atrocity crimes must face justice, but we must also be careful to recognize the right tool for each situation.

However, I must reiterate our longstanding and principled objection to any assertion of ICC jurisdiction over nationals of states that are not party to the Rome Statute, absent a UN Security Council referral or the consent of such states. Although we note the recent decision not to authorize an investigation into the situation in Afghanistan, we remain concerned about illegitimate attempts by the ICC to assert jurisdiction. Our position on the ICC in no way diminishes the United States' commitment to supporting accountability for atrocity crimes.

* * * *

On November 6, 2019, Deputy Legal Advisor for the U.S. Mission to the UN Julian Simcock delivered remarks at a UN Security Council briefing on the ICC and the situation in Libya. Mr. Simcock's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-international-criminal-court-on-the-situation-in-libya/

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…It is shameful that several of the most notorious perpetrators of crimes against the Libyan people this past decade continue to enjoy impunity.

Saif al-Islam Qadhafi, Mahmoud al-Werfalli, Al-Tuhamy Mohamed Khaled, and Abdullah al-Senussi must face justice for their alleged crimes. We call on individual Libyans or groups who harbor Saif al-Islam Qadhafi and Mahmoud al-Werfalli to deliver them to Libyan authorities immediately. We also call on those who shelter Al-Tuhamy Mohamed Khaled, the former head of Libya's notorious Internal Security Agency, to end their protection of this perpetrator.

We are also closely watching the Supreme Court of Libya's case against Abdullah Al-Senussi.

Accountability for these architects of Libya's darkest days would ensure that Libyan victims of these atrocities are not forgotten. It would also deliver a powerful deterrent message for future abusers—and to those involved in the current conflict who may be guilty of atrocities. We regret that we collectively have little to show in service of justice for the Libyan people for the suffering they have endured at the hands of these individuals.

Beyond these four cases, violence and abuses continue in Libya today. Human traffickers and smugglers prey on the most vulnerable, especially migrants, refugees, and asylum-seekers in Libya. A civil war continues to rage, and the numbers of civilian casualties and injuries are escalating. We strongly support accountability for any crimes that have been committed, including by officials and senior leaders involved in these networks.

The U.S. Government continues to receive other reports of potential human rights abuses in Libya, including accounts of arbitrary killings, forced disappearances, unlawful detention, torture, and sexual violence perpetrated by multiple militia groups and security forces, including by those in leadership and command positions.

The current conflict in Libya has had a destabilizing humanitarian effect, resulting in an increased numbers of displaced persons, including the migrant and refugee population. Prolonging this conflict will further strain the provision of basic services to the population and will contribute to political and security instability.

Libya's political and security instability has created an environment conducive to the commission of human rights abuses. In an effort to address the root causes of these atrocities, the United States continues to support a rapid return to a political process, and we thank UN Special Representative Salamé for his ongoing efforts to secure a negotiated political solution to this crisis.

Salamé and the UNSMIL team face great physical risk in the work they are doing: we are reminded of this by the terrorist attack that killed three UN employees in Benghazi a few months ago, as well as by the recent air strike—in violation of the UN arms embargo—that nearly hit the UN compound in Tripoli. We continue to call for de-escalation, a ceasefire, economic reforms, and an improvement to the security environment. And we condemn all acts of violence against the Libyan people and the UN workers who are trying to help the country achieve stability. The United States has historically been, and will continue to be, a strong supporter of meaningful accountability and justice for victims of atrocities through appropriate mechanisms. Perpetrators of atrocity crimes must face justice, but we must also be careful to recognize the right tool for each situation.

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d. Sudan

On June 19, 2019, Minister Counselor for the U.S. Mission to the UN Mark Simonoff delivered remarks at a UN Security Council briefing on the ICC investigation in Darfur, Sudan. Mr. Simonoff's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-international-criminal-courts-icc-investigation-in-darfur-sudan/.

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In April, civilian-led protests led to the removal of President Omar al-Bashir, whose regime was synonymous with genocide, war crimes, crimes against humanity, and human rights violations and abuses. For months, protesters have gathered together, united in a vision for a peaceful,

democratic Sudan. But rather than welcoming dialogue and discussion, those in power have responded violently.

The Transitional Military Council's (TMC) reprehensible attacks on demonstrators in Khartoum have led to over 100 deaths and hundreds injured. Reports of security forces beating and sexually assaulting protestors, and throwing victims into the Nile must be fully and fairly investigated. The TMC's grotesque display of violence against peaceful demonstrators in Khartoum was not an isolated incident. The government has also used excessive violence against internally displaced people in Darfur to stop peaceful rallies.

We are all too familiar with the unthinkable violence to which Darfuris have been subjected since 2003. Ongoing armed clashes in the Jebel Marra region between the Sudan Liberation Movement-Abdel Wahid (SLM/AW) rebel group and the Sudan Armed Forces, along with intercommunal violence in other parts of Darfur, serve as reminders of the ongoing security challenges that plague the region.

Darfur's security situation has become further challenged following delays in transitioning to a civilian-led government in Khartoum. These delays have had a negative impact on human rights throughout Sudan, and obstructed the implementation of policies to support the return of Internally Displaced Persons, including in Darfur.

We are concerned by increasing violence in IDP camps. In Darfur, sexual violence, rape, harassment, and other intimidation against women, girls, and boys remains prevalent. It is for this reason that the mission of the African Union-United Nations Hybrid Operation in Darfur (UNAMID) remains important.

We support the African Union (AU) Peace and Security Council's June 6 communiqué, which announced the immediate suspension of Sudan from all AU activities until the establishment of a civilian-led Transitional Authority. We call on Sudan's interim military authorities to cease attacks against civilians, withdraw all undue restrictions on media and civil society, restore access to the Internet, and ensure unhindered access for medical care providers. We also urge them to respect human rights, including freedom of expression and fair trial guarantees.

In that vein, we urge the TMC to agree to the request by the Office of the High Commissioner for Human Rights for the rapid deployment of a UN human rights monitoring team. The UN should also make promoting respect of human rights the heart of its efforts in Sudan, whether through UNAMID or the UN Country Team.

Long-term stability in Darfur and throughout Sudan depends on resolving the underlying causes of the protracted conflict. This includes strengthening Sudan's judicial system to ensure accountability at the local and national levels. It includes the establishment of a fully functional civilian-led national government that is committed to reform. And it includes a commitment by Khartoum to pursue a durable peace agreement in Darfur.

There will be no lasting peace in Sudan until there is genuine accountability for the crimes that have been committed against the Sudanese people. The United States has historically been, and will continue to be, a strong supporter of meaningful accountability and justice for victims of atrocities through appropriate mechanisms. Perpetrators of atrocity crimes must face justice, but we must also be careful to recognize the right tool for each situation.

I must reiterate our longstanding and principled objection to any assertion of ICC jurisdiction over nationals of States that are not party to the Rome Statute, absent a UN Security Council referral or the consent of such States. The United States remains concerned about illegitimate attempts by the ICC to assert such jurisdiction.

We also note our disagreement with a number of aspects of the ICC Appeals Chamber's recent decision in the Jordan appeal, including the analysis and conclusions regarding customary international law and the interpretation of Security Council resolutions, but our concerns about this decision and the ICC more generally in no way diminish our commitment to supporting accountability for atrocity crimes.

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2. International Criminal Tribunals for the Former Yugoslavia and Rwanda and the International Residual Mechanism for Criminal Tribunals

On July 17, 2019, Emily Pierce, counselor for the U.S. Mission to the UN, delivered remarks at a UN Security Council briefing on the International Residual Mechanism for Criminal Tribunals ("IRMCT"). Her remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-international-residual-mechanism-for-criminal-tribunals-irmct/.

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The ongoing work of the Mechanism includes very important cases, including the appellate proceedings in the Mladić case, the ongoing Stanišić and Simatović trial, and pre-trial proceedings in Turinabo.

We should also take a moment to highlight the ruling of the Appeals Chamber regarding Radovan Karadžić in March, upholding his convictions for genocide, crimes against humanity, and war crimes, because we are just one week past the anniversary of the genocide in Srebrenica.

Twenty-four years ago, after 30,000 Bosnian Muslim women, children, and elderly men were forcibly removed from Srebrenica, more than 8,000 men and boys were murdered. The Appeals Court upheld the Trial Chambers determination that these murders—the largest mass killing in Europe since World War II—were the direct result of the decision made by Karadžić and his accomplices to destroy the Bosnian Muslims of Srebrenica.

To accomplish these evil ends, Karadžić and others first engaged in a propaganda campaign to depict Bosnian Muslims and Bosnian Croats as enemies of the Serbs, exploiting distrust and suspicion to create the kind of climate in which genocide became possible.

It is because we continue to live in the shadow of that crime that we are deeply alarmed when we see convicted war criminals being glorified and unscrupulous leaders rewriting historical events. Those who deny the truth, manufacture distrust of the institutions of justice, deny the common humanity of their neighbors, and exploit the pain of victims for their own purposes must be condemned. We do a grave injustice to those who lost their lives when we are silent in the face of the politics of division and hatred.

Although Karadžić hid for over a decade, the fact that he was found and prosecuted is a powerful testament to the courage of the victims who testified and their devotion to justice.

But the burden is not on victims to bring justice to those who perpetrated crimes against them, but rather on states. We applaud the Mechanism's continued search for the eight Rwandans still wanted for their roles in the 1994 genocide, 25 years ago. These individuals are

accused of being responsible for some of the most appalling acts of our time: Felicien Kabuga, who allegedly financed the genocide; Protais Mpiranya, who led the Presidential Guard Battalion and is accused of being responsible for the killing of many moderate politicians and UN peacekeepers; and Augustin Bizimana, who led the Ministry of Defense. These men and five others remain at large, and it is all of our responsibility to bring them to justice.

Since 1998, the United States has offered financial rewards for information that leads to the arrest of Rwandan indictees and fugitives from the former Yugoslavia. We continue to offer up to $5 million for any information that leads to the arrest of these eight individuals, and let this, and the Karadžić case, be a message to them: we will not stop looking.

If there is anything all states need to stand behind, it is justice for victims of genocide. We welcome South Africa's stated commitment to fully cooperate with the Mechanism, but we were disappointed to hear that it had not yet taken action on the Mechanism's requests. We urge the government to coordinate closely with the Mechanism in the search of fugitives.

Finally, this is a transition phase for the Mechanism and its role ensuring that accountability winds down and the responsibility increasingly lies with national authorities to finish the task of prosecuting remaining cases.

As the ICTY and the ICTR were pioneers in international criminal law, the Mechanism is a trailblazer now, showing how knowledge and skills can be transferred to national jurisdictions. We also commend the Mechanism's work to build capacity in national judiciaries in Africa and in the former Yugoslavia to build new generations of attorneys able to prosecute atrocity crimes in their own systems. As the Prosecutor reported, the Mechanism has received an unprecedented number of requests for assistance. This demonstrates its immense and ongoing value in national systems.

The United States would like to emphasize its continued commitment to accountability for perpetrators and justice for victims. We will continue to remember those who lost their lives in Rwanda and the former Yugoslavia and stand with their families and communities in their efforts to attain justice.

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3. Other Accountability Proceedings and Mechanisms

a. UN Investigative Team for Accountability of Da'esh/ISIL ("UNITAD")

Ambassador Cherith Norman Chalet, U.S. Representative for UN Management and Reform, delivered remarks on July 15, 2019 after a Security Council briefing on the situation in Iraq, where Da'esh (ISIS or ISIL) has committed atrocities against religious and ethnic minorities. Ambassador Chalet's remarks are excerpted below, and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-un-investigative-team-for-accountability-of-daesh-unitad/.

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The plight of Iraq's ethnic and religious minorities is of critical importance to the United States. We will not waver from holding ISIS accountable for the atrocities it committed against all Iraqis.

The United States remains a strong, committed supporter of UNITAD's Security Council mandate to collect, store, and preserve evidence of ISIS's atrocities that may amount to war crimes, crimes against humanity, and genocide. We are pleased that the Security Council reiterated its unanimous support of UNITAD's mandate during the Council's first-ever trip to Iraq last month, where Council members had a chance to engage with Special Adviser Khan and his team.

The United States welcomes the rapid initiation of UNITAD's critical activities on the ground in Iraq over the past year, and the details you've provided us this morning. The recent appointments of Iraqi experts to the UNITAD team working alongside international experts is critical to UNITAD's success, as demonstrated by the appointment of Deputy Dr. Salama Hasson al-Khafaji, who joins us today, welcome.

The United States contributed $2 million in support of UNITAD's first exhumation of mass grave sites in Sinjar that took place earlier this year. UNITAD's access to these sites [is] vital for the professional and impartial evidence collection of the unimaginable atrocities that Yezidis suffered under ISIS.

We express our thanks to member states that have also stepped up to contribute to UNITAD's operations, through funding and other support means, including the United Kingdom, Germany, Qatar, the Netherlands, the United Arab Emirates, Sweden, Turkey and Saudi Arabia, and call on other member states to swiftly support UNITAD in order for the team to collect critical evidence before it is too late.

Of course, money alone will not guarantee effective evidence collection. We welcome the Government of Iraq's commitment to work closely with UNITAD. Such close cooperation between UNITAD and the Iraqi government is essential for the team's success as demonstrated by Special Adviser Khan's frequent meetings with key Iraqi political, religious, and societal leaders over the last year.

We call upon the Government of Iraq to continue to give UNITAD the space to operate effectively. Independence and impartiality are essential to the team's credibility moving forward.

No segment of Iraqi society has escaped ISIS's terror, and it is important to develop a balanced and accurate account of events.

This will give voice to all Iraqis, including members of all Iraq's religious and ethnic groups, who have been subjected to unspeakable atrocities.

Iraq needs accountability and reconciliation to begin in order to recover from the trauma that ISIS inflicted on the Iraqi people.

In recent weeks, UNITAD has taken the important step of beginning evidence collection in Mosul, once a former ISIS stronghold. UNITAD's work there will send an important message to all Iraqis—including the Sunni community—that the international community has not forgotten the atrocities they too endured.

It is especially important for Iraq to work through a law-based process to hold ISIS perpetrators and collaborators accountable. UNITAD plays a critical role in this effort, including ensuring that exhumations and evidence collection are conducted in accordance with international standards.

We extend our appreciation to the entire UNITAD team for aiming to assure justice is never beyond reach, for the heinous acts ISIS committed.

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U.S. Permanent Representative to the UN Kelly Craft delivered remarks at a UN Security Council briefing on UNITAD on November 26, 2019. Her remarks are available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-un-investigative-team-for-accountability-of-daesh-isil-unitad/, and excerpted below.

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The world witnessed ISIS target innocent Iraqis, including diverse ethnic and religious communities, in barbaric attacks. Lest we forget, ISIS is responsible for the deaths of thousands of innocent Iraqi civilians. It desecrated churches and mosques and other houses of worship. It drove millions of Iraqis from their homes. It held hundreds of women as slaves, subjecting them to brutal assault.

These are acts of pure evil, and as a body dedicated to maintaining international peace and security, it is our solemn responsibility to speak the truth about what ISIS did, to document this truth, and to answer the prayer for justice for those whose lives have been turned upside down by ISIS. This is what makes UNITAD's work so important. With the support of the Iraqi government, UNITAD is moving quickly, carefully, and determinedly to create a detailed record of ISIS appalling criminality against Iraqis of all faiths.

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In September, the Security Council unanimously endorsed UNITAD's one-year mandate renewal with the support of the Government of Iraq. This mandate will provide accountability and, we hope, a measure for healing for all Iraqis.

A crucial step that several member states are taking in support of UNITAD's mandate involves voluntary contributions. The United States has contributed three million dollars in support of UNITAD's field-based activities over the past year, including mass grave excavations in Sinjar, Mosul, and Tikrit. Thanks in part to this contribution, UNITAD has assisted Iraqi national authorities in excavating seventeen mass graves near the village of Kojo, which is of special significance to Iraq's Yezidi community.

We thank our partners from the United Kingdom, Germany, Qatar, Cyprus, the Philippines, the United Arab Emirates, the European Union, Denmark, Sweden, Australia and Uganda, for their voluntary contributions, and we urge other Member States to do their part to show the international community's support for the pursuit of justice on behalf of all the victims in Iraq—Yezidis, Christians, Shia and Sunni Muslims, and many, many more who have suffered at the hands of ISIS.

UNITAD's continued cooperation and coordination with Iraq's political, judicial, religious, and societal leaders is essential for the successful mandate implementation. For example, utilizing existing evidence held by Iraqi authorities greatly improved the team's ability to pursue its mandate this past year. In return, UNITAD is providing technical support to Iraqi authorities for mass grave excavations, DNA analysis, and the archiving of evidence documenting atrocities committed by ISIS.

Additionally, UNITAD has demonstrated the value of its work by directly supporting third-country criminal proceedings against members of ISIS. This is an early indicator that UNITAD will successfully use its current work in future prosecutions, including those in Iraq.

Fellow Council members, when we witness actions that can only be described as evil, it is our responsibility to name it for what it is; it's hell on earth. And we need to condemn it. But that is not enough. We must also be clear and forceful in stating that no perpetrator will ever be above the law; that we will be relentless in the pursuit of justice for the victims of ISIS; and that we will never fail to live up to our duty to fight for the dignity of all people, most especially the weak and the vulnerable.

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b. UN International Impartial and Independent Mechanism

On April 23, 2019, Minister Counselor Simonoff delivered remarks at a UN General Assembly debate on the International, Impartial and Independent Mechanism for Syria ("IIIM"). His remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-ga-debate-on-the-international-impartial-and-independent-mechanism-for-syria/.

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The United States welcomes the submission of the third report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.

We are proud to support the IIIM's work, and congratulate the IIIM on its progress so far. In particular, I would like to applaud Catherine Marchi-Uhel, Head of the Mechanism, and her Deputy, Michelle Jarvis, on their significant efforts in standing up the IIIM.

That is why the United States recently announced our intention to provide an additional $2 million in support of the IIIM on top of our $350,000 contribution last year. The United States' commitment to accountability in Syria is unwavering because without accountability, the peace we seek—the stable, just, enduring peace the Syrian people deserve—will remain elusive.

In addition to our voluntary contributions, I am pleased to announce today that the United States will also support funding for the IIIM from the UN Regular Budget through assessed contributions. We urge all member states to support Regular Budget funding for the IIIM through the Fifth Committee, and ultimately through this Assembly, so that the Mechanism's important work will be on firm financial footing.

The United States would also like to stress the importance of maintaining fiscal discipline through reprioritization of resources in the UN regular budget when incorporating the IIIM.

In the year since the IIIM started its work, it has made impressive progress to implement its mandate to collect, consolidate, preserve, and analyze evidence of violations of international humanitarian law and human rights violations and abuses. The United States applauds the IIIM's commitment to ensuring that in the process of pursuing justice and accountability it integrates Syrian women and girl's voices.

The United States also applauds the widespread cooperation between member states, civil society, and multilateral mechanisms including the Commission of Inquiry and IIIM. Together with civil society, the international community is engaged in a robust and comprehensive approach that can ultimately bring justice to the thousands of victims of the Assad regime's atrocities.

The IIIM is making invaluable progress in its structural investigations and specific-case building work that are providing the foundations for criminal cases. The United States looks forward to this information being available to support new prosecutions where jurisdiction exists, in accordance with international law.

The recent arrests of Assad regime officials in Germany and France demonstrate the valuable role outside documentation can play in supporting justice processes in countries other than Syria. Outside documentation was crucial in the civil case before the U.S. District Court in Washington D.C. that found the Assad regime civilly liable for the extra-judicial killing of American journalist Marie Colvin.

Accountability is also necessary for the use of chemical weapons in Syria. For example, member states of the Organization for the Prohibition of Chemical Weapons (OPCW) voted overwhelmingly last year to give the organization additional tools to respond to chemical weapons use, including the means to identify the perpetrators of chemical weapons attacks in Syria. This was a significant achievement towards holding accountable those who use chemical weapons in Syria.

The United States strongly supports the OPCW's attribution arrangements. We look forward to its new Investigation and Identification Team becoming fully operational and beginning its work to identify perpetrators of chemical weapons use in Syria for those cases where it has been determined that the use or likely use of chemical weapons has occurred.

Eight years ago, the Assad regime chose to meet Syrians' peaceful demands for respect for their human rights and fundamental freedoms with barrel bombs, chemical weapons, starvation, sexual violence, torture, arbitrary detention, and denial of fair trial guarantees. Numerous UN reports have repeatedly documented these acts, some of which may amount to crimes against humanity and war crimes by the regime.

The United States will continue to provide the political, diplomatic, and financial support essential to ensure there are real consequences for the atrocities committed in Syria—whether it be the thousands in arbitrary detention in Assad's prisons, those who have suffered and been killed by indiscriminate barrel bomb and chemical weapons attacks, or the many who have been exposed to the regime's starve and surrender tactics against civilians in Homs, Aleppo, Darayya, and eastern Ghouta. The United States, alongside our many allies and partners, remains committed to holding perpetrators of atrocities in Syria accountable.

It is deeply regrettable that the Security Council is unable to find consensus on ways to ensure accountability for the Syrian people. The United States expresses its appreciation to members of the General Assembly for their role in establishing and providing a mandate for the IIIM. Attempts to undermine the IIIM by claiming that the General Assembly overstepped its authority in establishing the IIIM are baseless. We emphatically reject arguments that the IIIM was created in violation of the UN Charter.

The IIIM is a vital mechanism that will help provide prosecutors and investigators with the evidence needed to make the case during trial, thereby achieving a measure of justice for the many victims of Assad regime atrocities. The Syrian people should be heard, and every individual Syrian should have the opportunity to seek justice. Accountability and justice are essential to the international community's efforts to ensure a lasting UN-led political process in Syria can take hold.

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Cross References

Visa Waiver Program, **Ch.1.B.3.**
U.S. v. Park *(prosecution for production abroad of child pornography)*, **Ch. 4.C.3.**
Children in Armed Conflict, **Ch. 6.C.1**
ILC Draft Articles on Crimes Against Humanity, **Ch. 7.C.1.**
Maritime cybersecurity, **Ch. 12.A.4.a**
Wildlife trafficking, **Ch. 13.C.4.**
Iran sanctions, **Ch. 16.A.1.**
Terrorism sanctions, **Ch. 16.A.9.**
Cyber activity sanctions, **Ch. 16.A.10**
Magnitsky and other corruption and human rights sanctions, **Ch. 16.A.11.**
Transnational crime sanctions, **Ch. 16.A.13.**
Colombia steps toward accountability, **Ch. 17.B.3.**
Accountability for atrocities in Syria, **Ch. 17.C.2.**
Use of force issues related to counterterrorism, **Ch. 18.A.3.**
Applicability of international law to conflicts in cyberspace, **Ch. 18.A.5.c.**
Criminal prosecutions of detainees: Hamidullin, **Ch. 18.C.1.**

CHAPTER 4

Treaty Affairs

A. TREATY LAW IN GENERAL

1. Senate Advice and Consent to Ratification of Treaties

On July 16, 2019, the U.S. Senate passed a resolution providing advice and consent to ratification of the Protocol Amending the Convention between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and its Protocol, signed at Madrid on February 22, 1990. Treaty Doc. 113-4. 165 Cong. Rec. S4850 (2019). The text of the treaty and the resolution of advice and consent are available at https://www.congress.gov/treaty-document/113th-congress/4.

On July 17, 2019, the U.S. Senate provided advice and consent to ratification of the Protocol Amending the Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, signed at Washington on October 2, 1996, signed on September 23, 2009, at Washington, as corrected by an exchange of notes effected November 16, 2010 and a related agreement effected by an exchange of notes on September 23, 2009. Treaty Doc. 112-1. 165 Cong. Rec. S4875 (2019). The text of the treaty and the resolution of advice and consent are available at https://www.congress.gov/treaty-document/112th-congress/1.

Also on July 17, 2019, the U.S. Senate provided advice and consent to ratification of the Protocol Amending the Convention between the Government of the United States of America and the Government of Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and a related agreement entered into by an exchange of notes, both signed on January 24, 2013, at Washington, together with correcting notes exchanged March 9 and March 29, 2013. Treaty Doc. 114-1. 165 Cong. Rec. S4876 (2019). The text of the treaty and the resolution of advice and consent are available at https://www.congress.gov/treaty-document/114th-congress/1.

And, also on July 17, 2019, the Senate provided advice and consent to ratification of the Protocol Amending the Convention between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed on May 20, 2009, at Luxembourg and a related agreement effected by the exchange of notes also signed on May 20, 2009. Treaty Doc. 111-8. 165 Cong. Rec. S4771 (2019). The text of the treaty and the resolution of advice and consent are available at https://www.congress.gov/treaty-document/111th-congress/8.

On October 22, 2019, the U.S. Senate provided its advice and consent to ratification of the Protocol to the North Atlantic Treaty of 1949 ("NATO") on the

Accession of North Macedonia. 165 Cong. Rec. S5942 (2019). The test of the treaty and the resolution of advice and consent are available at https://www.congress.gov/treaty-document/116th-congress/1/. See also discussion in Chapter 18.

2. ILC Draft Guide to Provisional Application of Treaties

On December 15, 2019, the United States provided comments on the International Law Commission's draft Guide to Provisional Application of Treaties, as adopted by the ILC on first reading in 2018 ("draft guidelines"). Excerpts follow (with most footnotes omitted) from the U.S. comments on the draft guidelines.

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General Observation

According to the Commission, the purpose of the draft guidelines is "to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties."

The United States considers the meaning of "provisional application" to be clear, settled, and generally well understood.[3] At its core, provisional application means that a State agrees to apply the treaty, or certain provisions thereof, on a legally binding basis prior to the treaty's entry into force for that State. It differs from entry into force of a treaty in one seminal respect: as a general matter, a State or international organization may terminate obligations arising from the provisional application of a treaty more easily than terminating the treaty after its entry into force.

The United States is pleased that the draft guidelines are in general accord with this view of provisional application. While we believe that the draft guidelines helpfully confirm the basic features of the legal regime regarding provisional application of treaties, we have concerns that in some areas, the draft guidelines and accompanying commentary make claims that are not supported by State practice. In these areas, we have concerns that the draft guidelines risk creating confusion about the state of the law and undermining the draft guidelines' purpose. Our observations focus on those draft guidelines and accompanying commentary that most implicate those concerns.

General Commentary

As with any Commission project, a threshold question arises regarding the character of the draft guidelines. The Commission has not proposed the draft guidelines as draft articles for a treaty on the provisional application of treaties, which might entail a corresponding

[3] Article 25 of the Vienna Convention on the Law of Treaties of 1969 (the "1969 Vienna Convention"), which the United States considers to reflect customary international law, provides that:

1. A treaty, or a part of a treaty is applied provisionally pending its entry into force if:
   a. the treaty itself so provides; or
   b. the negotiating States have in some other manner agreed.
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is applied provisionally of its intention not to become a party to the treaty

recommendation to States that they consider adopting such a treaty. Rather, the draft guidelines appear to reflect observations by the Commission on questions related to provisional application. In some instances, the Commission finds support for these observations in examples of State practice with regard to provisional application. In other instances, as acknowledged by the Commission in the commentary to particular draft guidelines, the draft guidelines address topics on which the Commission has identified little or no relevant State practice.

Against this background, aspects of the Commission's commentary raise questions about the character of the draft guidelines. On the one hand, paragraph 4 of the General Commentary states that "[a]lthough the draft guidelines are not legally binding as such, they elaborate upon existing rules of international law in the light of contemporary practice." On the other hand, paragraph 5 goes on to state that, in elaborating the guidelines, the Commission sought to "avoid any temptation to be overly prescriptive" and observes that "in line with the essentially voluntary nature of provisional application … the guide recognizes that States ... may set aside, *by mutual agreement*, the solutions identified in the draft guidelines if they so decide." (Emphasis added.)

The United States agrees that the guidelines cannot be legally binding as such. There is therefore no basis for the suggestion that States would need specifically to agree to set aside the solutions identified in the draft guidelines in order to avoid those solutions applying. Except to the extent that the Commission's observations on a particular point reflect extensive and virtually uniform State practice such that States should regard the matter as having a customary character, States and the Commission should regard the observations contained in the Commission's draft guidelines as reflecting only the Commission's own views. While States may consider the guidelines as they see fit, they do not represent default rules that should be understood to apply unless States opt out of them.

More generally, the United States notes that the value of the draft guidelines depends principally on the extent to which the Commission has compiled examples of State practice to support them. Where the Commission has compiled such examples, the guidelines can usefully illustrate how States have approached particular issues. For clarity, it would be helpful for the Commission to indicate any instances in which it believes such State practice and accompanying *opinio juris* meets the standard required to establish a customary law rule, and to distinguish those from instances in which there is insufficient practice and/or *opinio juris* to establish a customary rule. Even where no customary rule exists, the Commission's work to compile relevant practice in the area may nonetheless be helpful to States, as such practice may prove persuasive as they make their own decisions about how to handle analogous circumstances. Draft guidelines that are supported by limited or no State practice have much less utility, and the United States encourages the Commission to consider carefully whether they merit inclusion in the project at all. Guidelines not supported by significant State practice can only be understood as reflecting the Commission's own views for the progressive development of the law, and should be clearly identified as such if the Commission decides to include them.

Comments on Specific Provisions of the Draft Guidelines, accompanying commentary or both.

Draft Guideline 3 - General Rule

The Commission's approach to draft guideline 3 raises two principal matters of concern: the necessary parties to an agreement for a treaty to be provisionally applied and whether a State may provisionally apply a treaty pending its entry into force for that State after the treaty has entered into force for other States.

First, we address the "necessary parties" concern. As expressed in Article 25(1) of the 1969 Vienna Convention, a treaty is applied provisionally if the treaty itself so provides or if "the negotiating States have in some other manner so agreed." Draft Guideline 3 omits the reference to "the negotiating States" and in so doing creates uncertainty and potential confusion about the necessary parties to an agreement regarding provisional application of a treaty. The United States understands the reference to "the negotiating States" to be designed to ensure that all those States that would have rights or obligations under the provisional application of a treaty have consented to such provisional application. The issue of the necessary parties to an agreement for the provisional application of a treaty is a fundamental one, and the United States regards it as essential that the Commission accurately address it in a draft guideline purporting to articulate the "general rule" with regard to provisional application.

Second, the draft guideline does not make clear that a State may provisionally apply a treaty pending the treaty's entry into force for that State, even if the treaty has entered into force for other States. Draft guideline 3 does not address this particular circumstance. Yet there is ample support for States provisionally applying treaties that are in force for other States, and the Commission acknowledges as much in paragraph 5 of the commentary. That acknowledgement, without addressing in the guideline itself the matter described in the first sentence of this paragraph, is not sufficient.

In order to address these concerns, we recommend that the Commission revise the draft guideline to read as follows, and delete paragraph 5 of the commentary in its entirety:

> "A treaty or part of a treaty may be provisionally applied by a State or international organization, pending its entry into force for that State ~~between the States~~ or international organizations ~~concerned~~, if the treaty itself so provides, or if in some other manner ~~it has been~~ so agreed~~.~~ by all States or international organizations incurring rights and obligations pursuant to the provisional application of the treaty.

Third, we have concerns about the following observation contained in paragraph 7 of the commentary that accompanies this draft guideline:

> "Furthermore, the draft guideline envisages the possibility of a third State or international organization, completely *unconnected to the treaty*, provisionally applying it after *having agreed in some other manner with one or more States* or international organizations concerned." (Emphasis added.)

It is unclear what this sentence means, and the commentary cites no examples of State practice involving the provisional application of a treaty in the manner described. What does it mean to have a State "unconnected to the treaty" provisionally apply the treaty? What does "having agreed in some manner with one or more States or international organizations concerned" mean in this context? Would it be legally sufficient for a third State completely unconnected to the treaty to provisionally apply the treaty with the agreement of one, but not all, other States that are incurring rights and obligations pursuant to such provisional application? These are but few of the questions raised and left unanswered by paragraph 7 of the Commission's commentary. Accordingly, in the absence of language in the commentary that adequately addresses these questions, or otherwise clarifies the Commission's thinking in a manner that treaty law and practice support, we strongly urge the deletion of this sentence.

Draft Guideline 4 – Form of Agreement

We have several concerns regarding draft guideline 4, which is intended to address the form of agreement that could effectuate the provisional application of a treaty or parts thereof. This guideline attempts to explain the reference to "in some other manner it has been so agreed" as it appears in draft guideline 3 and in Article 25, paragraph 2, of the 1969 Vienna Convention.

The principal substance of the draft guideline is contained in subparagraph (b), which makes the assertion that two specific forms of "means or arrangements" may satisfy the Vienna Convention standard:

- "a resolution adopted by an international organization or at an intergovernmental conference"; and
- "a declaration by a State or international organization that is accepted by the other States or international organizations concerned."

The United States is concerned about the draft guideline's treatment of each of these elements.

First, the discussion of resolutions adopted by an international organization or at an intergovernmental conference risks creating confusion as to the applicable standard for an agreement to apply a treaty provisionally. In particular, the draft guideline suggests that there is some particular significance to resolutions adopted at international conferences for the purposes of establishing valid agreements for provisional application of treaties. An agreement to apply a treaty provisionally requires the consent of all States (and international organizations) assuming rights and obligations pursuant to that provisional application. A resolution adopted at an international conference can establish provisional application obligations only if all such States express their consent to its adoption. Resolutions adopted by an international conference that do not reflect the consent of all States assuming rights and obligations pursuant to provisional application – such as those adopted without the participation of or without the consent of all relevant States – would not establish a valid agreement for provisional application in respect of those States. The key consideration is not the mechanism through which States reach an agreement to apply a treaty provisionally, but rather whether all the necessary parties have consented to the agreement.

In this regard, the United States does not regard many of the examples cited in the commentary as meeting this condition. The commentary does not discuss whether all States among whom provisional application rights and obligations are asserted to have been created participated in the adoption of the resolutions discussed. Moreover, the commentary does not identify instances in which States – as opposed to international organizations – have sought to rely on provisional application rights or obligations asserted to have been created in the instances it cites, and thus the effectiveness of the resolutions in establishing such rights and obligations has not been demonstrated.

In a number of other instances, the examples cited in footnote 1020 to the commentary do not support the view that States have used resolutions as means of establishing provisional application where not otherwise provided for in the treaty. For example:

- The agreements on Olive Oil and Table Olives, Tropical Timber, and Cocoa, all provide for provisional application in the terms of the treaties themselves, rather than provisional application being established by resolution outside the treaty.
- The commentary misattributes views expressed in a working paper prepared by the Secretariat of the UN Framework Convention on Climate Change as representing the

views of the parties to the Kyoto Protocol. The Secretariat paper was prepared two years prior to the adoption of the amendments to the Kyoto Protocol and does not represent views or language adopted by the Parties, nor does it reflect what Parties decided to do two years later when they adopted the amendment at issue. Moreover, as noted above, there is no evidence that all States that would potentially incur rights or obligations under the provisional application regime actually consented to the adoption of the resolution. In any case, it appears that no State has, in fact, submitted a declaration claiming to apply the amendment provisionally, so there is no practice to illustrate whether and to what extent legally effective provisional application obligations would be created through this mechanism.

- The Comprehensive Nuclear-Test-Ban Treaty (CTBT) example does not involve provisional application based on agreement reached 'in some other manner,' or support the proposition of 'implied provisional application.' As footnote 1020 of the commentary acknowledges, there is no consensus that the 1996 resolution of the CTBT States Signatories that founded the CTBTO Preparatory Commission in fact provisionally applied the treaty, such that CTBT obligations became binding on signatories prior to entry into force of the treaty. No such intention to provisionally apply the treaty's provisions is clearly stated in the resolution itself, and it would be surprising if such an intention *was* stated, given that the negotiating States had affirmatively decided against including a mechanism for provisional application in the treaty.
- The Inmarsat example similarly does not involve "provisional application" based on agreement reached "in some other manner." In 1998, the Twelfth Session of the Inmarsat Assembly of Parties, adopted amendments to the Convention deemed necessary to effect Inmarsat's privatization. Recognizing that the time involved to formally bring the amendments into force would substantially delay the privatization, the Parties reached a separate legally-binding agreement to "rapidly implement" amendments deemed necessary to effect Inmarsat's privatization, to the extent permitted by their respective national constitutions, laws and regulations. In the lead up to the Assembly, the Parties had debated whether "provisional application" was the means through which privatization would be effected. The United States, among others, argued against use of that term to characterize what the Parties were contemplating. Implicit in the concept of provisional application is the notion that a Party may at any point, prior to the entry into force of a treaty, express its intent not to be bound by the treaty or amendments thereto. In the case of Inmarsat, it would have been difficult, if not impossible, for a Party that had agreed to Inmarsat's privatization at the Assembly thereafter to express its intent not to be bound to that agreement without there being a fundamental change to the pre-privatization status quo. There was nothing provisional about what was agreed at the Assembly.

In sum, we believe that the examples cited in footnotes to this draft guideline should be reviewed carefully and maintained only to the extent that they support the proposition for which they are cited. If the Commission cannot establish that they are reflective of provisional application as understood under current law or State practice, it should omit them altogether.

The draft guideline's assertion with respect to the second alternative form for establishing a provisional application agreement – a declaration by a State or international organization that is accepted by the other States or international organizations concerned – is not grounded in law or

practice. The commentary to the draft guideline acknowledges the lack of support for this claim by noting that practice relating to provisional application through such declarations "is still quite exceptional." The commentary cites only one example of practice to support this assertion. However, the example it cites – related to a declaration of the Syrian Arab Republic in respect of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction – does not involve the provisional application of a treaty. The Convention does not contain a provision on provisional application. In the example cited by the Commission, Syria deposited an instrument of accession stating that it "shall comply with the stipulations contained [in the Convention] and observe them faithfully and sincerely, applying the Convention provisionally pending its entry into force for the Syrian Arab Republic." In the U.S. view, the Syrian statement constituted a unilateral undertaking on the part of Syria that did not afford Syria rights *vis-à-vis* the States Parties to the Convention, nor impose obligations on them. As noted in the commentary itself, this is a case "in which the treaty does not require the negotiating or signatory States to apply it provisionally, but leaves open the possibility for each State to decide whether or not it wishes to apply the treaty." Whatever set of legal relationships are established by such an arrangement, they are not those of provisional application as that term is understood in the context of Article 25 of the 1969 Vienna Convention and customary international law.

For these reasons, the United States does not support inclusion of specific reference in draft guideline 4 to resolutions adopted by international organizations or conferences or to declarations made by States. We believe that, at a minimum, subparagraph (b) should be revised to make the limited statement that provisional application may be agreed through any means or arrangements other than a separate treaty that are accepted by *all* States or international organizations assuming rights or obligations in connection with the provisional application of the treaty. We recognize, however, that if limited in this way, the draft guideline would add little to the material already addressed in draft guideline 3. For this reason, the Commission may find it more appropriate to omit this draft guideline altogether.

Draft Guideline 6 – Legal Effect of Provisional Application

The United States appreciates the Commission's efforts to clarify the text of draft guideline 6, especially with regard to whether the provisional application of a treaty is the same as its entry into force. We concur with the Commission's view that these are separate concepts. However, we continue to have concerns about two aspects of the commentary accompanying this draft guideline.

First, for the reasons discussed above, we have concerns about the reference to draft guideline 4 that appears in the third sentence of paragraph 2 of the commentary. That sentence states, in relevant part, that the agreement to apply provisionally a treaty "may be expressed in the forms identified in draft guideline 4." In light of our concerns regarding draft guideline 4, we recommend deletion of the clause "which may be expressed in the forms identified in draft guideline 4."

Second, we doubt the necessity and utility of paragraph 6 of the commentary. As the Commission itself notes the "formulation adopted for draft guideline 6 was considered to be sufficiently comprehensive to deal" with the point whether provisional application can result in the modification of the content of a treaty. It is therefore difficult to understand the purpose that paragraph 6 serves and we therefore recommend its deletion.

Draft Guideline 7 - Reservations

The United States does not support including this draft guideline and urges its deletion. As reflected in its associated commentary, the Commission has not identified any State practice with respect to the making of reservations in the context of provisional application of treaties. This calls into question the relevance of the draft guideline, as it addresses an issue that States do not appear to encounter in practice. It also highlights that the draft guideline and accompanying commentary are not grounded in any actual legal authority, but instead represent the Commission's speculative thoughts on essentially academic questions.

Even if taken only as the Commission's own views, the Commission's draft guideline is not particularly helpful. It is premised on the unexplained and unsupported assertion that particular rules of the 1969 Vienna Convention should be understood to apply *mutatis mutandis* to the provisional application of treaties. The Commentary states that this is "meant to indicate the application of some, but not necessarily all, of the rules of the 1969 Vienna Convention applicable to reservations in the case of provisional application." However, the Commentary does little to explain what criteria should be used to determine which of those rules should be understood to apply and which should not. This approach does little to provide States a reasoned basis for assessing the value of the Commission's proposals on these points. Moreover, the Commission leaves unanswered how a hypothetical regime for reservations to provisional application would work in practice, including how such reservations might be filed, what rights other States might have to comment or object to them, and how those might be exercised.

For these reasons, we strongly share the views of those members of the Commission who have argued that a draft guideline and accompanying commentary on these issues are neither appropriate nor necessary, and we urge that they be deleted in their entirety.

Draft Guideline 9 – Termination and suspension of provisional application

The United States has concerns with paragraph 3 of this draft guideline, and paragraphs 7, 8, 9 and 10 of the accompanying commentary.

Paragraph 3 provides in relevant part that "[t]he present draft guideline is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in Part V, Section 3 of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension."

The Commission in this instance states that its "without prejudice" formulation is:

> intended to preserve the possibility that provisions pertaining to termination and suspension in the 1969 Vienna Convention may be applicable to a provisionally applied treaty. However, the provision does not aspire to definitively determine which grounds in section 3 might serve as an additional basis for the termination of provisional application, or in which scenarios and to what extent those grounds would be applied. Instead, the rules of the Vienna Convention are to be 'applied *mutatis mutandis'* depending on the circumstances.

The Commission itself acknowledges, however, an "apparent lack of relevant practice" with regard to these issues. Accordingly, as with draft guideline 7, paragraph 3 and its accompanying commentary, draft guideline 9, paragraph 3, appears not to be grounded in any actual legal authority or practice.

In any case, we doubt whether it is necessary to "preserve the possibility that provisions pertaining to termination and suspension in the 1969 Vienna Convention may be applicable to provisional application." Article 25, paragraph 2 of the Vienna Convention on the Law of

Treaties, which the United States considers to be reflective of customary international law, expressly addresses the circumstances under which States may terminate provisional application. A State may terminate provisional application by notifying the other States that are provisionally applying the treaty of its intent not to become a party to the treaty. There is no need for additional, rules for termination of provisional application and, in fact, State practice appears to support the proposition that these rules are unnecessary.

Furthermore, paragraph 3 and the accompanying commentary contain little in the way of analysis or explanation to give States a basis for understanding the Commission's proposal. The draft guideline makes a blanket assertion that the provisions Part V, paragraph 3 of the Vienna Convention may apply generally to the termination and suspension of provisional application, but makes little attempt to explain why this should be so, or what application of these provisions would entail in practice. Rather than providing useful guidance or suggestions on how States might approach these issues, paragraph 3 would create substantial confusion by suggesting the application of a set of legal rules that the Commission is unwilling or unable to explain.

For these reasons, the United States urges that the Commission delete paragraph 3 of the draft guideline, and paragraphs 7, 8, 9 and 10 of the accompanying commentary, in their entirety.

Draft Guidelines 10 and 11 – Internal law of States and rules of international organizations, and the observance of provisionally applied treaties, and Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

The United States does not have substantive concerns with the statements contained in draft guidelines 10 and 11. We note, however, that the Commission cites no State practice or other authority to support either guideline. Thus, while the positions reflected in these draft guidelines are sensible, we understand them to reflect the Commission's observations based on abstract reasoning rather than rules reflecting settled law.

Draft Model Clauses

Separately from the Draft Guidelines adopted by the Commission on first reading, the Special Rapporteur has also proposed in the Commission's 2019 annual report, for the Commission's consideration in 2020, draft model clauses on the provisional application of treaties. The United States does not find the proposed draft clauses particularly useful. They appear designed to serve as one size-fits-all formulations to address scenarios with multiple potential variations, and to apply uniformly to bilateral and multilateral treaties. The resulting clauses would require further adaptation and elaboration in just about any case in which they were to be used, substantially limiting their value as drafting models.

If the Commission wished to provide assistance to States in drafting provisional application clauses, a more useful approach would be to identify key elements that are frequently part of provisional application clauses, and to list examples of ways in which those elements have been addressed in actual treaties, including both bilateral and multilateral treaties. Such an exercise could be further enhanced by commentary that provides insight on whether particular formulations have proven more effective than others, and identifies particular interpretive difficulties States might wish to keep in mind when drafting clauses addressing such elements.

* * * *

B. CONCLUSION, ENTRY INTO FORCE, ACCESSION, WITHDRAWAL, TERMINATION

1. United States Withdrawal from the INF Treaty

On February 2, 2019, the United States gave notice of its withdrawal from the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles signed at Washington December 8, 1987 ("INF Treaty"). The operative paragraphs of the February 2, 2019 diplomatic note from the Department of State to the Embassy of the Russian Federation follow. For U.S. communications in 2018 regarding Russia's breach of the INF Treaty, see *Digest 2018* at 117-18 & 769-74. See Chapter 19 of this *Digest* for statements by the Secretary of State regarding U.S. withdrawal from the INF Treaty.

* * * *

In December 2018, the United States informed INF Treaty Parties that, as a consequence of the Russian Federation's material breach of its obligations under the INF Treaty, and in view of the urgent need to pursue expeditiously all measures necessary to protect U.S. national security, the United States would suspend its obligations under the Treaty as between the United States and other Treaty Parties, effective 60 days from December 4, unless the Russian Federation returns to full and verifiable compliance. As of February 2, 2019, it is apparent that the Russian Federation has failed to return to full and verifiable compliance with its obligations under the Treaty. To the contrary, the Russian Federation has continued to produce and field new units of the INF Treaty-noncompliant 9M729 missile system. Accordingly, the United States has suspended its obligations under the Treaty effective February 2.

Article XV, Paragraph 2, of the INF Treaty gives each Party the right to withdraw from the Treaty if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized its supreme interests. Taking into account the foregoing, and referring to Diplomatic Note No. 123/2018, the United States has decided that extraordinary events related to the subject matter of the Treaty arising from Russia's continued noncompliance have jeopardized the United States' supreme interests. The current situation, in which the Russian Federation continues to violate the Treaty while the United States abides by it, is untenable. Therefore, in the exercise of the right to withdraw from the Treaty provided in Article XV, Paragraph 2, the United States hereby give notice of its withdrawal from the Treaty. In accordance with the terms of the Treaty, U.S. withdrawal will be effective six months from the date of this note.

* * * *

2. Postal Services

As discussed in *Digest 2018* at 113-14 and 472-75, the United States sought modernization of the Universal Postal Union ("UPU") and provided notice of its withdrawal, set to take effect in October 2019, unless appropriate reforms were made to the system of reimbursement for the delivery of international mail. Specifically, the

United States sought the ability to self-declare its reimbursement rates for the delivery of inbound international bulky letters and small packages, rather than having those rates set by the UPU. In September 2019, the UPU convened an Extraordinary Congress in Geneva, Switzerland--only the third in its history--to discuss the reforms sought by the United States.

At that Congress, the UPU adopted by consensus reforms to the system for reimbursement of international mail, allowing the United States to self-declare its rates for inbound bulky letters and small packages from many countries, starting in July 2020. The United States accordingly revoked its withdrawal from the UPU and remained a member of that organization. On October 16, 2019, President Trump met with Bishar Abdirahman Hussein, Director General of the International Bureau of the UPU, and presented him with a letter from Secretary Pompeo officially revoking the United States' denunciation of the UPU Constitution. The text of that letter follows.

* * * *

I have the honor on behalf of the Government of the United States of America to refer to the Constitution of the Universal Postal Union adopted at Vienna, July 10, 1964, as amended (the UPU Constitution).

By letter dated October 15, 2018, I provided notification, on behalf of the United States of America, of its denunciation of the UPU Constitution and, thereby, its withdrawal from the Universal Postal Union. Pursuant to Article 12 of the UPU Constitution, the withdrawal of the United States was to become effective one year from the date of that notification.

This letter constitutes notification by the Government of the United States of America that it hereby revokes its previously communicated denunciation of the UPU Constitution, effective immediately. Accordingly, the denunciation shall not take effect and the United States shall remain a party to the UPU Constitution and a member of the Universal Postal Union. I respectfully request your written confirmation of receipt of this notice.

* * * *

On November 15, 2019, the Department of State announced the renewal of the charter of the Advisory Committee on International Postal and Delivery Services ("IPODS") for an additional two years, until November 14, 2021. See November 15, 2019 media note, available at https://www.state.gov/renewal-of-the-charter-for-the-advisory-committee-on-international-postal-and-delivery-services/. As explained in the media note:

> IPODS assists the Department in maintaining constructive interaction with the U.S. Postal Service and other international postal service providers. It provides advice on U.S. foreign policy related to international postal and other delivery services.

3. Marrakesh Treaty

For background on the Marrakesh Treaty to Facilitate Access to Public Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, Done at Marrakesh on June 27, 2013 (Treaty Doc.: 114-6), Submitted to the Senate on February

10, 2016, see *Digest 2018* at 116-17 (State Department testimony in support of the treaty); *Digest 2016* at 507; and *Digest 2013* at 335-36.

The Marrakesh Treaty received Senate advice and consent to ratification on June 28, 2018. After the President and Secretary of State signed the instrument of ratification for the Marrakesh Treaty in January 2019, the U.S. Mission in Geneva deposited the instrument at the World Intellectual Property Organization ("WIPO") on February 8, 2019. The United States became the 50th member to join the Marrakesh Treaty. By its terms, the Treaty entered into force for the United States on June 8, 2019.

4. Arms Trade Treaty

For background on the Arms Trade Treaty, see *Digest 2016* at 926-27; *Digest 2015* at 883-84; *Digest 2013* at 710-15; and *Digest 2012* at 674-79. On April 29, 2019, the President sent a message to the Senate indicating that:

> I have concluded that it is not in the interest of the United States to become a party to the Arms Trade Treaty (Senate Treaty Doc. 114-14, transmitted December 9, 2016). I have, therefore, decided to withdraw the aforementioned treaty from the Senate and accordingly request that it be returned to me.

165 Cong. Rec. S2483 (Apr. 29, 2019).

On June 15, 2019, Secretary of State Michael R. Pompeo sent a letter to UN Secretary-General António Guterres to inform him that the United States would not become a party to the Arms Trade Treaty. The body of the letter follows.

* * * *

This is to inform you, in connection with the Arms Trade Treaty, done at New York on April 2, 2013, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on September 25, 2013.

The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty, and all other publicly available media relating to the treaty be updated to reflect this intention not to become a party.

* * * *

C. LITIGATION INVOLVING TREATY LAW ISSUES

1. *Nagarwala*: Federal Prosecution for Female Genital Mutilation

In *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018), the defendants challenged the constitutionality of a federal statute under which they were indicted for their involvement in female genital mutilation ("FGM") procedures performed on girls. The United States argued that the federal criminalization of FGM was necessary and proper in carrying out the treaty power, specifically to implement certain provisions in

the International Covenant on Civil and Political Rights ("ICCPR"). The U.S. District Court for the Eastern District of Michigan rejected the U.S. government's arguments regarding the constitutionality of the statute and granted defendants' motion to dismiss the relevant counts of the indictment. Excerpts follow from the district court's opinion, in which the court discusses the necessary and proper clause of the U.S. Constitution and the relationship of the statute to identified provisions of the ICCPR. The opinion is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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* * * *

Article I, Section 8, Clause 18 of the Constitution grants Congress the power

> [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The Necessary and Proper Clause is not an independent grant of power, but it permits Congress to legislate to carry out powers enumerated elsewhere in the Constitution. *See United States v. Comstock*, 560 U.S. 126, 134 (2010) (noting that "whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power").

In the present case, the government argues that the relevant enumerated power resides in Article II, Section 2, Clause 2, which gives the President "Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur." Congress may pass legislation to effectuate a treaty, *see, e.g., Missouri v. Holland*, 252 U.S. 416 (1920), but only to the extent that the two are rationally related. *See United States v. Lue*, 134 F.3d 79, 84 (2nd Cir. 1998) (citing *McCulloch v. Maryland*, 17 U.S. 316 (1819)). Further, "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957). The treaty on which the government relies in the present case is the International Covenant on Civil and Political Rights ("ICCPR"), which the Senate ratified in 1992.

Specifically, the government points to two provisions of this treaty: Article 3, which calls on the signatories to "ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant"; and Article 24, which states that "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." The government argues that Congress, by enacting the FGM statute, acted reasonably to carry out these two treaty obligations.

The Court rejects the government's argument for two reasons. First, there is no rational relationship between the FGM statute and Article 3, which obligates member states "to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the

present Covenant." This article seeks to ensure equal civil and political rights (e.g., the freedom of expression, the right to participate in elections, and protections for defendants in criminal proceedings) for men and women, while the FGM statute seeks to protect girls aged seventeen and younger from a particular form of physical abuse. There is simply no rational relationship between Article 3 and the FGM statute. The latter does not effectuate the purposes of the former in any way.

The relationship between the FGM statute and Article 24 is arguably closer. As noted, that article states that "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." Still, the relationship between the FGM statute and Article 24 is tenuous. Article 24 is an anti-discrimination provision, which calls for the protection of minors without regard to their race, color, sex, or other characteristics. As laudable as the prohibition of a particular type of abuse of girls may be, it does not logically further the goal of protecting children on a nondiscriminatory basis.

Second, even assuming the treaty and the FGM statute are rationally related, federalism concerns deprive Congress of the power to enact this statute. In adopting the ICCPR, each member state obligated itself to "take the necessary steps, in accordance with its constitutional processes … to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant." ICCPR Art. 2 ¶ 2. The constitutional processes in the United States include the important—indeed, foundational—division of authority between the states and the federal government, as recognized in the report of the Senate Committee on Foreign Relations, which recommended that the Senate ratify this treaty subject to various reservations, understandings, and declarations. One of these understandings was

> [t]hat the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriated [sic] measures for the fulfillment of the Convention.

Defs.' Ex. S at 23 (Report of the Senate Committee on Foreign Relations dated Mar. 2, 1992). This understanding comported with one recommended by the Bush Administration, *see id.* at 9, which offered the following explanation:

> In light of Article 50 ("The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions"), it is appropriate to clarify that, even though the Covenant will apply to state and local authorities, it will be implemented consistent with U.S. concepts of federalism.
>
> ***
>
> The proposed understanding serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between the State and Federal governments or to use the provisions of the Covenant to "federalize" matters now within the competence of the States.

Id. at 17-18.

One aspect of this constitutional balance is that the "States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993). In the same vein, the Supreme Court has noted that in the area of "criminal law enforcement … States historically have been sovereign," *United States v. Lopez*, 514 U.S. 548, 564 (1995), and that "[t]he Constitution … withhold[s] from Congress a plenary police power." *Id.* at 566. In *United States v. Morrison*, 529 U.S. 598, 615, 618 (2000), the Court noted the "Constitution's distinction between national and local authority" and that "[t]he regulation and punishment of intrastate violence … has always been the province of the States." Further, "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* at 618.

In *Bond v. United States*, 572 U.S. 844 (2014), the Supreme Court commented on the interplay between Congress' authority to implement a treaty and the restraint on that authority imposed by federalism concerns. In that case, defendant was charged with violating the Chemical Weapons Convention Implementation Act, which Congress passed to effectuate the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. The Court found it unnecessary to rule on the constitutionality of the statute, as it determined that defendant's use of certain chemicals did not come within the statute's definition of a chemical weapon. Nonetheless, the Court's comments on the federalism issue bear repeating:

> There is no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond's common law assault.
>
> Even if the treaty does reach that far, nothing prevents Congress from implementing the Convention in the same manner it legislates with respect to innumerable other matters–*observing the Constitution's division of responsibility between sovereigns and leaving the prosecution of purely local crimes to the States*. The Convention, after all, is agnostic between enforcement at the state versus federal level: It provides that "[e]ach State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention." Art. VII(1), 1974 U.N.T.S. 331 (emphasis added); see also Tabassi, National Implementation: Article VII, in Kenyon & Feakes 205, 207 ("Since the creation of national law, the enforcement of it and the structure and administration of government are all sovereign acts reserved exclusively for [State Parties], it is not surprising that the Convention is so vague on the critical matter of national implementation.").
>
> Fortunately, we have no need to interpret the scope of the Convention in this case. Bond was prosecuted under section 229, and the statute– unlike the Convention–must be read consistent with principles of federalism inherent in our constitutional structure.
>
> ***
>
> The Convention provides for implementation by each ratifying nation "in accordance with its constitutional processes." Art. VII(1), 1974 U.N.T.S. 331. As James Madison explained, the constitutional process in our "compound republic" keeps power "divided between two distinct governments." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961). If section 229 reached Bond's conduct, it would mark a dramatic departure

> from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States. Absent a clear statement of that purpose, we will not presume Congress to have authorized such a stark intrusion into traditional state authority.

Id. at 856, 866 (emphasis added). Characteristically, Justice Scalia's concurring opinion made the argument somewhat more pointedly:

> *Holland* places Congress only one treaty away from acquiring a general police power.
>
> The Necessary and Proper Clause cannot bear such weight. As Chief Justice Marshall said regarding it, no "great substantive and independent power" can be "implied as incidental to other powers, or used as a means of executing them." *McCulloch v. Maryland*, 4 Wheat. 316, 411, 4 L.Ed. 579 (1819); see Baude, Rethinking the Federal Eminent Domain Power, 122 Yale L.J. 1738, 1749–1755 (2013). *No law that flattens the principle of state sovereignty, whether or not "necessary," can be said to be "proper."* As an old, well-known treatise put it, "it would not be a proper or constitutional exercise of the treaty-making power to provide that Congress should have a general legislative authority over a subject which has not been given it by the Constitution." 1 W. Willoughby, The Constitutional Law of the United States § 216, p. 504 (1910).

Id. at 879 (Scalia, J., concurring in the judgment) (emphasis added; footnotes omitted).

Application of these principles to the present case leads to the conclusion that Congress overstepped its bounds by legislating to prohibit FGM. Like the common law assault at issue in *Bond*, FGM is "local criminal activity" which, in keeping with longstanding tradition and our federal system of government, is for the states to regulate, not Congress. *Id.* at 848. Therefore, even accepting the government's contention that the criminal punishment of FGM is rationally related to the cited articles of the ICCPR, federalism concerns and the Supreme Court's statements regarding state sovereignty in the area of punishing crime—and the federal government's lack of a general police power—prevent Congress from criminalizing FGM. "[T]he principle that [t]he Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States is deeply ingrained in our constitutional history." *Morrison*, 529 U.S. at 618 n.8 (internal quotation marks omitted). The FGM statute cannot be sustained under the Necessary and Proper Clause.

* * * *

On April 10, 2019, the U.S. Department of Justice wrote to the U.S. Congress, consistent with 28 USC 530D, to inform Congress of the Department's decision not to appeal the district court's decision in *Nagarwala* and to propose amendments to address the constitutionality of the statute criminalizing FGM. The proposed amendments address the commerce clause as a purported basis for federal legislation, rather than the necessary and proper clause. The letter is excerpted below and available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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* * * *

Consistent with 28 U.S.C. 530D, I write to call your attention to the above-referenced decision of the United States District Court for the Eastern District of Michigan. A copy of the decision is attached.

This case is the first federal prosecution under 18 U.S.C. l 16(a), which prohibits female genital mutilation (FGM). Section 116(a) makes it a criminal offense to "knowingly circumcise[], excise[], or infibulate[] the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years." *Ibid.* The district court dismissed the FGM charges, holding that Section 116(a) is beyond Congress's power. First, the court concluded that Section 116(a) is not necessary and proper to effectuate an international treaty under *Missouri* v. *Holland,* 252 U.S. 416 (1920). The court rejected the government's argument that the provision was rationally related to implementing the United States' obligations under the International Covenant on Civil and Political Rights (ICCPR), *done,* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368. Second, the court relied on *United States* v. *Lopez,* 514 U.S. 549 (1995), and *United States* v. *Morrison,* 529 U.S. 598 (2000), to hold that Section 116(a) was beyond Congress's power under the Commerce Clause. The court found that FGM was not an economic activity but was instead a form of physical assault, and that the statute adding Section 116(a) to the U.S. Code was unaccompanied by detailed, record-based findings from which a court could determine that FGM substantially affects interstate commerce. The court further emphasized that, unlike many federal criminal statutes, Section 116(a) does not include any jurisdictional elements, such as a requirement that the charged offense have an explicit connection with, or effect on, interstate commerce.

Section 116(a) targets an especially heinous practice—permanently mutilating young girls—that should be universally condemned. FGM is a form of gender-based violence and child abuse that harms victims not only when they are girls, suffering the immediate trauma of the act, but also throughout their lives as women, when it often results in a range of physical and psychological harms. See Act of Sept. 30, 1996, Pub. L. 104-208, Div. C., Tit. VI, § 644(a), 110 Stat. 3009-708 (18 U.S.C. 116 note). The Centers for Disease Control and Prevention estimates that half a million women and girls in the United States have already suffered FGM or are at risk for being subjected to FGM in the future. See Howard Goldberg et al., Centers for Disease Control and Prevention, *Female Genital Mutilation/Cutting in the United States,* 131 Public Health Reports 340 (2016). The Department therefore condemns this practice in the strongest possible terms.

That said, the Department has reluctantly determined that—particularly in light of the Supreme Court's decision in *Morrison,* which was decided after Section 116(a)'s enactment—it lacks a reasonable defense of the provision, as currently worded, and will not pursue an appeal of the district court's decision. Instead, we urge that Congress act forthwith to address the constitutional problem, by promptly enacting the attached legislative proposal, which, in our view, would clearly establish Congress's authority to criminalize FGM of minors and ensure that this practice is prohibited by federal law.

First, the Department has determined that it lacks an adequate argument that Section 116(a), as it is currently written, is necessary and proper to the regulation of interstate commerce. Pursuant to the Commerce Clause, Congress can regulate and protect the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that "substantially affect interstate commerce." *Gonzales* v. *Raich,* 545 U.S. 1, 17 (2005). Unlike many federal criminal

statutes, however, Section 116(a) does not require proof of any nexus between the conduct at issue (performing FGM on minors) and interstate commerce—the critical defect found by the Supreme Court in *Morrison* and *Lopez.* Furthermore, although FGM can be performed in circumstances with commercial characteristics, FGM itself does not appear to be inherently an economic activity, and when performed purely locally, FGM does not appear to be "part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Ibid.*

Second, the Department has determined that it does not have an adequate argument that Section 116(a) is within Congress's authority to enact legislation to implement the ICCPR, which does not address FGM. None of the ICCPR's provisions references FGM at all. Nor do they provide a basis for the federal government itself (rather than the individual States) to criminalize FGM of minors by private parties. This case is therefore not analogous to *Holland,* which involved a treaty that more directly addressed the parties' obligation to protect certain migratory birds and to propose legislation to do so. See 252 U.S. at 431. Thus, even maintaining the full continuing validity of *Holland,* the Department does not believe it can defend Section 116(a) on this ground.

Although the Department has determined not to appeal the district court's decision, it recognizes the severity of the charged conduct, its lifelong impact on victims, and the importance of a federal prohibition on FGM committed on minors. Accordingly, the Department urges Congress to amend Section 116(a) to address the constitutional issue that formed the basis of the district court's opinion in this case. Specifically, concurrently with submitting this letter, the Department is submitting to Congress a legislative proposal that would amend Section 116(a) to provide that FGM is a federal crime when (1) the defendant or victim travels in or uses a channel or instrumentality of interstate or foreign commerce in furtherance of the FGM; (2) the defendant uses a means, channel, facility, or instrumentality of interstate commerce in connection with the FGM; (3) a payment is made in or affecting interstate or foreign commerce in furtherance of the FGM; (4) an offer or other communication is made in or affecting interstate or foreign commerce in furtherance of the FGM; (5) the conduct occurs within the United States' special maritime and territorial jurisdiction, or within the District of Columbia or a U.S. territory; or (6) the FGM otherwise occurs in or affects interstate or foreign commerce. In our view, adding these provisions would ensure that, in every prosecution under the statute, there is a nexus to interstate commerce.

* * * *

2. *Center for Biological Diversity*

As discussed in *Digest 2018* at 118-20, the Center for Biological Diversity ("CBD") filed suit against the Department of State in the U.S. District Court for the District of Columbia, alleging in part that the Department failed to comply with a reporting deadline under the United Nations Framework Convention on Climate Change ("UNFCCC"). On June 12, 2019, the court granted the U.S. motion to partially dismiss and denied CBD's motion for partial summary judgment. *CBD v. United States*, No. 18-cv-563 (D.D.C. 2019).

3. *United States v. Park*

On September 13, 2019, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *United States v. Joseph Park*,938 F.3d 354 (D.C. Cir.) The Court reversed the district court's dismissal of Park's indictment. Park, a U.S. citizen and convicted sex offender, moved to Vietnam in 2003. In 2017, a grand jury in D.C. indicted Park on one count of violating 18 U.S.C. 2423(c) ("the PROTECT Act"), which prohibits a U.S. citizen who "resides in a foreign country" from engaging in "illicit sexual conduct," including non-commercial sexual abuse of a minor and production of child pornography. Following his deportation from Vietnam and Thailand, Park returned to the United States, where he was arrested. The district court granted Park's motion to dismiss the indictment on the grounds that the statute exceeds Congress's authority. On appeal, the U.S. government argued: (1) Congress may regulate the production of a commodity (child pornography) as economic activity under the Foreign Commerce Clause; (2) even non-commercial sexual abuse has a "demonstrable effect" on foreign commerce, including sex tourism and child trafficking; (3) the prohibition on producing child pornography is a valid exercise of Congress's treaty power to implement the Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, which specifically calls on states to ban child pornography production; and (4) for the same reasons non-commercial child sexual abuse affects commerce, it is within the sphere of conduct the Optional Protocol sought to eradicate and also falls within the treaty power.

Excerpts follow from the discussion of the treaty power in the opinion of the D.C. Circuit panel, which adopts the arguments in the U.S. government's brief. The separate concurrence (not excerpted herein) relates not to the treaty discussion but to the foreign commerce clause.

* * * *

The government argues on appeal that Congress's treaty power and the Foreign Commerce Clause support the application of 18 U.S.C. § 2423 to Park's conduct in Vietnam. Accordingly, we must determine whether the PROTECT Act, as applied to Park, is a "necessary and proper means to" implement the Optional Protocol, *Missouri v. Holland*, 252 U.S. 416, 432 (1920), or whether it falls within the scope of Congress's foreign commerce powers. Our review is de novo. *See Hodge v. Talkin*, 799 F.3d 1145, 1155 (D.C. Cir. 2015); *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488 (D.C. Cir. 2008).

We start from the premise that "the 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). A court must be able to discern a basis for Congress's exercise of an enumerated power, but that does not mean that a "law must be struck down because Congress used the wrong labels" or failed to identify the source of its power. *Id.* at 569- 70. …

Congress's power to legislate may also stem from more than one enumerated power. *See United States v. Morrison*, 529 U.S. 598, 607 (2000) (noting that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution"); ... Where, as here, Congress's treaty and Commerce Clause powers dovetail, both powers may

provide support for the constitutionality of Congress's actions, *see Lara*, 541 U.S. at 200-02, which in our view makes it appropriate to examine all potential sources…

A. Congress's treaty power reaches Park's conduct.

Article II of the Constitution empowers the President to make treaties with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. The Necessary and Proper Clause, U.S. Const. art I, § 8, cl. 18, in turn, confers on Congress the "power to enact such legislation as is appropriate to give efficacy to … treat[ies]" made by the President with the advice and consent of the Senate. *Neely v. Henkel*, 180 U.S. 109, 121 (1901). In Justice Holmes's memorable formulation, "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." *Holland*, 252 U.S. at 432. Congress's power to enact legislation it deems necessary and proper to implement a valid treaty is commonly referred to as the "treaty power." *Lara*, 541 U.S. at 201.

"[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 560 U.S. 126, 134 (2010) (citing *Sabri v. United States*, 541 U.S. 600, 605 (2004)). The inquiry is "simply 'whether the means chosen are "reasonably adapted" to the attainment of a legitimate end.'" *Id.* at 135 (quoting *Raich*, 545 U.S. at 35 (Scalia, J., concurring in judgment)). In this case, the "legitimate end" is implementation of the Optional Protocol. If it is apparent that the means Congress has chosen are "convenient, or useful, or conducive" to effectuate a valid treaty, *id.* at 134-35 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 413), then "the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone," *id*. at 135 (quoting *Burroughs v. United States*, 290 U.S. 534, 548 (1934)).

Accordingly, to determine whether the challenged provisions as applied to Park are within the scope of federal authority, we consider whether they are rationally related to implementing the Optional Protocol's goals. These goals include not only, as the district court observed, 297 F. Supp. 3d at 180, combating the "international traffic of children," but also "eliminat[ing] … child prostitution and child pornography," and addressing international "sex tourism," Optional Protocol, preamble. Because the government charged Park with only one count, which encompasses both Park's child pornography production and child sex abuse, the indictment stands so long as Congress had the authority to reach either type of conduct. We hold that both applications are constitutionally valid exercises of Congress's treaty power.

Each of the provisions under which he is charged— criminalizing production of child pornography by a U.S. citizen residing abroad, 18 U.S.C. §§ 2423(c), (f)(3), and non-commercial child sexual abuse by a U.S. citizen residing abroad, *id.* §§ 2423(c), (f)(1)—helps to eradicate the sexual exploitation of children that the Optional Protocol targets. Each provision is therefore rationally related to fulfilling the United States' obligations under the treaty.

1. The PROTECT Act's prohibition against United States citizens producing child pornography while residing abroad is rationally related to implementing the Optional Protocol.

The PROTECT Act's prohibition against U.S. citizens producing child pornography while residing abroad rationally relates to two aspects of the Optional Protocol. First, the Optional Protocol requires the States Parties to criminalize the production of child pornography. Second, it empowers them to exercise jurisdiction over the pertinent offenses of their nationals

regardless of where the offenses occur. The Protocol thus constitutionally supports indictment of Park, a U.S. citizen, for producing child pornography in Vietnam.

The Optional Protocol directs the States Parties to criminalize the production of child pornography. Each State Party "shall prohibit … child pornography as provided for by the present Protocol," Optional Protocol, art. 1, including specifically prohibiting the "[p]roducing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography," *id.* art.3(1)(c). By criminalizing the "production of child pornography" by U.S. citizens abroad, 18 U.S.C. § 2423(f)(3), the PROTECT Act is rationally related to implementing the Optional Protocol.

Park objects that the Optional Protocol is concerned only with commercial child pornography, so the PROTECT Act's ban on child pornography homemade for one's own use, not bought or sold—*i.e.*, the type of conduct alleged against Park— is not rationally related to the implementation of the Protocol. The Protocol is not so confined. It calls on States Parties to prohibit the production of child pornography without limitation to any proven commercial conduct or plans.

"When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used," applying all "general rules of construction" to aid our understanding. *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (internal quotation marks and citation omitted). The preamble to the Optional Protocol states an ultimate goal of "elimination of … child pornography," without limitation to commercially traded images, such that even non-commercial production falls within its scope. Optional Protocol, preamble. The Optional Protocol also capaciously defines "child pornography" as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts." *Id.* art. 2(c).

The States Parties chose not to limit the Optional Protocol to commercial child pornography production for obvious reasons. As a practical matter, the line between possession of and trade in pornographic images is exceedingly fine and fragile. "[C]hild pornography is now traded with ease on the Internet" and, in the digital age, "the number of still images and videos memorializing the sexual assault and other sexual exploitation of children, many very young in age, has grown exponentially." *Paroline v. United States*, 572 U.S. 434, 440 (2014) (quoting Patti B. Saris et al., U.S. Sentencing Comm'n, *Federal Child Pornography Offenses* 3 (2012)). Child pornography stored online can be distributed worldwide almost instantaneously. *United States v. Sullivan*, 451 F.3d 884, 891 (D.C. Cir. 2006).

Commercial transactions in child pornography can be difficult if not impossible to establish where no traceable payment means is used. …Criminalizing production only where there is proof of a monetary transaction or commercial purpose would be a mere half measure toward halting the supply of child pornography available to the illegal market, and so fall short in serving one of the primary purposes of the treaty: "the elimination … of child pornography." Optional Protocol, preamble.

That the treaty requires the criminalization of "[p]roducing, distributing, disseminating, importing, exporting, offering, selling or possessing *for the above purposes* child pornography," *id.* art. 3(1)(c) (emphasis added), does not, as Park suggests, limit its terms to child pornography produced for commercial distribution. He reads the phrase "for the above purposes" as confined to either the other "purposes" expressly identified in Article 3—"sexual exploitation of the child," "transfer of organs of the child for profit," or "engagement of the child in forced labor," *id.* art. 3(1)(a)(i)—or the general activities listed in subsections (a) and (b) of Article 3—the sale

of children and child prostitution, *id.* art. 3(1)(a), (b). However, we typically apply the "rule of the last antecedent" when interpreting a text that "include[s] a list of terms or phrases followed by a limiting clause." *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016). Thus, "a limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). As used here, the phrase "for the above purposes" modifies only the last antecedent, "possessing," and references the listed purposes of "producing, distributing, disseminating, importing, exporting, offering, [and] selling" child pornography. UNICEF adopts this reading, in fact recognizing it as the one most protective of potential offenders: "Interpreted strictly, article 3(1)(c) of the [Protocol] obliges States Parties to punish the possession of child pornography only when this possession is 'for the above purposes'—producing, distributing, disseminating, importing, exporting, offering or selling." UNICEF, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography* 12 (2009); *see also id.* (noting that the "Committee on the Rights of the Child has nevertheless encouraged countries to prohibit simple possession"). Given its narrow scope, the phrase "for the above purposes" in no way limits to commercial production the Protocol's prohibition against "producing" child pornography.

Because the Optional Protocol, by its terms, reaches both commercial and non-commercial production of child pornography, the PROTECT Act's criminalization of non-commercial child pornography production plainly implements the treaty and is constitutional as applied to Park.

Congress's decision to apply the PROTECT Act to Americans who "reside[], either temporarily or permanently, in a foreign country," 18 U.S.C. § 2423(c), similarly fulfills the Optional Protocol's expectation that States Parties will take jurisdiction over the misdeeds of their nationals wherever they occur.

The Optional Protocol reflects agreement that each State Party "may take such measures as may be necessary to establish its jurisdiction" over offenses "[w]hen the alleged offender is a national of that State." Optional Protocol, art. 4(2). This type of jurisdiction, where a country prescribes law with respect to the "conduct, interests, status, and relations of its nationals and residents outside its territory," is known as "active personality jurisdiction" or "nationality jurisdiction." Restatement (Fourth) of Foreign Relations Law of the United States, § 402(1)(c), cmt. g & rep. note 7 (Am. Law Inst. 2018). Under international law, every nation has "jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy," and the United States is no exception. *Blackmer v. United States*, 284 U.S. 421, 437 n.2 (1932) (quoting L. Oppenheim, 1 *International Law* 281 (4th ed. 1926)). Congress retains authority over U.S. citizens residing abroad "[b]y virtue of the obligations of citizenship." *Id.* at 436; *accord United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936).

When the United States originally ratified the Protocol, however, it chose not to exercise its nationality jurisdiction over its citizens' conduct abroad. *See* Protocol Analysis at *23. The United Nations twice criticized the United States for that reticence, stressing that the United States must "establish its jurisdiction in all cases listed under article 4" of the Optional Protocol in order to "strengthen the framework for prosecution and punishment." 2013 Concluding Observations ¶ 39-40; 2008 Consideration of Reports ¶ 35-36. Congress could have rationally concluded that, to fully implement the United States' obligations under the Protocol, it needed to respond to international opprobrium by expanding the coverage of section 2423(c) to criminalize child pornography produced by U.S. citizens residing abroad. Indeed, in 2016, the United States cited the revised version of section 2423(c), reaching offenses by U.S. citizens residing abroad,

as evidence of its continuing efforts to fulfill its responsibilities under the Optional Protocol. *See* Dep't of State, *Combined Third and Fourth Periodic Report of the United States of America on the Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Sale of Children, Child Prostitution, and Child Pornography*, ¶ C-57 (Jan. 22, 2016).

Park objects that the PROTECT Act does not implement the Optional Protocol because, in his view, the "Protocol 'does not require the United States to criminalize the production of child pornography in *another* country.'" Appellee Br. 50 (quoting *Park*, 297 F. Supp. 3d at 181) (emphasis in *Park*). He contends that the Optional Protocol addresses only child pornography produced domestically within the United States or produced "transnationally," which he somewhat awkwardly reads to mean "between the United States and another nation." *Id.* at 45 (quoting Optional Protocol art. 3(1)). But "transnationally" is often used to mean simply "reaching beyond national boundaries," *see, e.g.*, Philip Jessup, *Transnational Law* 2 (1956) (defining "transnational law" to "include all law which regulates actions or events that transcend national frontiers"); *Transnational*, Black's Law Dictionary (2019) (defining "transnational" as "[i]nvolving more than one country"). The Protocol's coverage of both domestic and transnational offenses is naturally read as exhaustive, encompassing, for example, both what a citizen of one country does within his own country and what he does abroad. Indeed, this reading accords with the view of the United Nations itself, which has observed that "[e]xtraterritorial legislation is one of the key tools in combating [child sex tourism], as it allows legal authorities to hold nationals and citizens accountable for crimes committed abroad." 2012 U.N. Report at 11. The full text of the sentence Park quotes shows an intent to sweep broadly. In requiring States Parties to criminalize the specified conduct whether it is "committed domestically or transnationally or on an individual or organized basis," Optional Protocol, art. 3(1), the treaty calls for bans on that conduct no matter where it is committed, or by one person or many. The PROTECT Act's prohibition on the production of child pornography by U.S. citizens abroad is rationally related to the implementation of this final clause.

Moreover, it is unlikely that the States Parties intended Park's crabbed and ineffectual reading, which would criminalize domestic and "transnational" activity but not the acts of U.S. citizens within foreign countries. A "treaty is a contract … between nations," and its "interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent." *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014). Here, the text itself encourages the States Parties to go further than its bare terms. The same sentence on which Park relies also states that "[e]ach State Party shall ensure that, *as a minimum*" the conduct described is criminalized. Optional Protocol, art. 3(1). The preamble to the Optional Protocol further recognizes that "the elimination of the sale of children, child prostitution and child pornography" would require "a holistic approach." *Id.*, preamble. Where the text of a treaty "create[s] a floor, not a ceiling" in this manner, Congress may properly implement the treaty's intent by going further in its implementing legislation. *United States v. Belfast*, 611 F.3d 783, 807 (11th Cir. 2010). Accordingly, the "extraterritorial application" of the PROTECT Act, 18 U.S.C. § 2423(c), to Park's conduct while he was residing abroad is expressly permitted by the Optional Protocol.

2. The PROTECT Act's prohibition of child sexual abuse by United States citizens residing abroad is rationally related to implementing the Optional Protocol.

The Optional Protocol prohibits the "[o]ffering, obtaining, procuring or providing a child for child prostitution," Optional Protocol art. 3(1)(b), and defines "child prostitution" as "the use of a child in sexual activities for remuneration or any other form of consideration," *id.* art. 2(b).

As such, the Protocol does not itself specifically address non-commercial child sexual abuse. Nevertheless, the PROTECT Act's broader prohibition on child sex abuse by U.S. citizens residing abroad, including non-commercial crimes, 18 U.S.C. §§ 2424(c), (f)(1), was appropriate to combat commercial child sex tourism and control the problem of American sex offenders relocating and sexually abusing children abroad, thereby closing enforcement gaps that otherwise could have hindered the objectives of the Optional Protocol.

The Necessary and Proper Clause empowers Congress to fill "regulatory gaps" that could otherwise be left by its exercise of constitutionally enumerated legislative powers. *Sabri v. United States*, 541 U.S. 600, 607 (2004); *see United States v. Kebodeaux*, 570 U.S. 387, 395 (2013). Here, the Optional Protocol's goal of eliminating commercial child sexual exploitation, including global sex tourism, could be undercut if Congress failed to criminalize non-commercial child sex abuse by U.S. residents abroad. This is so for at least three reasons.

First, as a general matter, such a "loophole in the law" could encourage American sex tourists—who by some estimates comprise one quarter of all sex tourists globally—to go abroad seeking *non*-commercial sex with minors that, had it occurred in the United States, would be criminalized as statutory rape. "If Americans believe that traveling to a particular foreign country includes the opportunity for unregulated, non-commercial illicit sexual conduct, they may travel to that country when they otherwise would not … ." *United States v. Lindsay*, 931 F.3d 852, 863 (9th Cir. 2019); *see also United States v. Pendleton*, 658 F.3d 299, 311 (3d Cir. 2011). The "Constitution does not envision or condone" such "a vacuum" of power in which "citizens may commit acts abroad that would clearly be crimes if committed at home." *Bollinger*, 798 F.3d at 219.

Second, and relatedly, Congress might well have concluded that the PROTECT Act's prohibition of non- commercial sexual exploitation of minors by U.S. residents abroad was appropriate to ameliorate a specific externality of the United States' intensified domestic policing of child sexual abuse: the relocation to other countries of registered U.S. sex offenders and the risks such offenders may pose there. Until 2016, SORNA did not require registered sex offenders in the United States to update their sex offender registrations when they moved abroad. *See, e.g.*, *Nichols*, 136 S. Ct. at 1118. Consequently, "known child-sex offenders [were] traveling internationally," International Megan's Law § 2, and some relocated abroad to get out from under SORNA's registration requirements, *see, e.g.*, *Nichols*, 136 S. Ct. at 1117-18; *Lunsford*, 725 F.3d at 861-62. (After the events at issue here, Congress took further steps to address this externality, amending the law to require registered U.S. sex offenders to update their SORNA registrations when they plan to travel outside the United States, *see* 34 U.S.C. § 20914(a)(7); 18 U.S.C. § 2250(b).) When domestic legislation creates or exacerbates identified risks to treaty partners—*e.g.* when domestic counter-recidivism measures like SORNA lead U.S.-citizen sex offenders to move overseas and commit the very crimes the Protocol aims to eliminate—Congress's treaty power authorizes it to address that danger.

Third, Congress rationally could have concluded that the Optional Protocol's goal of eliminating global sex tourism involving minors would be undermined unless putatively non-commercial sex with minors were also criminalized. Congress was well aware that the *quid-pro-quo* in child prostitution is typically more indirect or hidden than for prostitution involving adults. If a U.S. national could travel overseas and entice a child with inchoate favors, valuable experiences, promised future benefits, meals, or other gifts—any of which might be difficult to establish as "consideration" in support of a child prostitution charge—deterrents against traveling internationally to sexually abuse children would be significantly weakened. The

statutory prohibition against non- commercial child sex abuse is therefore a "vital component" in the "PROTECT Act's larger scheme" to "curb the supply and demand in the sex tourism industry." *Durham*, 902 F.3d at 1214.

Congress's power to give the treaty practical effect against conduct like Park's is not confined to the Optional Protocol's minimum requirements. Again, the Protocol identifies the child sexual exploitation it targets and specifies "a floor, not a ceiling" on how signatories should address such exploitation by their nationals abroad. *See Belfast*, 611 F.3d at 807; *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998). The States Parties to the Optional Protocol recognized that the "elimination of . . . child prostitution" would require national lawmakers to take "a holistic approach, addressing the contributing factors," including "irresponsible adult sexual behaviour." Optional Protocol, preamble. The treaty therefore stipulates that criminalizing the conduct it identifies is "only a 'minimum' requirement." *Bollinger*, 798 F.3d at 219 (quoting Optional Protocol art. 3). In view of the Protocol's purpose and scope, it was reasonable for Congress in enacting the PROTECT Act "to determine that the non-commercial abuse of children is a factor that contributes to commercial sexual exploitation, and to regulate non-commercial conduct accordingly." *Id.* And it was therefore constitutional for Congress to reach Park's alleged conduct in this case.

Our conclusions regarding the treaty power comport with the fundamental constitutional principle that Congress may legislate only within the scope of its constitutionally conferred powers. The government may not simply point to any tangentially related treaty to defend a constitutionally suspect statute. There are at least two recognized limits to what Congress may legislate in the name of implementing a treaty. First, to be a valid exercise of the Necessary and Proper Clause, the treaty itself must be "legitimate," and the statute must be "plainly adapted to" the treaty. *McCulloch*, 17 U.S. (4 Wheat.) at 421. Second, implementing legislation must be both "not prohibited" by the Constitution and "consistent with the letter and spirit of the Constitution." *Id.* It is "well established that 'no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.'" *Boos v. Barry*, 485 U.S. 312, 324 (1988) (quoting *Reid v. Covert*, 354 U.S. 1, 16 (1957)). Though this inquiry is deferential, it is not toothless. Here, the PROTECT Act is plainly necessary and proper to implement the goals of the Optional Protocol.

Park argues for an additional limit. He claims that we must first assess "whether a statute is in fact implementing legislation," and argues that "§ 2423(c), originally and as amended, contains no indication that it is implementing the Protocol." Appellee Br. 38. To the extent any such nexus is required—and Park provides no support for this proposition— we find it satisfied here. The House Judiciary Committee recommended passage of what became the PROTECT Act just six days after the Senate ratified the Optional Protocol. And, as discussed, Congress passed later amendments to the PROTECT Act to address loopholes in the international regulatory scheme.

In addition, Park passingly suggests that Congress's treaty power is confined to helping the President make treaties, and that "[o]nce a treaty has been made, Congress's power to do what is 'necessary and proper' to assist the making of treaties drops out of the picture." *Id.* at 37 (quoting *Bond v. United States*, 572 U.S. 844, 876 (2014) (Scalia, J., concurring in the judgment)). According to that view, Congress "must rely upon its independent … Article I, § 8, powers" in order to "legislate compliance with the United States' treaty obligations." *Bond*, 572 U.S. at 876. But under *Missouri v. Holland*, 252 U.S. at 433-34, that is not the law. Under long

established treaty power doctrine, the PROTECT Act is constitutional as applied to Park's conduct abroad.

Cross References

Asylum Cooperative Agreements, **Ch. 1.C.3.**
Hague Abduction Convention cases, **Ch. 2.B.2.c.**
Extradition treaties, **Ch. 3.A.1.**
Aguasvivas v. Pompeo *(extradition treaty case),* **Ch. 3.A.4.**
Renegotiating Compacts of Free Association, **Ch. 5.E.**
ILC Draft Articles on Crimes Against Humanity, **Ch. 7.C.1.**
Inter-American Treaty of Reciprocal Assistance, **Ch. 7.D.1.**
Air transport agreements, **Ch. 11.A.1.**
U.S.-Mexico-Canada Agreement, **Ch. 11.D.3**
Tax treaties, **Ch. 11.F.2**
Maritime boundary treaties, **Ch. 12.A.3.**
Central Arctic Fisheries Agreement, **Ch. 13.B.1.a.**
Protocol to Amend the Atlantic Tunas Convention, **Ch. 13.B.1.b.**
Columbia River Treaty, **Ch. 13.C.5.**
Cultural property MOUs, **Ch. 14.A.**
Singapore Convention on Mediation, **Ch. 15.A.2.**
UN Convention on the Assignment of Receivables in International Trade, **Ch. 15.A.3.**
GE France v. Outokumpu Stainless USA, **Ch. 15.C.**
North Macedonia Accession to NATO, **Ch. 18.A.4.a.**
Agreements on nuclear safety, **Ch. 19.B.4.d.**
INF Treaty, **Ch. 19.C.5.**

CHAPTER 5

Foreign Relations

A. LITIGATION INVOLVING FOREIGN RELATIONS, NATIONAL SECURITY, AND FOREIGN POLICY ISSUES

Klieman v. Palestinian Authority

On February 15, 2019, the United States filed a brief in response to the court's order in *Klieman v. Palestinian Authority*, No. 15-7034, in the U.S. Court of Appeals for the D.C. Circuit. The case involves the question of personal jurisdiction over the Palestinian Authority ("PA"), including under the Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-253, 132 Stat. 3183 (2018) ("ATCA"). Excerpts follow from the February 15, 2019 U.S. brief (with most footnotes omitted). The brief is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

The United States files this response to the Court's February 6, 2019 Order to inform the Court that neither the "accepts" nor "continues to maintain" provisions of Section 4 of the Anti-Terrorism Clarification Act of 2018 (ATCA), have been satisfied. Section 4 thus does not operate to "deem" defendants to have consented to personal jurisdiction in this case, and this Court therefore need not address Section 4's constitutionality.

The United States respectfully submits that the Court should resolve the antecedent issue of whether the ATCA's factual predicates are satisfied before requesting the United States' views on the constitutional issue. …

1. Section 4 of the ATCA, Pub. L. No. 115-253, codified at 18 U.S.C. § 2334(e), provides that a defendant will be "deemed to have consented to personal jurisdiction" in a civil Anti-Terrorism Act case if, after the date that is 120 days after the enactment of the statute (i.e., January 31, 2019), the defendant (1) accepts specified forms of assistance under the Foreign Assistance Act of 1961, or, (2) "in the case of a defendant benefiting from a waiver or suspension of section 1003 of the Anti-Terrorism Act of 1987 (22 U.S.C. § 5202)," the defendant "continues to maintain" or "establishes" "any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States." 18 U.S.C. § 2334(e)(1).

2. On December 19, 2018, the Court invited the United States to file an amicus brief addressing whether Section 4 of ATCA is constitutional. The Court's order directed the United

States to "assume that the 'accepts' and or 'continues to maintain' provisions of Section 4 will be satisfied 'after the date that is 120 days after the date of enactment'" of the ATCA. *See* Dec. 19, 2018 Order.

On February 6, 2019, the Court instructed the parties to file supplemental briefs "updating their views on the current applicability of Section 4," including whether the 'accepts' and/or 'continues to maintain' provisions have been satisfied." *See* Feb. 6, 2019 Order. The Court also instructed the parties' supplemental briefs to address the views presented in the United States' amicus brief, due February 27, 2019. *Id.*

3. The United States writes to inform the Court that, as of February 1, 2019, and continuing to the present, the "accepts" and "continues to maintain" provisions of the ATCA are not satisfied.

First, as of February 1, 2019 and at all times since, defendants have not accepted foreign assistance provided under the legal authorities specified in Section 4. On December 26, 2018, the "Government of Palestine," which the United States understands to be speaking on behalf of defendants,[1] sent a letter to the State Department explicitly declining to accept the forms of foreign assistance enumerated in Section 4. *See* Ex. 1, Letter from Rami Hamdallah to U.S. Dep't of State (Dec. 26, 2018). Consistent with this request, the State Department ended all such assistance to the Palestinian Authority prior to February 1, 2019. *See* Ex. 2, Letter from the U.S. Dep't of State to Rami Hamdallah (Jan. 29, 2019). The State Department does not provide assistance under any of the foreign assistance authorities enumerated in section 4 to the Palestine Liberation Organization (PLO). Section 4's "accepts" provision is thus not satisfied.

Second, defendants do not currently "benefit" from a waiver of section 1003 of the Anti-Terrorism Act of 1987, including to "continue to maintain" "any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States" pursuant to such a waiver. 22 U.S.C. § 2334(e)(1)(B). Section 1003 makes it unlawful for the PLO "or any of its constituent groups" to "establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States." 22 U.S.C. § 5202. The Executive Branch has historically issued waivers of section 1003 on a six-month basis, permitting the PLO to maintain an office of the General Delegation of the PLO in Washington, DC. *See, e.g.*, Ex. 3, May 8, 2017 Waiver. The last waiver issued by the State Department expired in 2017, however, *id.*, and the State Department announced in 2018 that in the absence of a waiver, the PLO's office in Washington D.C. must close because "the PLO has not taken steps to advance the start of direct and meaningful negotiations with Israel," and has "refused to engage with the U.S. government with respect to peace efforts and otherwise." There is no waiver of section 1003 currently in effect, and the PLO's Washington office closed as of October 10, 2018. *See* Ex. 5, Letter from U.S. Dep't of State to Chief Representative, General Delegation of the PLO (Sept. 10, 2018).

The PLO continues to maintain its United Nations Observer Mission in New York. The PLO's maintenance of that office, however, could not fall within the terms of the ATCA, as there is no current waiver of section 1003. Since the enactment of section 1003, courts have held that its prohibition "does not apply … to the PLO's Mission in New York." *See, e.g.*, *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro*, 937 F.2d 44, 46 (2d Cir. 1991); *United States v. PLO*, 695 F. Supp. 1456, 1464–71 (S.D.N.Y. 1988). The Executive Branch does

[1] While the United States does not recognize a Palestinian state, the Department of State recognizes this letter as having been sent by the PA. Assistance is not provided to the PLO.

not issue waivers of section 1003 to permit the PLO to maintain its New York Observer Mission. Section 4's "continues to maintain" provision is thus not satisfied.

In sum, as of February 1, 2019 and since that date, defendants have not accepted any of the foreign assistance provided under the authorities enumerated in Section 4, and they do not currently "benefit" from a waiver of section 1003 of the Anti-Terrorism Act of 1987, including to maintain an office in the United States pursuant to such a waiver. Based on the facts of which the government is aware, there is no need for a remand to the district court. This Court can determine that the ATCA's statutory predicates are not satisfied, and thus Section 4 does not operate to "deem" the PA/PLO to have consented to personal jurisdiction in this case.

Accordingly, this Court need not address the constitutionality of the statute. …The Court should particularly avoid unnecessarily addressing the constitutional issue here, as it arises in the context of the conduct of foreign relations. The United States respectfully submits that the Court should resolve the antecedent issue of whether the ATCA's factual predicates are satisfied before requesting briefing on the constitutionality of Section 4 of the ATCA.

* * * *

On March 13, 2019, the United States filed an additional brief in *Klieman* in response to the court's order to address the constitutionality of the ATCA, which the February brief did not address. Excerpts follow from the March 13, 2019 U.S. brief (with most footnotes and record citations omitted). The brief is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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* * * *

III. Section 4 is Constitutional

A. Congress May Treat the Palestinian Authority's or Palestine Liberation Organization's Consent as a Lawful Basis for Exercising Personal Jurisdiction Under Section 4

This Court held in *Livnat v. Palestinian Authority*, 851 F.3d 45, 55 (D.C. Cir. 2017), that the Palestinian Authority has due process rights, and that a federal court must establish personal jurisdiction over it consistent with the Fifth Amendment. The United States assumes for purposes of this brief that the Palestine Liberation Organization also has due process rights. The Supreme Court has long recognized, however, that "[b]ecause the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Bauxites*, 456 U.S. at 703.

There are a "variety of legal arrangements" through which a defendant may consent to a court's exercise of jurisdiction in the absence of minimum contacts. *Id.*; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985). A defendant may consent by, for example, entering a contract and "agree[ing] in advance to submit to the jurisdiction of a given court," *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964), or through "the voluntary use of certain state procedures," *Bauxites*, 456 U.S. at 704. As long as a defendant's consent is "knowing and voluntary," the court's exercise of jurisdiction is consistent with due process. *See Wellness Int'l Network v. Sharif*, 135 S. Ct. 1932, 1948 (2015); *Burger King*, 471 U.S. at 472 n.14.

1. Section 4 is one such "legal arrangement" through which a defendant can consent to personal jurisdiction. *See Bauxites*, 456 U.S. at 703. Section 4 sets out expressly what actions will cause a defendant to be "deemed to have consented" to personal jurisdiction in civil cases under the ATA of 1992 if those actions are taken after 120 days after the enactment of Section 4. 18 U.S.C. § 2334(e). Since the ATCA's enactment, the Palestinian Authority and Palestine Liberation Organization have "know[n]" what actions will be deemed consent, and have had the opportunity to "voluntarily" choose whether or not to continue such actions and thereby consent to jurisdiction in the courts of the United States for civil actions under the ATA of 1992. *See Wellness Int'l Network*, 135 S. Ct. at 1948.

Section 4 thus operates similarly to other legal arrangements through which a defendant may validly consent to personal jurisdiction. *See Bauxites*, 456 U.S. at 703. For example, a defendant that consents by contract to suit in a particular forum is aware in advance of the forum in which it may be subject to suit, and the causes of action for which it may be sued: those arising out of the contract. The defendant can "structure [its] primary conduct with some minimum assurance as to where that conduct will and will not render [it] liable to suit," consistent with the Due Process Clause. *Daimler*, 571 U.S. at 139 (quoting *Burger King*, 471 U.S. at 472); *see also id.* at 137 (discussing predictability and personal-jurisdiction rules). Similarly, Section 4 sets out expressly what actions will be deemed consent to personal jurisdiction in the courts of the United States, and it specifies the cause of action for which the defendant will be deemed to have consented to personal jurisdiction: civil cases under the ATA of 1992. The 120-day implementation period also gives defendants fair warning that particular conduct will subject them to personal jurisdiction, and a reasonable period of time to structure their conduct accordingly.

2. Furthermore, "Congress passed, and the President signed, [the ATCA] in furtherance of their stance on a matter of foreign policy," a "realm [that] warrants respectful review by courts." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 (2016). Specifically, Congress enacted, and the President signed, Section 4 to provide a meaningful response to international terrorism, and the political branches acted against an extensive backdrop of statutes relating to the terms under which the Palestine Liberation Organization may operate in the United States and the Palestinian Authority may receive foreign assistance.

The civil-liability provision of the ATA of 1992 is intended "to develop a comprehensive legal response to international terrorism." 1992 House Report at 5. Congress found in the ATCA, however, that because courts had determined that the Palestinian Authority and Palestine Liberation Organization were not subject to general personal jurisdiction in the United States, the goals of the ATA of 1992 were not being realized. *See* H.R. Rep. No. 115-858, at 6. Congress thus determined that it was necessary to enact Section 4 so that the ATA of 1992's civil-liability provision could function effectively to "halt, deter, and disrupt international terrorism." *Id.* at 7–8; *see also id.* at 2–3.

The actions Congress selected in Section 4 to "deem" consent to personal jurisdiction are consistent with this legislative purpose. Defendants are *sui generis* foreign entities that exercise governmental power but have not been recognized as a sovereign government by the Executive. Their right to operate within the United States and their receipt of foreign assistance is dependent on the coordinated judgments of the political branches. As a matter of historical practice, the political branches have long imposed conditions on these benefits based on the same concerns that motivated enactment of this statute, namely concerns about support for acts of terrorism by the Palestinian Authority and Palestine Liberation Organization. …

In this context, it was reasonable and consistent with the Fifth Amendment for Congress and the Executive to determine that the Palestine Liberation Organization's maintenance of an office in this country after a waiver of section 1003, or the Palestinian Authority's continued receipt of certain foreign assistance, should be "deemed" consent to personal jurisdiction in civil cases under the ATA of 1992, the purpose for which is to deter terrorism. *See* 2018 House Report at 7 (explaining that "Congress has repeatedly tied the[Palestinian Authority and Palestine Liberation Organization's] continued receipt of these privileges to their adherence to their commitment to renounce terrorism," and that it is appropriate to deem the continued acceptance of these benefits to be "consent to jurisdiction in cases in which a person's terrorist acts injure or kill U.S. nationals").

3. Defendants' contrary arguments are not persuasive. Defendants insist that they are not "at home" in the United States. … But the "at home" test for general jurisdiction is relevant only in the absence of consent. *See Daimler*, 571 U.S. at 129; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927–28 (2011). A forum's ability to exercise jurisdiction by consent is separate and apart from the forum's ability to exercise general or "specific jurisdiction over an out-of-state defendant who has not consented to suit there." *Burger King*, 471 U.S. at 472.

Defendants also contend that any consent to jurisdiction under the ATCA cannot be "'voluntary.'" … But the ATCA explicitly sets out which actions will be "deemed" consent, and it provides advanced notice to defendants so that they can choose whether or not to continue those actions. Once a defendant is on notice, the defendant's choice to continue receiving foreign assistance under the specified authorities, or choice to continue to maintain an office pursuant to an Executive Branch waiver of section 1003, is the "voluntary act" that manifests consent to jurisdiction. …

4. The United States takes no position on whether a State may enact a statute deeming certain conduct, such as registering to do business in the State, to be consent to jurisdiction, and this Court need not address that question to decide the constitutionality of Section 4, which arises in a unique foreign affairs context. … As discussed above, this case involves jurisdiction in a limited set of anti-terrorism cases against *sui generis* foreign non-sovereign entities that have no right to operate in the United States. The United States does not recognize a Palestinian state, and yet the Palestine Liberation Organization wishes to operate an office here to conduct public diplomacy and public advocacy on behalf of an entity that holds itself out as a foreign government. In this foreign affairs context, in contrast to the limited and mutually exclusive sovereignty of the several states, Congress may deem certain actions of defendants like the Palestinian Authority and the Palestine Liberation Organization to be consent to personal jurisdiction in the United States, even if a State cannot enact similar legislation. *See J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality op.) (explaining that "personal jurisdiction requires a forum-by-forum, or sovereign- by-sovereign, analysis").

Section 4 also differs meaningfully from a state statute deeming registration or other processes to be consent to jurisdiction. A state registration-by-consent statute could make a defendant "amenable to suit" in the forum, "on any claim for relief," simply by virtue of doing business in the forum. *See Goodyear*, 564 U.S. at 929; *see also Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 636–38, 640 (2d Cir. 2016). Section 4, by contrast, grants jurisdiction over specified civil actions under a single federal statute, and only if the defendant performs specified actions under the ATCA. Those civil actions also have a nexus to conduct by the Palestinian Authority and the Palestine Liberation Organization that has historically been the basis for

restrictions on assistance (in the case of the Palestinian Authority) or operating in the United States (in the case of the Palestine Liberation Organization): engaging in or providing support for terrorist activity. Section 4 is thus substantially narrower than State consent-by-registration statutes, and poses less risk of unfair surprise. Moreover, in light of this foreign affairs and national security context, Section 4 is entitled to deference in a way that state consent-by-registration statutes are not. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 35–36 (2010) (discussing deference owed to political branches when "sensitive interests in national security and foreign affairs [are] at stake"). This Court need not, and should not, address state consent-by-registration statutes in order to find Section 4 constitutional.

B. Section 4 Does Not Impose an Unconstitutional Condition

The Court's order inviting the United States to file an amicus brief also directed the United States to address "defendants' argument that Section 4 of the Act violates the unconstitutional conditions doctrine." Neither this Court nor the Supreme Court has applied an unconstitutional conditions doctrine to a statute that deems certain actions taken by a defendant to be consent to personal jurisdiction for purposes of the Fifth Amendment's Due Process Clause. And no case has addressed such a statute with respect to these *sui generis* defendants. Assuming that some form of unconstitutional conditions doctrine applies in this context, however, it is satisfied here.

In applying the unconstitutional conditions doctrine in the context of the Takings Clause, the Supreme Court has held that a condition on the grant of a land use permit or other permission that would constitute an outright taking if imposed directly is permissible if it furthers the end advanced as the justification for the prohibition. *See Dolan v. City of Tigard*, 512 U.S. 374, 385–86, 391 (1994) (determining whether the state interest has a "nexus" and "rough proportionality" to the imposed condition); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837–38 (1987) (same). And in the First Amendment context, in reviewing government funding conditions applied to domestic entities with constitutional rights, Congress is permitted to impose "conditions that define the limits of [a] government spending program" and thereby "specify the activities Congress wants to subsidize." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). "[I]f a party objects" to the conditions, its "recourse is to decline the funds." *Id.* A condition becomes unconstitutional only where it "seek[s] to leverage funding" to burden First Amendment-protected activity "outside the contours of the program itself." *Id.* at 214–15.

Regardless of the analytical framework, if any, that applies in this context, Section 4 does not impose an unconstitutional condition. The Palestine Liberation Organization is presumptively prohibited from establishing or maintaining an office in the United States based on Congress's determination that it is "a terrorist organization and a threat to the interests of the United States, its allies, and to international law." 22 U.S.C. §§ 5201(b), 5202. Waiver of this prohibition has historically been contingent on the Executive Branch's determination that certain conditions are met, including that the Palestine Liberation Organization have renounced terrorism and committed to peace in the Middle East. *See, e.g.*, Middle East Peace Facilitation Act of 1994, Pub. L. No. 103-236, § 583, 108 Stat. 488, 488–89; Middle East Peace Facilitation Act of 1996, Pub. L. No. 104-107, § 604, (b), 110 Stat. 755, 756–57; Department of State, Foreign Operations, and Related Programs Appropriations Act, 2018, div. K, Pub. L. No. 115-141, § 7041(m)(2)(B). To the extent the Executive Branch permits the Palestine Liberation Organization to operate in the United States for the purposes of advancing United States efforts to promote peace between Israel and the Palestinians, it is reasonable and proportional for the

United States to condition the Palestine Liberation Organization's exercise of the waiver on its consent to personal jurisdiction in cases that allege they have provided material support for terrorist attacks injuring U.S. persons. *See Dolan*, 512 U.S. at 391.

Similarly, the Palestinian Authority's receipt of foreign assistance is subject to restrictions related to international terrorism, and dependent on the judgments of the political branches with respect to the Palestinian Authority's actions, including prior judgments that such assistance was not being used to support terrorism. *See, e.g.*, 2019 Appropriations Act, div. F, Pub. L. No. 116-6, § 7039(b) (requiring Secretary of State to ensure that "assistance is not provided to or through any individual, private or government entity that the Secretary knows or has reason to believe advocates, plans, sponsors, engages in, or has engaged in, terrorist activity"); *id.* § 7040(a), (b) (prohibiting funds to the Palestinian Authority unless the President certifies that it is "important to the national security interest of the United States"); *id.* § 7041(k)(1) (requiring Secretary of State, before providing assistance to the West Bank and Gaza, to certify the assistance is for specified purposes, including to "advance Middle East peace" or "improve security in the region"). The assistance provided under the authorities in Section 4 likewise has historically served counterterrorism purposes, including by improving the capacity of Palestinian Authority security forces and police to combat terrorism. If the Executive Branch has made the required determinations and provided assistance to the Palestinian Authority under the specified authorities, it is within "the contours" of the programs for Congress to also require that, if the Palestinian Authority knowingly accepts that assistance, it must also consent to personal jurisdiction in cases alleging it has provided material support for terrorism. *Cf. Alliance for Open Society Int'l*, 570 U.S. at 214–15; *see also* 2018 House Report at 7.

In sum, to the extent Section 4 imposes conditions on defendants for purposes of an unconstitutional conditions doctrine, those conditions are constitutional because they relate to the terms under which the Palestinian Authority and Palestine Liberation Organization may receive foreign assistance or operate in the United States—benefits that have long been subject to conditions set by the political branches in relation to those entities' renouncement of terrorism. Congress may appropriately impose such conditions in the foreign affairs context with respect to entities such as defendants here, even assuming Congress could not set the same conditions with respect to domestic entities. In this particular statutory context, it is not an unconstitutional condition for Congress to determine that the Palestinian Authority's acceptance of foreign assistance from the United States, or the Palestine Liberation Organization's establishment or maintenance of an office in the United States pursuant to a waiver of the ATA of 1987, should be deemed consent to personal jurisdiction in civil cases under the ATA of 1992, the purpose of which is to meaningfully combat terrorism.

* * * *

The D.C. Circuit Court decided the case on May 14, 2019, concluding, *inter alia*, that none of the factual predicates for jurisdiction under the statute had been triggered during the relevant time period and declining to reach the constitutional questions. *Estate of Klieman v. Palestinian Auth.*, 923 F.3d 1115 (D.C. Cir. 2019). On December 5, 2019,

the Estate of Esther Klieman filed a petition in the U.S. Supreme Court for a writ of certiorari.*

B. ALIEN TORT STATUTE AND TORTURE VICTIM PROTECTION ACT

1. Overview

The Alien Tort Statute ("ATS"), sometimes referred to as the Alien Tort Claims Act ("ATCA"), was enacted as part of the First Judiciary Act in 1789 and is codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." In 2004 the Supreme Court held that the ATS is "in terms only jurisdictional" but that, in enacting the ATS in 1789, Congress intended to "enable federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens.

The Torture Victim Protection Act ("TVPA"), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against "[a]n individual … [acting] under actual or apparent authority, or color of law, of any foreign nation" for individuals, including U.S. nationals, for torture and/or extrajudicial killing. The TVPA contains an exhaustion requirement and a ten-year statute of limitations.

2. Al-Tamimi

As discussed in *Digest 2018* at 144-46 and *Digest 2017* at 131-35, the United States filed briefs in the district court and on appeal in *Al-Tamimi v. Adelson*, a case invoking the TVPA and ATS. The U.S. Court of Appeals for the D.C. Circuit issued its opinion in the case on February 19, 2019, reversing the lower court's decision that it lacked jurisdiction because the case involved political questions. The opinion is discussed in the political question section of this chapter, C.1. *infra*.

C. POLITICAL QUESTION DOCTRINE, COMITY, AND *FORUM NON CONVENIENS*

Political Question: *Al-Tamimi*

On February 19, 2019, the Court of Appeals for the D.C. Circuit issued its decision in *Al-Tamimi v. Adelson*, 916 F.3d 1 (D.C. Cir. 2019), a case alleging that defendants conspired to support Israeli settlements and also eviction of, and crimes against, Palestinians in

* Editor's note: On April 27, 2020 the Supreme Court granted the petition for certiorari, vacated the judgment and remanded the case for further consideration in light of the Promoting Security and Justice for Victims of Terrorism Act of 2019, Pub. L. No. 116–94, div. J, tit. IX, § 903, 133 Stat. 3082.

disputed territory (defined as the West Bank, including East Jerusalem, and the Gaza Strip). As discussed in *Digest 2018* at 165-68 and *Digest 2017* at 155-61, the U.S. briefs in the district court and on appeal in *Al-Tamimi* discuss the political question doctrine (as well as the TVPA and ATS). The Court of Appeals reversed the lower court's decision that it lacked jurisdiction because the case involved political questions, but did not discuss in great depth the TVPA or ATS. Excerpts follow from the court's opinion.

* * * *

The political question doctrine arises from the constitutional principle of separation of powers. The "doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). In deciding whether a controversy presents a political question, "[w]e must conduct 'a discriminating analysis of the particular question posed' in the 'specific case.'" *bin Ali Jaber*, 861 F.3d at 245 (quoting *Baker*, 369 U.S. at 211). Abstraction and generality do not suffice. To be precise, we follow a three-step process. First, we identify the issues raised by the plaintiffs' complaint. Next, we use the six *Baker* factors to determine whether any issue presents a political question. *See El-Shifa*, 607 F.3d at 840–42. Finally, we decide whether the plaintiffs' claims can be resolved without considering any political question, to the extent one or more is presented. Indeed, the political question doctrine mandates dismissal only if a political question is "inextricable from the case." *Baker*, 369 U.S. at 217; *see also U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 456 (1992); *Davis v. Bandemer*, 478 U.S. 109, 122 (1986). In other words, "the political question doctrine is a limited and narrow exception to federal court jurisdiction." *Starr*, 910 F.3d at 533 (citing *United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990)). A court cannot "avoid [its] responsibility" to enforce a specific statutory right "merely 'because the issues have political implications.'" *Zivotofsky ex rel. Zivotofsky v. Clinton* (*Zivotofsky I*), 566 U.S. 189, 196 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)).

1. Issues Raised by Plaintiffs' Complaint

As noted earlier, the district court concluded that the plaintiffs' complaint raises five political questions:

> (1) the limits of state sovereignty in foreign territories where boundaries have been disputed since at least 1967; (2) the rights of private landowners in those territories; (3) the legality of Israeli settlements in the West Bank, Gaza, and East Jerusalem; (4) whether the actions of Israeli soldiers and private settlers in the disputed territories constitute genocide and ethnic cleansing … [and (5)] whether contributing funds to or performing services in these settlements is inherently unlawful and tortious.

Al-Tamimi, 264 F. Supp. 3d at 78. …

In Count I the plaintiffs allege that the defendants engaged in a civil conspiracy to expel all non-Jews from the disputed territory. The elements of civil conspiracy are:

> (1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme.

Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983). Count I charges as the requisite "unlawful acts" genocide and theft and destruction of private property. To determine whether Israeli settlers committed genocide, we must answer only one of the seven political questions identified by the district court and the defendants—Question #4 (Do the Israeli settlers' actions in the disputed territory constitute genocide and ethnic cleansing?). And to determine whether Israeli settlers engaged in theft and destruction of private property, we must answer only Question #2 (What are the rights of private landowners in the disputed territory?).

In Count II, the plaintiffs allege that the defendants committed war crimes, crimes against humanity and genocide in violation of the law of nations. Specifically, they allege the defendants committed "murder, ill treatment of a civilian population in occupied territory, pillage, destruction of private property, and persecution based upon religious or racial grounds." And in Count III, the plaintiffs allege that the defendants aided and abetted the crimes alleged in Count II. Counts II and III therefore require the court to determine whether Israeli settlers committed murder, pillage, destruction of private property, persecution based upon religious or racial grounds or ill-treatment of a civilian population in occupied territory. To determine whether Palestinians constitute a "civilian population in occupied territory," the court must answer only Question #1 (What are the limits of state sovereignty in the West Bank, Gaza and East Jerusalem?). To determine whether the Israeli settlers pillaged or destroyed private property, the court must answer only Question #2 (What are the rights of private landowners in the disputed territory?). And to determine whether Israeli settlers murdered or persecuted Palestinians based upon religious or racial grounds, the court must answer only Question #4 (Do the actions of Israeli settlers in the disputed territory constitute genocide and ethnic cleansing?). Finally, Count IV alleges that the defendants committed aggravated and ongoing trespass. To resolve Count IV, the court must answer only Question #2 (What are the rights of private landowners in the disputed territory?).

Thus, only three of the seven purported political questions identified by the district court or the defendants are questions— political or otherwise—potentially presented by this case. Of the three, two (Questions #1 and #2) can be reduced to a single question: *who has sovereignty over the disputed territory*? The other (Question #4) can be restated as: *are Israeli settlers committing genocide*? A close reading of the two-hundred-page complaint confirms that these are the only two potential political questions raised by the plaintiffs' claims. To determine if these two questions are jurisdiction-stripping political questions, we turn to the *Baker* factors.

2. Application of *Baker* Factors

a. First Two Factors

The first *Baker* factor requires us to determine whether there is a textually demonstrable commitment of the question to either the Executive Branch or the Legislative Branch. *Baker*, 369 U.S. at 217. The second *Baker* factor requires us to determine whether there are judicially manageable standards to answer the question. *Id.* Together, these factors often dictate that a case touching on foreign affairs presents a political question. *See Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *El-Shifa*, 607 F.3d at 841 ("Disputes involving foreign

relations...are 'quintessential sources of political questions.'" (quoting *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006))). Indeed, the Constitution expressly commits certain foreign affairs questions to the Executive or the Legislature. *See* U.S. Const. art. I, § 8 (the Congress's power to "regulate Commerce with foreign Nations," "declare War," "raise and support Armies," "provide and maintain a Navy" and "make Rules for the Government and Regulation of the land and naval Forces"); U.S. Const. art. II, § 2 (the President's power to "make Treaties" and "appoint Ambassadors" and the President's role as "Commander in Chief of the Army and Navy of the United States"). Moreover, resolution of questions touching foreign relations "frequently turn[s] on standards that defy judicial application." *Baker*, 369 U.S. at 211. But not every case that involves foreign affairs is a political question. *Id.* ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."); *Hourani v. Mirtchev*, 796 F.3d 1, 9 (D.C. Cir. 2015) ("Adjudicating the lawfulness of those acts of a foreign sovereign that are subject to the United States' territorial jurisdiction … is not an issue that the Constitution entirely forbids the judiciary to entertain."); *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 313 (D.C. Cir. 2014) ("[W]e do not automatically decline to adjudicate legal questions if they may implicate foreign policy or national security."). How do we determine whether a case involving foreign affairs is a political question? Our en banc court has answered that question: policy choices are to be made by the political branches and purely legal issues are to be decided by the courts. *El Shifa*, 607 F.3d at 842 ("We have consistently held … that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security. In this vein, we have distinguished between claims requiring us to decide whether taking military action was 'wise'—'a policy choice and value determination constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch'—and claims '[p]resenting purely legal issues' such as whether the government had legal authority to act." (alterations in original) (quoting *Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring))). This is the distinction on which this litigation turns.

The first potential political question presented—*who has sovereignty over the disputed territory*—plainly implicates foreign policy and thus is reserved to the political branches. As the Supreme Court has explained, in our constitutional system questions regarding the "legal and international status [of Jerusalem] are … committed to the Legislature and the Executive, not the Judiciary." *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 135 S. Ct. 2076, 2081 (2015). What is true of Jerusalem specifically is true of the entirety of the disputed territory. In fact, the Executive Branch recently addressed the question *who has sovereignty over the disputed territory*. *See* Statement by President Trump on Jerusalem (Dec. 6, 2017), https://www.whitehouse.gov/briefings-statements/statement-president-trump-jerusalem/ ("We are not taking a position [on] any final status issues, including the specific boundaries of the Israeli sovereignty in Jerusalem, *or the resolution of contested borders*." (emphasis added)).

On the other hand, the second potential political question presented—*are Israeli settlers committing genocide*—is a purely legal issue. As noted earlier, one of the bases of the plaintiffs' complaint is the Alien Tort Statute. The ATS provides in part that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. An ATS claim, then, incorporates the law of nations. And it is well settled that genocide violates the law of nations. *Simon v. Republic of Hungary*, 812 F.3d 127, 145 (D.C. Cir. 2016) ("[T]he relevant international-law violation for jurisdictional purposes is *genocide*."); *see also Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1401–02 (2018). Genocide

has a legal definition. *See* United Nations Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277, 280 (defining genocide, in part, as "[k]illing members of [a national, ethnic, racial or religious group]" "with intent to destroy [the group], in whole or in part"). Thus, the ATS—by incorporating the law of nations and the definitions included therein—provides a judicially manageable standard to determine whether Israeli settlers are committing genocide. We recognize that the ATS "enable[s] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez- Machain*, 542 U.S. 692, 712 (2004). We are well able, however, to apply the standards enunciated by the Supreme Court to the facts of this case. The first two *Baker* factors, then, suggest that this case presents only one political question: *who has sovereignty over the disputed territory*.

b. The Four Prudential Factors

The last four *Baker* factors—the prudential factors—are closely related in that they are animated by the same principle: as a prudential matter, the Judiciary should be hesitant to conflict with the other two branches. *See Baker*, 369 U.S. at 217. Traditionally, the existence of one of the prudential factors indicates that a question is a political question. *Schneider*, 412 F.3d at 194 ("The *Baker* analysis lists the six factors in the disjunctive, not the conjunctive. To find a political question, we need only conclude that one factor is present, not all."). In its most recent discussion of the *Baker* factors, however, the Supreme Court did not discuss the prudential factors. *Zivotofsky I*, 566 U.S. at 195 ("We have explained that a controversy 'involves a political question … where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993))). Because the Supreme Court "does not normally overturn, or dramatically limit, earlier authority *sub silentio*," we do not interpret the omission as eliminating the prudential factors. *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). Nor can we say, however, that the omission was unintentional. *See Zivotofsky I*, 566 U.S. at 202–07 (Sotomayor, J., concurring in part and in the judgment) (commenting on majority opinion's omission of prudential factors); *id.* at 212 (Breyer, J., dissenting) (same); *cf. Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008) (calling first two factors "most important"). At the very least, *Zivotofsky I* suggests that, if the first two *Baker* factors are not present, more is required to create a political question than apparent inconsistency between a judicial decision and the position of another branch. *See* 566 U.S. at 194–201 (no political question notwithstanding Judiciary's decision that plaintiff's passport can list "Jerusalem, Israel" as his birthplace would appear inconsistent with Executive's decision—at that time—not to recognize Jerusalem as part of Israel).

In analyzing the prudential *Baker* factors, the official position of the Executive is highly relevant. The Executive is institutionally well-positioned to understand the foreign policy ramifications of the court's resolution of a potential political question. Accordingly, an Executive Branch opinion regarding these ramifications is owed deference, no matter what form it takes. *See Hwang Geum Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005) (Executive offered opinion in Statement of Interest, opinion was "compelling" and rendered case nonjusticiable under political question doctrine"); *see also Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 62 (D.C. Cir. 2011) (Executive offered opinion in Statement of Interest and amicus briefs and court invited it to reassert concerns on remand), *vacated on other grounds*, 527 F. App'x 7, 7 (D.C. Cir. 2013); *cf. In re Papandreou*, 139 F.3d 247, 252 (D.C. Cir. 1998) (Executive offered opinion regarding Foreign Sovereign Immunities Act defense as amicus and court gave its "factual estimation"

"substantial weight" but treated its "legal conclusions" as "no more authoritative than those of private litigants"). Here, the Department of Justice expressed its opinion that judicial resolution of the plaintiffs' complaint could create an inter-branch conflict because, "[g]iven the level of political and military support provided Israel by the American government, a judicial finding that the Israeli armed forces had committed the alleged offenses would 'implicitly condemn American foreign policy by suggesting that the [government's] support of Israel is wrongful.'" Gov't Appellee's Br. 16. This concern, although entitled to deference, is now moot as the plaintiffs have waived any theory of liability based on the conduct of the Israeli military. …

Ultimately, we believe that the court would create an interbranch conflict by deciding *who has sovereignty over the disputed territory*. By answering the question—regardless of the answer—the court would directly contradict the Executive, which has formally decided to take no position on the question. We do not believe, however, that the court would necessarily create an interbranch conflict by deciding *whether Israeli settlers are committing genocide*. A legal determination that Israeli settlers commit genocide in the disputed territory would not decide the ownership of the disputed territory and thus would not directly contradict any foreign policy choice. In light of the statutory grounds of plaintiffs' claims coupled with *Zivotofsky I*'s muteness regarding *Baker*'s four prudential factors, we believe that *whether Israeli settlers are committing genocide* is not a jurisdiction-stripping political question. Accordingly, although the question *who has sovereignty over the disputed territory* does present a "hands-off" political question, the question *whether Israeli settlers are committing genocide* does not.

* * * *

D. EXTRATERRITORIAL APPLICATION OF U.S. CONSTITUTION

1. *Hernandez*

As discussed in *Digest 2018* at 169, the Supreme Court invited a brief expressing the views of the United States in *Hernandez v. Mesa*, No. 17-1678, a case before the Supreme Court for the second time. *Hernandez* is a damages action against a U.S. Border Protection officer (Mesa) for the death of a Mexican national in a shooting across the U.S. border with Mexico. See *Digest 2017* at 172-77 for discussion of the U.S. brief filed in the Supreme Court in 2017 and the Supreme Court's 2017 decision ("*Hernandez I*"), remanding to the U.S. Court of Appeals for the Fifth Circuit in light of another Supreme Court decision in a *Bivens* action (*Ziglar v. Abbasi*, 582 U.S. ___, 137 S.Ct. 1843 (2017)*).* See *Digest 2016* at 192 and *Digest 2015* at 163-66 for discussion of the initial decision by the Fifth Circuit, en banc, affirming the dismissal of all claims in *Hernandez v. Mesa et al.*, 785 F.3d 117 (5th Cir. 2015). On remand from the Supreme Court, the Fifth Circuit once again affirmed the district court's dismissal of all claims, focusing on the *Bivens* action. *Hernandez v. Mesa,* 885 F.3d 811 (5th Cir. 2018) (en banc). Excerpts follow from the brief of the United States as amicus, filed on September 30, 2019, arguing for the Supreme Court to affirm the dismissal and decline to extend a *Bivens* remedy to aliens injured abroad. The United States also filed a brief on April 11, 2019 at

the petition stage in *Hernandez II*, which also addressed *Swartz v. Rodriguez*, No. 18-309.[**]

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C. Multiple Special Factors Counsel Hesitation Before Extending A *Bivens* Remedy To Aliens Injured Abroad

In determining whether a new context presents a "'special factor counselling hesitation,'" a court "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1857-1858. This Court has explained that relevant considerations include whether "Congress has designed its regulatory authority in a guarded way, making it less likely that Congress would want the Judiciary to interfere"; whether "an alternative remedial structure" is available; or whether "some other feature of [the] case," such as the implications for policymaking, the burdens of litigation and liability, or the potential for intrusion on the political branches' prerogatives, "causes a court to pause before acting without express congressional authorization." *Id.* at 1858; see *id.* at 1860-1863. If there are any "sound reasons to think Congress *might doubt* the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts *must refrain* from creating the remedy in order to respect the role of Congress." *Id.* at 1858 (emphasis added).

Here, multiple special factors counsel hesitation. First, claims by aliens injured abroad risk judicial interference with matters that the Constitution has committed to the political branches. Second, the need for caution is reinforced by the fact that, in a variety of statutes, Congress has long taken care *not* to provide aliens injured abroad with the sort of judicial damages remedy petitioners seek. Third, the general presumption against extraterritoriality further underscores the separation-of-powers consequences of the Judiciary's acting where Congress has not.

1. Claims by aliens injured abroad implicate foreign affairs and national security

a. "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918); see, *e.g.*, U.S. Const. Art. I, § 8, Cls. 3, 10, 11, 12, 13; Art. II, § 2. "[F]oreign affairs" is thus "a domain in which the controlling role of the political branches is both necessary and proper." *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1328 (2016). In recognition of the political branches' special competence and responsibility, this Court has long held that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981).

This Court has made clear that *Bivens* should not be expanded to an area that the Constitution commits to the political branches. …

The same logic precludes the extension of *Bivens* to aliens injured by federal officials in foreign territory. As the Fifth Circuit explained, "the United States government is always responsible to foreign sovereigns when federal officials injure foreign citizens on foreign soil." … Judicial examination of the government's treatment of aliens outside the United States would inject the courts into sensitive matters of international diplomacy and risk "what [this] Court has

[**] Editor's note: On February 25, 2020, the Supreme Court affirmed the dismissal.

called in another context 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'" *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J.) (citation omitted). Moreover, "damage remedies * * * for allegedly unconstitutional treatment of foreign subjects causing injury abroad" could carry other "foreign affairs implications"—including "the danger of foreign citizens' using the courts * * * to obstruct the foreign policy of our government." *Ibid.*

This case illustrates the inevitable foreign-affairs implications of *Bivens* suits by aliens injured abroad. The Government of Mexico has filed an amicus brief explaining (at 1, 3) that "[a]s a sovereign and independent state," it has a "vital interest in working with the United States to improve the safety and security of the border and to ensure that both countries' agents act to protect * * * the safety of the public in the border area." Issues of border security, including cross-border shootings, have been of great concern to the United States' bilateral relationship with Mexico for several years. In 2014, the two governments established a joint Border Violence Prevention Council to provide a standing forum in which to address issues of border violence. Mexico and the United States have also addressed cross-border shootings in other forums, including the U.S.-Mexico Bilateral Human Rights Dialogue. And the particular incident here has prompted bilateral exchanges, including Mexico's request that Agent Mesa be extradited to face criminal charges. … After a comprehensive DOJ investigation concluded that Agent Mesa did not violate Border Patrol policy on the use of force, the United States declined to extradite him, but it has reiterated its commitment to "work with the Mexican government within existing mechanisms and agreements to prevent future incidents." *DOJ Statement*.

Petitioners respond … that the mere presence of "a foreign *fact*" does not establish "genuine foreign affairs *concerns*." But the foreign-affairs concerns presented by these facts, far from being a "nonsensical non sequitur" … are straightforward: The injury of an alien by a federal officer in foreign territory is a matter that triggers diplomatic discussions, and the involvement of the Judicial Branch may interfere with the Executive Branch's negotiations or representations. Here, for example, the Executive has determined that Agent Mesa did *not* act improperly and has taken that position in discussions with Mexico, a position that would be undermined if a federal court entered a contrary judgment, including by bolstering Mexico's request that Agent Mesa be extradited to Mexico. The fact that the Governments of Mexico and the United States disagree over the availability of a damages remedy in this case … only underscores the foreign-affairs concerns with judicial intrusion.

More generally, petitioners suggest … that courts can mitigate foreign-affairs concerns by undertaking an ad hoc analysis of the international impact of recognizing a damages remedy in a particular case, based on their assessment of the reaction of foreign governments. The Judiciary is ill-suited to make such determinations—and attempting to make them on a case-by-case basis would itself intrude on foreign affairs. … *Abbasi* accordingly makes clear that the question whether to imply a damages remedy is not limited to its impact in a particular case. By framing the question as whether the Judiciary or Congress should consider the impact of a damages remedy "on governmental operations systemwide," *Abbasi* acknowledged that the special-factors analysis must account for the costs and consequences of a new *class* of tort liability. 137 S. Ct. at 1858…

b. Permitting aliens injured abroad to bring *Bivens* suits against the particular set of defendants here—Border Patrol agents—also would have clear implications for national security. Just as with foreign affairs, the Constitution reserves questions of national security for the political branches. …

As the court of appeals explained, Congress has charged the Department of Homeland Security (DHS) and its components, including the U.S. Border Patrol, with "prevent[ing] terrorist attacks within the United States" and "securing the homeland." 6 U.S.C. 111(b)(1)(A) and (E) …

Petitioners contend … that this particular suit does not implicate national security and is instead akin to a matter of domestic law enforcement. That contention is both wrong and irrelevant. It is wrong because, at an appropriate level of generality, the facts alleged in petitioners' complaint do implicate border security, which Congress has linked to national security: Several individuals repeatedly crossed an international border, and a responding officer detained one suspect who had crossed the border illegally and fired a weapon across the border at another suspect. … It is irrelevant because, even if the specific facts alleged do not implicate national security, the key question is whether special factors counsel against extending *Bivens* to the relevant *class* of cases. See *Wilkie*, 551 U.S. at 550; *Stanley*, 483 U.S. at 682; *Bush*, 462 U.S. at 389. A class of cases involving aliens injured *abroad* by Border Patrol agents by definition targets border-security activities distinct from the ordinary domestic activities performed by law enforcement (including Border Patrol agents) in the United States.

2. Congress's consistent decisions not to provide a judicial damages remedy to aliens injured abroad confirm that a* Bivens *remedy is inappropriate

A variety of statutes indicate that Congress's omission of the damages remedy that plaintiffs seek was not an "oversight," confirming that it would be inappropriate for the Judiciary to create a damages remedy here when Congress has elected not to do so. *Abbasi*, 137 S. Ct. at 1862; see *Schweiker*, 487 U.S. at 423.

a. Where Congress has provided judicial damages remedies against governmental officials, it has taken care not to extend those remedies to injuries suffered by aliens abroad. Most relevant, when Congress enacted Section 1983 to provide a statutory remedy for individuals whose constitutional rights are violated by state officers, it expressly limited the remedy to "citizen[s] of the United States or other person[s] within the jurisdiction thereof." 42 U.S.C. 1983. Because *Bivens* judicially implied a federal damages action against federal officers, whereas Congress expressly created such an action against state officers in Section 1983, Congress's express limitation on the reach of Section 1983 should, *a fortiori*, limit the reach of *Bivens*. … It would turn separation-of-powers principles on their head to judicially infer liability for federal officers that Congress has expressly rejected for state officers. …

Similarly, although the FTCA waives the United States' sovereign immunity for certain injuries inflicted by federal employees generally, 28 U.S.C. 2674, Congress specifically excluded "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k). The foreign-country exception was motivated in part by Congress's "unwillingness to subject the United States to liabilities depending upon the laws of a foreign power," which would have governed FTCA claims arising abroad. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 707 (2004) (brackets and citation omitted). But avoiding the application of foreign law was not Congress's only goal. Even before DOJ raised concerns about foreign law, the bill that became the FTCA excluded "all claims 'arising in a foreign country *in behalf of an alien*.' " *Ibid.* (quoting H.R. 5373, 77th Cong., 1st Sess. 8 (1941)) (emphasis added). That history demonstrates that Congress's decision not to provide an FTCA remedy to *aliens* injured in foreign countries reflected adherence to the traditional practice of addressing such injuries through nonjudicial means. …

More recently, in the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, Congress created a cause of action for damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects another

individual to "torture" or "extrajudicial killing." 28 U.S.C. 1350 note 2. "But the statute exempts U.S. officials, a point that President George H.W. Bush stressed when signing the legislation." *Meshal* v. *Higgenbotham*, 804 F.3d 417, 430 (D.C. Cir. 2015) (Kavanaugh, J., concurring), cert. denied, 137 S. Ct. 2325 (2017). "In confining the coverage of statutes such as the [FTCA] and the [TVPA], Congress has deliberately decided not to fashion a cause of action" for aliens injured abroad by federal officials. *Ibid.* Congress's repeated decisions not to provide such a remedy counsel strongly against the Judiciary's creating one.

b. When Congress *has* provided compensation for aliens injured abroad, it has done so through tailored administrative mechanisms, not by authorizing suits in federal court.

Traditionally, injuries suffered by aliens abroad were addressed through diplomatic negotiations, which could result in *ex gratia* payments to injured parties. See William R. Mullins, *The International Responsibility of a State for Torts of Its Military Forces*, 34 Mil. L. Rev. 59, 61-65 & n.22 (1966); see also, *e.g.*, Exec. Order No. 13,732, § 2(b)(ii), 81 Fed. Reg. 44,486 (July 7, 2016) (providing for *ex gratia* condolence payments to civilians injured or killed by certain uses of military force).

In certain recurring circumstances, Congress has determined that the United States' interests would be better served by establishing administrative claims procedures. …

In addition, Congress has in limited circumstances authorized specific agencies to pay claims for torts occurring abroad, including torts arising from the overseas operations of the Department of State, 22 U.S.C. 2669-1, and the Drug Enforcement Administration, 21 U.S.C. 904. In those statutes, as under the FCA, Congress provided an administrative remedy subject to careful constraints, see, *e.g.*, 10 U.S.C. 2734(b); it did not permit the injured parties to bring suit in court.

c. Petitioners contend … that congressional inaction does not qualify as a "special factor" in this case because Congress has not legislated about cross-border shootings and has infrequently legislated about the tort liability of federal officers. That assertion ignores the FTCA's foreign-country exception—which precludes liability in the precise circumstances here, as petitioners elsewhere acknowledge…—and the various alternative administrative schemes that Congress has created for injuries suffered abroad. Moreover, by artificially excluding state officers, petitioners fail to give due weight to the analogous Section 1983 regime. In combination, Congress's actions demonstrate that it has given "careful attention to conflicting policy considerations" in this arena and the system it has adopted should not "be augmented by the creation of a new judicial remedy." *Bush*, 462 U.S. at 388; see *Schweiker*, 487 U.S. at 423.

3. The presumption against extraterritoriality reinforces the inappropriateness of extending* Bivens *to aliens injured abroad

a. The presumption against extraterritoriality further confirms that *Bivens* should not be extended to aliens injured abroad. It is a basic principle of our legal system that, in general, "United States law governs domestically but does not rule the world." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (citation omitted). In statutory interpretation, that presumption is reflected in the canon that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). That canon "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 569 U.S. at 116.

This Court has made clear that "the principles underlying the canon of interpretation similarly constrain courts" in recognizing common-law causes of action. *Kiobel*, 569 U.S. at 116.

Indeed, the Court explained in *Kiobel* that "the danger of unwarranted judicial interference in the conduct of foreign policy is *magnified* in the context of the ATS, because the question is not what Congress has done, but instead what courts may do." *Ibid.* (emphasis added). That danger is still greater in the *Bivens* context, where courts are asked to create a cause of action without even the minimal congressional guidance found in the ATS.

After *Kiobel*, the Court clarified that the presumption against extraterritoriality "separately appl[ies]" to a private damages remedy for injuries suffered abroad, even if the underlying substantive rule has extraterritorial reach. *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2106 (2016); see *id.* at 2106-2108. In *RJR Nabisco*, the Court thus concluded that a statutory private right of action did not reach injuries suffered abroad—even injuries caused by domestic conduct, see *id.* at 2105—because the statute did not "provide a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States," *id.* at 2108. Under that reasoning, even if Congress had enacted a statute expressly providing a damages remedy for individuals whose constitutional rights are violated by federal officers, this Court would not extend that statutory remedy to this case absent a "clear indication" that Congress intended to reach "injuries suffered outside of the United States." *Ibid.* And it would be "grossly anomalous * * * to apply *Bivens* extraterritorially when [courts] would not apply an identical statutory cause of action for constitutional torts extraterritorially." *Meshal*, 804 F.3d at 430 (Kavanaugh, J., concurring).

b. Petitioners respond … that the presumption against extraterritoriality should not apply because extending *Bivens* will not cause international discord in this case. But the presumption applies "across the board, regardless of whether there is a risk of conflict" with other nations in a particular case, as confirmed by the fact that the European Community was itself the plaintiff in *RJR Nabisco*. 136 S. Ct. at 2100 (citation and internal quotation marks omitted).

Petitioners next assert that the presumption does not apply to constitutional claims because "th[e] Court is not acting as the agent of the legislature" when it interprets the Constitution, unlike when it interprets statutes. But in determining whether to extend a damages remedy for a constitutional violation, the Court is indeed attempting to ascertain "the likely or probable intent of Congress." *Abbasi*, 137 S. Ct. at 1862. As *Abbasi* explained, the touchstone of the Court's analysis is thus whether "*Congress* might doubt the efficacy or necessity of a damages remedy." *Id.* at 1858 (emphasis added).

Finally, petitioners for the first time contend that the presumption has been rebutted here because Agent Mesa's conduct sufficiently "touche[s] and concern[s]" the United States. … (quoting *Kiobel*, 569 U.S. at 124-125). Even if the Court considers that new argument, *RJR Nabisco* establishes that when a cause of action focuses on a plaintiff 's injury, the presumption applies to claims that "rest entirely on injury suffered abroad." 136 S. Ct. at 2111; see *id.* at 2105-2107. And more generally, a "touch and concern" analysis would require a case-specific inquiry into whether a particular defendant's conduct sufficiently involved the United States. That sort of inquiry is incompatible with the categorical question whether this Court should extend a non-statutory remedy to the class of potential claims brought by aliens injured abroad.

* * * *

2. *Swartz v. Rodriguez*

Rodriguez v. Swartz involves issues similar to those in *Hernandez*. However, unlike the Fifth Circuit in *Hernandez*, the Ninth Circuit found, *inter alia*, that there was an implied remedy for damages under *Bivens* in the context of a cross-border shooting. *Rodriguez v. Swartz*, 899 F.3d 719 (2018). See *Digest 2016* at 192 for discussion of the U.S. government's notification to the Ninth Circuit that it should use the Supreme Court's determination in *Hernandez* in deciding *Rodriguez*. See *Digest 2017* at 177-81 for discussion of the U.S. supplemental brief filed in 2017 in the Ninth Circuit supporting reversal. After the Ninth Circuit's decision in 2018, the defendant in the district court filed a petition for writ of certiorari in the U.S. Supreme Court. On October 29, 2018, the Supreme Court invited the U.S. government to file a brief expressing its views. *Swartz v. Rodriguez*, No. 18-309. The U.S. brief filed on April 11, 2019 in both *Hernandez* and *Swartz* recommends that the Court address the question of extending a *Bivens* remedy in the *Hernandez* case and hold the *Swartz* case, pending the decision in *Hernandez*.

E. RENEGOTIATING COMPACTS OF FREE ASSOCIATION

On May 21, 2019, the White House issued a Joint Statement from the President of the United States and the Presidents of the Freely Associated States (the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau) after their meeting. The joint statement is available at https://www.whitehouse.gov/briefings-statements/joint-statement-president-united-states-presidents-freely-associated-states/. On July 23, 2019, Deputy Assistant Secretary of State Sandra Oudkirk provided a statement to Congress on the Freely Associated States, which is available at https://www.energy.senate.gov/public/index.cfm/files/serve?File_id=8DC6AFF6-45DD-43FA-A734-7C4CF3165D51.

On August 5, 2019, government leaders from the United States and the Freely Associated States provided a joint press conference to share the outcome of bilateral meetings. The remarks of the leaders are available at https://www.state.gov/secretary-of-state-michael-r-pompeo-federated-states-of-micronesia-president-david-w-panuelo-republic-of-the-marshall-islands-president-hilda-c-heine-and-republic-of-palau-vice-president-and-min/. At the press conference, Secretary of State Michael R. Pompeo announced that the United States had begun renegotiations to extend compacts of free association with each of these three countries.

On September 26, 2019, Deputy Assistant Secretary Oudkirk provided a further statement to Congress, available at http://docs.house.gov/meetings/FA/FA00/20190926/110046/HHRG-116-FA00-Wstate-OudkirkS-20190926.pdf, and excerpted below.

> On August 5, during the first visit by a Secretary of State to the Federated States of Micronesia, Secretary Pompeo announced that the United States has begun consultations on certain provisions of our respective Compacts of Free Association with each country.

We are already coordinating closely across the interagency to evaluate a range of options to promote our continued relationships with all three countries. These agreements are complex and require a thoughtful approach with extensive consultations to make sure that we get them right. An interagency group will travel to each of the Freely Associated States in October to better understand the needs of each of the three countries.

We welcome the opportunity to work with Congress to secure long-term U.S. strategic interests in this vital region. We are committed to working collaboratively to explore ways in which we might further strengthen these relationships after the economic assistance the United States currently provides expires under the current terms of the three Compacts of Free Association.

Cross References

Case regarding extraterritoriality of U.S. IP law, **Ch. 11.F.5.e.**

CHAPTER 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On March 13, 2019, the Department of State released the 2018 Country Reports on Human Rights Practices. The Department submits the reports to Congress annually per §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961, as amended, and § 504 of the Trade Act of 1974, as amended. These reports are often cited as a source for accounts of human rights practices in other countries. While the Country Reports describe facts relevant to human rights concerns, the reports do not reach conclusions about human rights law or legal definitions. The Country Reports are available at https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/. Michael G. Kozak, Acting Principal Deputy Assistant Secretary for Democracy, Human Rights, and Labor, presented the 2018 Country Reports in a briefing on March 13, 2019, which is transcribed at https://www.state.gov/ambassador-michael-kozak-bureau-of-democracy-human-rights-and-labor-on-the-release-of-the-2018-country-reports-on-human-rights-practices/. Secretary of State Michael R. Pompeo also delivered remarks on the release of the 2018 Reports on March 13, 2019. Secretary Pompeo's remarks are available at https://www.state.gov/remarks-on-the-release-of-the-2018-country-reports-on-human-rights-practices/.

2. General Statement at UN Third Committee

On November 7, 2019, the United States submitted a general statement relevant to multiple resolutions at the Third Committee of the UN. The U.S. general statement follows and is available at https://usun.usmission.gov/united-states-general-statement-on-issues-relevant-to-multiple-third-committee-resolutions/.

* * * *

The United States takes this opportunity to make important points of clarification on some of the language we see reflected across multiple resolutions. We underscore that these and other UN General Assembly resolutions are non-binding documents that do not create rights or obligations under international law.

The United States understands that General Assembly resolutions do not change the current state of conventional or customary international law. We do not read resolutions to imply

that States must join or implement obligations under international instruments to which States are not a party, and any reaffirmation of such Convention applies only to those States that are party to it. For the United States, this understanding includes references to the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities, the International Covenant on Economic, Social, and Cultural Rights, and Convention on the Rights of the Child, to which we are not party. Moreover, U.S. co-sponsorship of or consensus on resolutions does not imply endorsement of the views of special rapporteurs or other special procedures mandate-holders as to the contents of international law. We note that the Universal Declaration of Human Rights does not create binding obligations on States.

Points of Clarification

Universal Access to Health Care: The United States aspires to help increase access to high-quality health care, but we understand that each country should develop its own approach to achieving access to health care within its own context. The United States also recognizes the important role of partnerships with the private sector non-governmental organizations, including faith-based organizations, and other stakeholders. As we said at the time of the adoption of the Political Declaration on Universal Health Coverage, patient control and access to high-quality, people-centered care are key.

Women's Equality and Empowerment: The United States is committed to promoting women's equality and to empowering women and girls. Accordingly, when the subject of resolution text is "women," or in some cases "women and girls," our preference is to use these terms rather than "gender" for greater precision. Further, the United States recalls the unequivocal objections of two delegations to the adoption of the so-called Agreed Conclusions of the 63rd meeting of the Commission on the Status of Women (CSW), which included substantive concerns the United States shared. Many of those same problems are endemic amongst Third Committee resolutions, including problematic references to abortion, the proliferation of ill-defined gender jargon, and the inclusion of language that undermines the role of the family. The United States does not consider the outcome documents from this year's meeting of the Commission on the Status of Women to be the product of consensus.

International Criminal Court (ICC): The United States does not and cannot support references to the International Criminal Court and the Rome Statute that do not distinguish sufficiently between Parties and Non-Parties, or are otherwise inconsistent with the U.S. position on the ICC, particularly our continuing and longstanding objection to any assertion of ICC jurisdiction over nationals of States that are not parties to the Rome Statute absent a referral from the UN Security Council or consent of such a State. Our position on the ICC in no way diminishes our commitment to supporting accountability for atrocities.

Additionally, the United States notes that any references to certain acts as crimes against humanity or war crimes under the Rome Statute should be understood in the context of how those terms are defined in the Statute itself, including that crimes against humanity must include a widespread or systematic attack against a civilian population and/or pursuant to a state or organizational policy.

Sexual and Reproductive Health: The United States defends human dignity, and supports access to high-quality health care for women and girls across the lifespan. We do not accept references to "sexual and reproductive health," "sexual and reproductive health and reproductive rights," "safe termination of pregnancy," or other language that suggests or explicitly states that access to legal abortion is necessarily included in the more general terms "health services" or

"health care services" in particular contexts concerning women. The United States believes in legal protections for the unborn, and rejects any interpretation of international human rights (such as General Comment 36 on the International Covenant on Civil and Political Rights) to require any State Party to provide safe, legal, and effective access to abortion. As President Trump has stated, "Americans will never tire of defending innocent life." Each nation has the sovereign right to implement related programs and activities consistent with their laws and policies. There is no international right to abortion, nor is there any duty on the part of States to finance or facilitate abortion. Further, consistent with the 1994 International Conference on Population and Development Programme of Action and the 1995 Beijing Declaration and Platform for Action, and their reports, we do not recognize abortion as a method of family planning, nor do we support abortion in our global health assistance.

Migration: The United States maintains the sovereign right to facilitate or restrict access to its territory, in accordance with its national laws and policies, subject to our existing international obligations. The United States did not participate in the negotiation of the Global Compact for Safe, Orderly, and Regular Migration (GCM), objected to its adoption, and is not bound by any of the commitments or outcomes stemming from the GCM process or contained in the GCM itself. The GCM and the New York Declaration for Refugees and Migrants contain goals and objectives that are inconsistent and incompatible with U.S. law, policy, and the interests of the American people. We refer you to the National Statement of the United States of America on the Adoption of the GCM, issued December 7, 2018.

2030 Agenda for Sustainable Development: We underscore that the 2030 Agenda is non-binding and does not create or affect rights or obligations under international law, nor does it create any new financial commitments. Further, the United States understands any references to "internationally agreed development goals" to be referring to the non-binding 2030 Agenda.

The United States recognizes the 2030 Agenda as a global framework for sustainable development that can help countries work toward global peace and prosperity. We applaud the call for shared responsibility, including national responsibility, in the 2030 Agenda and emphasize that all countries have a role to play in achieving its vision. The 2030 Agenda recognizes that each country must work toward implementation in accordance with its own national policies and priorities.

The United States also underscores that paragraph 18 of the 2030 Agenda calls for countries to implement the Agenda in a manner that is consistent with the rights and obligations of States under international law. We also highlight our mutual recognition in paragraph 58 that 2030 Agenda implementation must respect and be without prejudice to the independent mandates of other processes and institutions, including negotiations, and does not prejudge or serve as precedent for decisions and actions underway in other forums. For example, this Agenda does not represent a commitment to provide new market access for goods or services. This Agenda also does not interpret or alter any WTO agreement or decision, including the Agreement on Trade-Related Aspects of Intellectual Property.

Further, the 2030 Agenda states that "no one" will be left behind. We believe any alteration from the 2030 language, such as "no country left behind," erodes the people-centered focus of the Agenda and distracts from the many multi-faceted and multi-stakeholder efforts to advance sustainable development.

Climate Change: The United States submitted formal notification of its withdrawal from the Paris Agreement to the United Nations on November 4, 2019. The withdrawal will take effect one year from the delivery of the notification. Therefore, references to the Paris

Agreement and climate change are without prejudice to U.S. positions.

With respect to references to the Intergovernmental Panel on Climate Change (IPCC) special reports, the United States has indicated at the IPCC that IPCC acceptance of such reports and approval of their respective Summaries for Policymakers does not imply U.S. endorsement of the specific findings contained in the reports. References to the IPCC special reports are also without prejudice to U.S. positions.

Trade: As President Trump stated to the General Assembly on September 25, 2018, the United States will act in its sovereign interest, including on trade matters. This means that we do not take our trade policy direction from the United Nations. It is our view that the United Nations must respect the independent mandates of other processes and institutions, including trade negotiations, and must not involve itself in decisions and actions in other forums, including at the World Trade Organization. The UN is not the appropriate venue for these discussions, and there should be no expectation or misconception that the United States would heed decisions made by the Economic and Social Council or the General Assembly on these issues. This includes calls that undermine incentives for innovation, such as technology transfer that is not voluntary and on mutually agreed terms. Further, the United States is disappointed to see references to the "world financial and economic crisis." We note that impacts of the financial crisis are no longer of any real relevance and continued references to it detract from efforts to focus both on today's challenges and on the steady global economic growth we are experiencing.

We take this opportunity to make important points of clarification regarding the reaffirmation of the Addis Ababa Action Agenda. Specifically, we note that much of the trade-related language in the Addis outcome document has been overtaken by events since July 2015; therefore, it is immaterial, and our reaffirmation of the outcome document has no standing for ongoing work and negotiations that involve trade.

Right to Development: The "right to development," which is not recognized in any of the core UN human rights conventions, does not have an agreed international meaning. Furthermore, work is needed to make it consistent with human rights, which the international community recognizes as universal rights held and enjoyed by individuals and which every individual may demand from his or her own government.

Also, we continue to be concerned that the "right to development" referenced in resolutions this year protects states instead of individuals. States must implement their human rights obligations, regardless of external factors, including the availability of development and other assistance. Lack of development may not be invoked to justify the abridgement of internationally recognized human rights. To this end, we continually encourage all states to respect their human rights obligations and commitments, regardless of their levels of development.

Therefore, we continue to oppose reference to the "right to development" in resolutions presented in the General Assembly this session

ESC Rights: As the International Covenant on Economic, Social, and Cultural Rights provides, each State Party undertakes to take the steps set out in Article 2(1) "with a view to achieving progressively the full realization of the rights." We interpret references to the obligations of States as applicable only to the extent they have assumed such obligations, and with respect to States Parties to the Covenant, in light of its Article 2(1). The United States is not a Party to the International Covenant on Economic, Social, and Cultural Rights and the rights contained therein are not justiciable as such in U.S. Courts. We note that countries have a wide array of policies and actions that may be appropriate in promoting the progressive realization of

economic, social, and cultural rights. We therefore believe that resolutions should not try to define the content of those rights, or related rights, including those derived from other instruments.

Education: The United States is firmly committed to providing equal access to education. As educational matters in the United States are primarily determined at the state and local levels, when resolutions call on States to strengthen various aspects of education, including with respect to curriculum, this is done in terms consistent with our respective federal, state, and local authorities.

And finally, it is our intention that this statement applies to action on all agenda items in the Third Committee. We request that this statement be made part of the official record of the meeting.

* * * *

3. Human Rights Council

As discussed in *Digest 2018* at 173-76, the United States withdrew from the Human Rights Council ("HRC") in 2018. On November 1, 2019, John Giordano, counselor for the U.S. Mission to the UN, delivered remarks on the report of the HRC. Mr. Giordano's remarks are excerpted below and available at https://usun.usmission.gov/remarks-by-the-united-states-on-the-report-of-the-human-rights-council/.

* * * *

Thank you, Mr. President, as we reflect on the recent work of the Human Rights Council, we must all acknowledge that the body continues to fall far short of its potential as laid out by the General Assembly in 2006.

Underpinning the problems affecting the Council is a broken membership selection process that permits human rights abusers such as the former Maduro regime to gain representation at the expense of those who would support human rights. As Ambassador Craft said, "that one of the world's worst human rights abusers would be granted a seat on a body that is supposed to defend human rights is utterly appalling." The Council will never achieve legitimacy as long as States responsible for human rights violations and abuses are given a platform to criticize the human rights situations of other states all the while perverting the Council's own mechanisms to avoid responsibility for their own violations and abuses.

Further undercutting the Council's credibility is its continued refusal to treat all states equally, as demonstrated by its continued discriminatory treatment of Israel under permanent Item 7.

Moreover, we have grave concerns about reprisals against human rights defenders appearing before the HRC and other UN fora in Geneva, including Chinese efforts to silence voices of dissent in its Universal Periodic Review.

We continue to hope that changes in procedures and focus can enable the Council to meaningfully promote, in the words of resolution 60/251, "universal respect for the protection of all human rights and fundamental freedoms for all."

* * * *

4. Country-specific Concerns

a. Human Rights Report on Venezuela

On July 5, 2019, the State Department issued a press statement on the UN Human Rights report documenting human rights abuses by the former Maduro regime in Venezuela. The statement is available at https://www.state.gov/un-human-rights-report-documents-maduro-regimes-human-rights-abuses/.

b. Venezuela's election to the Human Rights Council

On October 17, 2019, the State Department issued a press statement by Secretary Pompeo on the illegitimate election of the Maduro regime in Venezuela to a seat on the HRC. The press statement appears below and is available at https://www.state.gov/illegitimate-maduro-regimes-election-to-the-un-human-rights-council/.

* * * *

The UN High Commissioner report on Human Rights issued this past July documented egregious human rights abuses of the former Maduro regime in Venezuela. It is sadly no surprise that Maduro shamelessly sought a seat on the UN Human Rights Council in an effort to block any limit to his repressive control of the Venezuelan people. What is truly tragic, however, is that other nations voted to give Maduro's representative for Venezuela a seat on the UN Human Rights Council. This is a harsh blow not just against the victims of the Venezuelan regime, but also against the cause of human rights around the world.

The Human Rights Council ought to be a protector and defender of human rights of people the world over. It should be speaking out about the daily abuses of the former Maduro regime, and others like it. Instead, the Council has become an exercise in shameless hypocrisy—with some of the world's most serious offenders sitting on the Council itself. Its membership includes authoritarian governments with unambiguous and abhorrent human rights records, such as China, Cuba, and Venezuela. These are among the reasons why the United States withdrew from the Human Rights Council in 2018.

The United States strongly supports multilateral organizations that sincerely and effectively work to protect human rights. The election to the Human Rights Council of Maduro's representative is a farce that further undermines the Council's already frail credibility. We desire to work with our allies and partners in support of Venezuelan interim President Guaidó's efforts to restore human rights and democracy in Venezuela, a critical objective that reflects the United States' commitment to human rights and freedom.

* * * *

5. Treaty Bodies

On June 27, 2019, Ambassador Cherith Norman Chalet, U.S. Representative to the UN for UN Management and Reform, delivered a statement for the United States at the annual meeting of Chairpersons of the Human Rights Treaty Bodies with member states.

Ambassador Norman's June 27 intervention follows. The Costa Rica paper referenced in the statement is available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1354&Lang=en.

* * * *

The United States has been integrally involved in conversations about treaty body reform since well before Resolution 68/268 in 2014, and we are pleased to join this discussion today. The treaty body system plays a critical role in holding States accountable for meeting their obligations under human rights treaties, and we firmly support efforts to strengthening this system and enhance coordination among the bodies.

To this end, our colleagues in Geneva have worked closely with other states in developing the list of important considerations that Costa Rica sent to you last week. While it may not be feasible to pursue implementation of every element on the list, we endorse the Costa Rican paper as a clear and useful roadmap for focusing the dialogue as we move toward the April 2020 review.

I would just highlight a few elements of particular importance:

- First, we must find additional ways to reduce the burden on both states and treaty bodies from repeated volleys of information in a single reporting cycle. While important efficiencies have been gained through simplified reporting, page limits, and the common core document, we must redouble our efforts to streamline reporting, consolidate where appropriate, harmonize procedures across treaty bodies, and explore a coordinated calendar to make reporting more manageable.
- Second, we must find ways to improve the selection and election process of members, including by increasing transparency, to ensure that members are both substantively qualified and demonstrably independent of their government. Strong membership makes treaty bodies more credible and effective.
- Third, we must improve safeguards against intimidation and reprisals against individuals and groups cooperating with treaty bodies.

* * * *

B. DISCRIMINATION

1. Race

a. CERD Observations on China's actions in Xinjiang

On October 29, 2019, at the Third Committee dialogue of the Committee for the Elimination of Racial Discrimination, a group of 23 countries, which included the United States, issued a statement on Xinjiang. The joint statement, delivered by the Ambassador for the United Kingdom, is available at https://usun.usmission.gov/joint-statement-delivered-by-uk-rep-to-un-on-xinjiang-at-the-third-committee-dialogue-of-the-committee-for-the-elimination-of-racial-discrimination/ and reads:

> We share the concerns raised by the Committee for the Elimination of Racial Discrimination in their August 2018 Concluding Observations on China regarding credible reports of mass detention; efforts to restrict cultural and religious practices; mass surveillance disproportionately targeting ethnic Uighurs; and other human rights violations and abuses in the Xinjiang Uighur Autonomous Region.
>
> We call on the Chinese government to uphold its national laws and international obligations and commitments to respect human rights, including freedom of religion or belief, in Xinjiang and across China. The Chinese government should urgently implement CERD's eight recommendations related to Xinjiang, including by refraining from the arbitrary detention of Uighurs and members of other Muslim communities. In view of these concerns, we call on all countries to respect the principle of non-refoulement.
>
> Furthermore, we call on the Chinese government to allow the Office of the United Nations High Commissioner for Human Rights and UN Special Procedures immediate unfettered, meaningful access to Xinjiang.

On the same day, U.S. Permanent Representative to the UN Kelly Craft delivered a statement for the United States during the Third Committee meeting with the chair of the Committee on the Elimination of Racial Discrimination. Ambassador Craft's statement is available at https://usun.usmission.gov/statement-during-the-third-committee-interactive-dialogue-with-the-chair-of-the-committee-on-the-elimination-of-racial-d/ and follows:

> The United States aligns itself with the joint statement delivered by the UK. We condemn the Chinese government's arbitrary detention of more than one million Uighur and other Muslims in internment camps in Xinjiang. We will speak out against violations of human rights and human dignity wherever they occur.
>
> Further, the US welcomes the Committee's report. The Committee plays a crucial role monitoring and promoting States Parties' implementation of their Convention obligations.
>
> We are firmly committed to promoting equality and strongly condemn all forms of racial discrimination. We are dedicated to pursuing its elimination, while also respecting freedoms of expression, association, and peaceful assembly.
>
> We recognize the threat of racial discrimination, and we support collaboration among States Parties, NGOs, civil society groups, and individuals to counter racism and combat bias-motivated violence.

b. Follow-up to the Durban Declaration

On November 19, 2019, Jason Mack, counselor for the U.S. Mission to the UN, delivered the U.S. statement on "Follow-up to the Durban Declaration." Mr. Mack's statement is excerpted below and available at https://usun.usmission.gov/statement-on-agenda-item-68-b-follow-up-to-the-durban-declaration/.

* * * *

The United States remains firmly committed to combatting racism and racial discrimination. Indeed, we recognize a special obligation to do so given historical injustices perpetrated during past eras of colonial expansion into indigenous communities, slavery, and Jim Crow. We pledge to continue our work with civil society, international mechanisms, and all nations of goodwill to combat this evil.

The United States implements the International Convention on the Elimination of All Forms of Racial Discrimination to which we are a State Party, because we believe it provides comprehensive protections in this area and constitutes the most relevant international framework to address all forms of racial discrimination. We continue to raise the profile of and participate in activities in support of the International Decade for People of African Descent.

In addition, we remain deeply concerned about speech that advocates national, racial, or religious hatred, particularly when it constitutes discrimination, hostility, or incitement to violence. From our own experience and history, the United States remains convinced that the best antidote to offensive speech is not bans and punishments but a combination of three key elements: robust legal protections against discrimination and hate crimes, proactive government outreach to racial and religious communities, and the vigorous protection of freedom of expression, both on- and off-line.

Like last year, we regret that we cannot support this resolution on such an important topic, because this text is not genuinely focused on combatting racism, racial discrimination, xenophobia and related intolerance. Among our concerns about the resolution are its endorsements of the Durban Declaration and Program of Action (DDPA), as well as the outcome of the Durban review conference, and its endorsement of overbroad restrictions on freedom of speech and expression. We reject any efforts to advance the "full implementation" of the DDPA. We believe this resolution serves as a vehicle to prolong the divisions caused by the Durban conference and its follow-up rather than providing a comprehensive and inclusive way forward for the international community to combat the scourge of racism and racial discrimination.

In addition, the United States cannot accept the resolution's call for States Parties, as a matter of urgency, to consider withdrawing reservations to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination or its suggestion that such reservations may be contrary to the object and purpose of the treaty; we note that this resolution has no effect as a matter of international law. We also categorically reject the resolution's welcoming a call for "former colonial Powers" to provide reparations "consistent with" the DDPA.

Finally, we underscore our concerns about the additional costs this resolution will impose on the UN's regular budget through the request for reactivation of the Independent Eminent Experts' activities. In view of the significant constraints on the UN's regular budget, and the limited ability of member states to provide increasing amounts of resources, we stress the need for this body to consider carefully the resource implications of such requests before making them.

For these reasons, we must again vote against this resolution, and we urge other delegations to do the same.

* * * *

2. Gender

a. Women, Peace, and Security

On June 11, 2019, the State Department issued a press statement by Secretary Pompeo announcing the release of the U.S. strategy on women, peace, and security. The statement is excerpted below and available at https://www.state.gov/release-of-the-united-states-strategy-on-women-peace-and-security/.

* * * *

Women around the world have an essential role in conflict prevention and resolution, security provision, peace processes, and countering terrorism. For over a decade, the United States has been a leader in promoting global peace and stability by empowering women to take on those roles and addressing challenges faced by women and girls in conflict and disaster affected areas. Today, the United States reaffirms our leadership on these issues with President Trump's release of the U.S. Strategy on Women, Peace, and Security.

The strategy directs the Department of State to ensure women and girls' meaningful participation and safety in efforts to promote stable and lasting peace as well as enhance U.S. partners' capacity to advance women, peace, and security. We are proud to take on this task in partnership with the Department of Defense, Department of Homeland Security, and the United States Agency for International Development (USAID). The Department of State will mobilize the unique contributions of American diplomacy through the implementation of this strategy.

The United States recognizes that societies which empower women economically and politically are more stable and peaceful. As such, the strategy is a government-wide effort, complementing the recently announced Women's Global Development and Prosperity Initiative. Both efforts underscore President Trump's emphasis on the importance of empowering women to participate fully in civic and economic life, leading to more peaceful and prosperous societies.

* * * *

On October 29, 2019, Ambassador Craft delivered the explanation of vote for the United States on the adoption by the Security Council of a resolution on women, peace, and security. Ambassador Craft's statement is excerpted below and available at https://usun.usmission.gov/explanation-of-vote-on-the-adoption-of-the-un-security-council-resolution-on-women-peace-and-security/.

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The United States joins other member states in support of the Women, Peace, and Security Resolution. We remain deeply committed to this issue.

I commend South Africa for the cooperative spirit in which it led this process. However, the resolution refers to previous documents that include references to 'sexual and reproductive health." I must note that we cannot accept references to "sexual and reproductive health," nor any references to "safe termination of pregnancy" or language that would promote abortion or suggest a right to abortion.

The United States has stated clearly on many occasions, consistent with the 1994 ICPD Programme of Action and its report, that we do not recognize abortion as a method of family planning, nor do we support this in our women's global assistance initiatives. The U.N. should not put itself in a position of promoting or suggesting a right to abortion, whether it is humanitarian or development work. A new resolution on Women, Peace, and Security offers an opportunity to highlight the great personal risks women face and emphasize efforts to support and protect women peacebuilders.

We are pleased that this resolution includes elements of the Women, Peace, and Security agenda related to peacekeeping because, as we all know, women improve the effectiveness of peacekeeping missions. However, the resolution falls short of putting the full weight and support of the Council behind the women who are putting their lives on the line every day to build peace.

This resolution also leaves out key aspects of the Action of Peacekeeping Declaration of Shared Commitments, which emphasizes that Member States need to collectively ensure that a gender perspective is integrated into all stages of peace processes. While we appreciate that the resolution notes the gender parity strategy, we are disappointed that it failed to highlight the aspects of the strategy that aim to increase the number of women in the military and police contingents of UN peacekeeping operations.

Individually, we should all be taking steps to address the persistent barriers women peacekeepers face, and to overcome these barriers in our systems. We continue to urge all troop- and police-contributing countries to adopt and promote policies to achieve these objectives.

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b. Commission on Status of Women

On March 22, 2019, Ambassador Norman delivered the concluding statement for the United States on the Commission on the Status of Women 2019 Agreed Conclusions. Ambassador Norman's remarks are excerpted below and available at https://usun.usmission.gov/concluding-statement-on-the-csw-2019-agreed-conclusions/.

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The United States is concerned by all reports of harassment and bullying during this session, including of the facilitator. This is unacceptable.

In our opening statement, we concluded by saying 'we hoped the CSW could speak as "one voice for every woman and every girl in this room and around the world." Unfortunately, this did not happen as the process was deeply flawed including how some decisions were taken on sensitive issues.

Further, the document is unwieldy and retains terms and concepts that remain controversial or unclear among the broader UN membership as others have said which prevented all Members of the Commission to join consensus on this document. Unfortunately, we are not surprised by this outcome. Although the United States was not a member of the Commission, we participated fully in negotiations and are sad to say the clear views of many delegations were not taken into account.

Some of the issues of concern to my delegation remain that the agreed conclusions must take into account the sovereignty of each country. But national sovereignty begins with a respect

for human rights. As Secretary Pompeo has said, "nothing can replace the nation-state as the guarantor of democratic freedoms and national interests… We aspire to make the international order serve our citizens—not to control them. America intends to lead—now and always."

Madam Chair, the United States supports the empowerment of women and girls. That is why my delegation preferred the use of the term "women and girls" where it provided greater clarity and focus in the document.

The United States also strongly supports the irreplaceable primacy of parents and the family they create, which is the foundational institution of society, vital to the health of a nation and human flourishing. As President Trump aptly stated "parents, not bureaucrats, know best how to raise their children and create a thriving society.

Madam Chair, the United States fully supports maternal and child health and informed and voluntary access to family planning. We have stated clearly and on many occasions, consistent with the 1994 International Conference on Population and Development (ICPD) Program of Action and its report, as adopted by the General Assembly, that we do not recognize abortion as a method of family planning, nor do we support abortion in our women's global assistance. Over the years and among some UN agencies the phrases "sexual and reproductive health", "health care services" and "health services" have acquired connotations that promote abortion and attempt to create a claimed "right" to abortion. As others have said tonight, the United States does not accept these terms as they often encompass abortion as a method of family planning. Moving forward, the Administration seeks to find consensus with a wide group of Member States on other terminology that would better capture our common commitment to meet the health needs of women and adolescents throughout the world, while respecting national policies.

The U.S. supports optimal adolescent health and locally driven, family-centered sex education, provided in a context that increases opportunities for youth to thrive, and which empowers them to avoid all forms of sexual risk.

However, the inclusion of the terms "comprehensive education and sexual and reproductive health information" is unacceptable. The application of this term often normalizes adolescent sexual experimentation, fails to incorporate family, faith and community values, are inconsistent with public health messages that promote "the highest attainable standard of health, and promotes abortion as a solution to a teen pregnancy."

Madam Chair, again, the listing of various international conventions neither changes the current state of conventional or customary international law nor implies that states must join or implement obligations under international instruments to which they are not a party.

The United States continues to emphasize the important role civil society plays both in the promotion and protection of human rights, democracy, and the rule of law, and in providing expertise and advocacy within the UN system. It acknowledges that strong, vibrant civil societies are critical to having strong, successful countries. It acknowledges that governments are more responsive and effective when citizens are free to organize and work together across borders. We recognize the importance of states' commitments to creating an enabling environment for civil society and encourage all states to work together and with relevant regional, UN, and civil society mechanisms in this effort.

We were pleased to see language on indigenous women and girls and women and girls with disabilities. Women and girls belonging to these marginalized groups experience additional discrimination and challenges to social protection from barriers society puts on them. We are also happy to see women and girls with disabilities included in various issues related to social

protection in this text—drawing attention here in the CSW to the challenges and discrimination they face moves us one step closer to mainstreaming the human rights of persons with disabilities across the UN system. Separately, my delegation will continue to focus on improving accessibility to the UN.

Madam Chair, the United States continues to believe that each Member State has the prerogative to determine its relationship with other countries, and that this includes restricting that relationship in certain circumstances. Economic sanctions, whether unilateral or multilateral, can be a successful means to achieve foreign policy, national security, and other objectives. In cases in which the United States has applied sanctions, we have used these with specific objectives in mind, including as a means to promote a return to rule of law or democratic systems, to respect human rights and fundamental freedoms, or to prevent threats to international security. We are within our rights to use sanctions as a tool to achieve noble objectives, and U.S. sanctions are consistent with the Charter of the United Nations and international law.

We would also like to reiterate our understanding of the references to "universal health coverage." We emphasize that States do not have obligations under international law to achieve universal access to healthcare. We encourage governments and public institutions to strive to improve access to quality universal healthcare and to do so in accordance with their national contexts and policies. The United States will continue to work to improve access to quality healthcare while also recognizing the necessary role of partnerships with the private sector, civil society, faith-based organizations, and other non-governmental stakeholders.

Turning to this document's "reaffirmation" of the 2030 Agenda, the United States recognizes the Agenda as a global framework for sustainable development that can help countries work toward global peace and prosperity. The United States supports the spirit of the 2030 Agenda for Sustainable Development as a framework for development and will continue to be a global leader in sustainable development through our policies, partnerships, innovations, and calls to action. However, the 2030 Agenda recognizes that each country must work toward implementation in accordance with its own national policies and priorities.

We look forward to participating next year as a Member of the Commission, when we will once again join in discussions on the best path toward removing barriers to the empowerment of women and girls.

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c. Women's Global Development and Prosperity ("W-GDP") Initiative

In February 2019, President Trump established the Women's Global Development and Prosperity ("W-GDP") Initiative. The Third Pillar of the initiative concerns legal reforms aimed at removing barriers for women in the economy. On December 23, 2019, the President signed a memorandum on W-GDP's Third Pillar, identifying specific areas of focus for legal reforms. The memorandum is available at https://www.whitehouse.gov/presidential-actions/memorandum-addressing-legal-societal-barriers-womens-global-development-prosperity/, and excerpted below.

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Section 1. Policy. Consistent with National Security Presidential Memorandum-16 of February 7, 2019 (Promoting Women's Global Development and Prosperity) (NSPM-16), it shall be the

policy of the United States to enhance the opportunity for women to participate in, contribute to, and benefit meaningfully and equitably from, economic opportunities as individuals, parents, workers, consumers, innovators, entrepreneurs, and investors.

The United States will pursue this economic and national security objective across the developing world through the Women's Global Development and Prosperity (W-GDP) Initiative, and its three pillars, as described in NSPM-16. The W-GDP Initiative's third pillar, Women Enabled in the Economy, specifically addresses the factors that affect women's ability to reach their economic potential, including applicable laws, regulations, policies, practices, and social and cultural norms.

Women are frequently discouraged, and often effectively barred, from economic engagement by disproportionate burdens of unpaid care, gender-based violence and abuse, underinvestment in their education, the need for spousal approval for employment, and legal barriers to participation in certain professions. Some of the economic barriers women face arise from laws that limit women's rights to inherit or own property, or enter contracts in their own names, or arise from a failure to enforce laws that establish women's rights in these areas. Reducing those barriers while ensuring women have the needed legal and policy protections requires deliberate efforts by the government, the private sector, and civil society.

Sec. 2. Addressing Legal and Societal Barriers. The heads of executive departments and agencies (agencies) represented on the W-GDP Working Group established by NSPM-16 shall focus their programmatic and diplomatic efforts, as appropriate, on the following five areas of emphasis in support of pillar three of the W-GDP Initiative:

(a) Lifting restrictions on women's authority to sign legal documents, such as contracts and court documents, and addressing unequal access to courts and administrative bodies for women, whether officially or through lack of proper enforcement.

(b) Ensuring women's equal access to credit and capital to start and grow their businesses, and prohibiting discrimination in access to credit on the basis of sex or marital status.

(c) Lifting restrictions on women's possessing and managing property, including limitations on inheritance and the ability to transfer, purchase, or lease property.

(d) Addressing constraints on women's freedom of movement, including restrictions on obtaining passports on the basis of sex.

(e) Eliminating barriers that limit working hours, occupations, or tasks on the basis of sex.

Sec. 3. Action Plans. The agencies represented on the W GDP Working Group established by NSPM-16 shall develop action plans for addressing the five areas of emphasis identified in section 2 of this memorandum in developing countries, to be submitted to the President through the Co-Chairs of the W-GDP Working Group established by NSPM-16. Agencies shall provide plan frameworks to the Co-Chairs by February 7, 2020, and final action plans by March 7, 2020.

The action plans should identify each agency's unique capabilities for addressing these areas of emphasis through cooperation with country governments, civil society, the private sector, or non-governmental organizations, and specific goals they will work toward to achieve progress on these objectives. Beginning in 2021, as part of the annual reports required by section 5 of NSPM-16, agencies shall report publicly on the progress made toward the goals identified in the action plans required by this section.

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3. Age

On November 19, 2019, Mr. Mack delivered the U.S. statement on "Follow-Up to the Second World Assembly on Ageing." The statement is excerpted below and available at https://usun.usmission.gov/statement-on-agenda-item-25-b-follow-up-to-the-second-world-assembly-on-ageing/. For the November 7 general statement referenced in the U.S. statement, see section A.2 *supra*.

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The United States thanks the G-77 for its resolution on "Follow-Up to the Second World Assembly on Ageing." And would in particular like to express our appreciation to its facilitator, Argentina. The United States is pleased to join consensus on the resolution.

With regard to this resolution's references to the 2030 Agenda for Sustainable Development; the world financial and economic crisis; the New Urban Agenda; health care; and economic, social, and cultural rights, we have addressed our concerns in previous statements including in our general statement delivered on November 7. The resolution calls upon member states to act to protect and assist older persons in emergency situations, in accordance with the Madrid Plan of Action and the Sendai Framework. We note that these two documents are voluntary, and that there are other documents which also figure in protecting and assisting persons, including older persons, in humanitarian crisis situations. The Guidelines to Protect Migrants Experiencing Conflict or Natural Disaster and the Guiding Principles on Internal Displacement are two prominent examples.

The United States would like to underscore the importance of promoting the Fundamental Principles and Rights at Work for all workers, including care workers.

Regarding the term "migrants," which is used in paragraph 18 of the resolution: We note this and the term "migration" are not well-defined in international law. The United States maintains the sovereign right to facilitate or restrict access to its territory, in accordance with its national laws, policies, and interests, subject to its existing international obligations. We refer to the National Statement of the United States of America on the Adoption of the Global Compact for Safe, Orderly and Regular Migration, issued December 7, 2018. Further, the United States is not a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

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4. Disabilities

On June 20, 2019, the United States co-sponsored a resolution, adopted by the UN Security Council, on persons with disabilities in armed conflict. The U.S. statement on the resolution was delivered by Ambassador Norman. The statement is excerpted below and available at https://usun.usmission.gov/remarks-at-the-adoption-of-a-un-security-council-resolution-on-persons-with-disabilities-in-armed-conflict/.

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The United States is pleased to co-sponsor this important resolution on Persons with Disabilities in Armed Conflict. We thank Poland and the UK for their tremendous and tireless efforts to conduct a thorough and transparent negotiation process. This groundbreaking resolution is a significant step forward in mainstreaming the rights of persons with disabilities across the UN by bringing the issue here, an area of the UN where we have not done enough on this topic.

Our delegation knows firsthand the challenges we face in mainstreaming disability rights across the UN system, including physical access here at Headquarters, so we are pleased to see a reference to the UN Disability Inclusion Strategy in this text. Persons with disabilities are already marginalized in times of peace—their vulnerability and further marginalization increases drastically in armed conflict. Persons with disabilities are disproportionately affected by armed conflict and other situations of violence compared to persons without disabilities. Support mechanisms for accessing basic services such as water, sanitation, food, shelter and health care may be disrupted as well as existing environmental, communication and attitudinal barriers in accessing services may further be exacerbated. Moreover, humanitarian services are often not adapted to ensure that persons with disabilities can access them, and as a result, persons with disabilities are too often left out and left behind.

This short but effective resolution addresses the challenges faced by persons with disabilities as well as concrete actions the Council and the international community can take to address them. The United States especially welcomes the paragraphs on data collection, capacity building, and the meaningful participation and leadership of persons with disabilities during all stages of conflict. We also look forward to more regular briefings by persons with disabilities and their representative organizations as well as humanitarian organizations and other stakeholders—our hope is that this becomes a regular part of the Council's work, the way that we address other issues such as women and girls in conflict. Thank you very much.

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On July 26, 2019, the 29th anniversary of the enactment of the Americans with Disabilities Act ("ADA"), the United States announced that it had formally endorsed the Charter on Inclusion of Persons with Disabilities in Humanitarian Action. The State Department press statement making the announcement, available at https://www.state.gov/on-anniversary-of-americans-with-disabilities-act-u-s-endorses-charter-on-inclusion-of-persons-with-disabilities/, also includes the following:

> These international commitments help ensure that humanitarian assistance, relief, and recovery services are inclusive and accessible—reducing barriers that can leave persons with disabilities open to targeted violence, exploitation, and abuse.
>
> Though challenges and barriers abound, we will continue to work tirelessly to ensure that every person is afforded the opportunity to reach their full potential.

The United States issued an explanatory statement on its endorsement of the Charter on Inclusion of Persons with Disabilities in Humanitarian Action, which follows.

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The United States embraces the goals of inclusion and protection of persons with disabilities in situations of risk reflected in the Charter on Inclusion of Persons with Disabilities in Humanitarian Action. The United States emphasizes its continued commitment to protecting persons with disabilities in humanitarian crises, and promoting the meaningful involvement of persons with disabilities in developing relevant policies and programs. We are pleased to endorse the charter, which was developed in advance of the World Humanitarian Summit held May 23-24, 2016, in Istanbul, Turkey, subject to the following understandings. We endorse the charter with the understanding, as footnote 1 underscores, that the Document is not legally binding, and does not change nor necessarily reflect the United States' or other States' obligations under treaty or customary international law of the United States or other Member States, but rather expresses a common, voluntary political intention and intended course of action. In that regard, and with respect to paragraph 1.5, we note that the obligations under the Convention on the Rights of Persons with Disabilities apply to States Parties to that Convention, of which the United States is not one. We also express our support for the principles in paragraph 1.5 regarding the inclusion of persons with disabilities in humanitarian preparedness and response. As a legal matter, however, we note that this and other paragraphs' references to human rights principles and obligations are imprecisely worded and therefore could give rise to confusion about which legal regime is applicable during armed conflict. Although we also recognize that determining what international law rules apply to any particular government action during an armed conflict is often highly fact-specific, we emphasize that international humanitarian law is the lex specialis applicable to situations of armed conflict and, therefore, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims. We read the text of the charter on that basis. We further wish to state our understanding that the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977 do not create specific obligations for States Parties and parties to armed conflict to "respect and protect persons with disabilities" or to "pay attention to their specific needs during armed conflicts" as paragraph 1.5 suggests. Rather, States Parties and parties to armed conflict have general obligations under the 1949 Geneva Conventions and 1977 Additional Protocols, as applicable, for the protection of all war victims, including those who happen to be persons with disabilities. In addition, international humanitarian law also includes specific obligations for the protection of civilians who are wounded, sick, or infirm and of prisoners of war with disabilities, who often might warrant special consideration during conflict situations.

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On November 18, 2019, Adviser to the U.S. Mission to the UN Sofija Korac provided the U.S. general statement on "Implementation of the Convention on the Rights of Persons with Disabilities and the Optional Protocol Thereto." Her statement is available at https://usun.usmission.gov/us-general-statement-on-implementation-of-the-convention-on-the-rights-of-persons-with-disabilities-and-the-optional-protocol-thereto/, and excerpted below.

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The United States is proud to co-sponsor this resolution, particularly given its focus on accessibility this year. We thank New Zealand and Mexico for their good facilitation and their efforts to accommodate all delegations.

We do regret that the final text did not contain references to Security Council resolutions and in particular that we lost the direct reference to Resolution 2475. This groundbreaking resolution is a significant step forward to mainstream the rights of persons with disabilities across the United Nations by bringing the issue here, an area of the UN where we have not done enough on this topic. It is regrettable that some delegations did not want this reference, particularly those who were part of the negotiations in the Security Council and voted in favor of Resolution 2475.

We are pleased with many elements of this resolution including particularly the references to the UN Disability Inclusion Strategy (UNDIS) and the Accessibility Steering Committee chaired by the Republic of Korea and Antigua and Barbuda.

We welcome the report this resolution covers. The topic of this year's resolution was very fortuitous and timely and will enable us to evaluate the implementation of the UNDIS through the report. The steering group developed recommendations in June 2019 in order to increase accessibility across UN headquarters.

My delegation has also been proud to actively participate in these two initiatives. We know firsthand the challenges of mainstreaming disability rights across the UN system, including to improve physical access here at Headquarters.

The United States was also pleased to see the accessible seating proposal adopted within the General Assembly revitalization text passed in September. By creating a system to move delegations' seats to an accessible location, we have already seen firsthand the benefits of this proposal, which allows all members of our delegation to attend all UN meetings in a way that is accessible. Thank you to Mexico and New Zealand for also including this important development in their text.

We also support the extensive focus on this resolution to consider different types of disabilities and the diverse accessibility challenges they face. The decision-making paragraphs in this resolution are also critical: in the true spirit of "Nothing about us without us," persons with disabilities need to be involved in all decision making processes including on accessibility.

While the United States cannot ensure the enjoyment of human rights, because non-state actors can affect their enjoyment, we recognize the importance of promoting and protecting the human rights of persons with disabilities, including children with disabilities. The United States supports enabling persons with disabilities to live independently and participate fully in all aspects of life. We emphasize that States should take appropriate measures to ensure that persons with disabilities have access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.

The United States understands references to the right to privacy to refer to those protections provided under Article 17 of the International Covenant on Civil and Political Rights, and confirms the importance of respect for applicable data protection laws and regulations.

With regard to this resolution's references to reaffirmation of international instruments to which the United States is not a Party and the 2030 Agenda for Sustainable Development, among other issues, we refer you to our previous statement on Third Committee resolutions delivered on November 7, 2019.

Finally, the United States calls on other countries to redouble their efforts and join us in continuing the positive work to mainstream persons with disabilities fully across the UN and the work of the international community.

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5. Sexual Orientation

a. Annual statement at the Organization of American States

At the 49th regular session of the General Assembly of the Organization of American States ("OAS"), June 26-28, 2019, the United States co-sponsored and endorsed the annual statement on human rights and prevention of discrimination and violence against LGBTI persons, with the following explanation of position ("EOP"). The record of proceedings, OAS Doc. No. OEA/Ser.P/XLIX-O.2, is available at http://scm.oas.org/doc_public/ENGLISH/HIST_19/AG07996E03.doc. The U.S. EOP is included in the "Report of the Rapporteur Of The General Committee," OAS Doc. No. OEA/Ser.P/XLIX-AG/CG/doc.10/19, available at http://scm.oas.org/doc_public/ENGLISH/HIST_19/AG07965E06.doc.

> Protecting the human rights of all persons, including LGBTI persons, has long been and remains the policy of the United States. Around the world, we make a concerted effort to prevent and address violations and abuses of human rights and undue restrictions on fundamental freedoms. That includes threats to human rights and fundamental freedoms faced by LGBTI persons. With this in mind, and in our capacity as chair pro tempore of the OAS LGBTI Core Group, the United States affirms our support for the text "Human rights and prevention of discrimination and violence against LGBTI persons" as contained in the draft resolution "Promotion and Protection of Human Rights," while noting that we understand "discrimination" as used in this resolution to refer only to government action with respect to the provision of government services and not to governmental action taken in support of legitimate governmental purposes, including the protection of fundamental freedoms and compliance with other laws. We seek to support a resolution that fosters safer, better futures for LGBTI persons across our entire region.

b. UN

On October 24, 2019, Jason Mack delivered remarks at a UN Third Committee dialogue with the independent expert on protection against violence and discrimination based on sexual orientation. Mr. Mack's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-third-committee-dialogue-with-the-independent-expert-on-protection-against-violence-and-discrimination-based-on-sexual-orientation-an/.

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In joining the statement by the UN LGBTI Core Group on October 18, the United States highlighted its commitment to the dignity and equal protection of LGBTI persons under each nation's domestic laws. The United States strongly supports eradicating violence against LGBTI persons, and particularly urges an end to the criminalization of consensual same-sex behavior between adults.

The Statement also addresses protecting LGBTI persons from discrimination. The United States recognizes that the use of the term "discrimination" without a definition is subject to broad-ranging interpretations, and we would welcome a further discussion on that topic. The United States would also welcome a concerted and sustained effort to eliminate systematic barriers that restrict the ability of LGBTI persons to access essential goods and services.

Around the world, LGBTI persons are subjected to violence and bias-motived crime. All governments should seek to ensure equal protection of every person's fundamental freedoms. No government should support or encourage hostility directed at LGBTI persons under any circumstances.

The underreporting of violence and serious discrimination is deeply concerning. Comprehensive and accurate data collection is essential to formulating policy and to holding officials and others accountable for behavior inconsistent with the equal rights and status of LGBTI persons.

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C. CHILDREN

1. Children in Armed Conflict

Consistent with the Child Soldiers Prevention Act of 2008 ("CSPA"), Title IV of Public Law 110-457, as amended, the State Department's 2018 Trafficking in Persons ("TIP") report lists the foreign governments that have violated the standards under the CSPA, *i.e.* governments of countries that have been "clearly identified" during the previous year as "having governmental armed forces or government-supported armed groups, including paramilitaries, militias, or civil defense forces, that recruit and use child soldiers," as defined in the CSPA. Those so identified in the 2018 report are the governments of Burma, the Democratic Republic of the Congo, Iran, Iraq, Mali, Niger, Nigeria, Somalia, South Sudan, Syria, and Yemen.

The CSPA list is included in the TIP report, available at https://www.state.gov/trafficking-in-persons-report-2019/. For additional discussion of the TIP report and related issues, see Chapter 3.B.3. Absent further action by the President, the foreign governments listed in accordance with the CSPA are subject to restrictions applicable to certain security assistance and licenses for direct commercial sales of military equipment for the subsequent fiscal year. In a memorandum for the Secretary of State dated October 18, 2019, 84 Fed. Reg. 59,519 (Nov. 4, 2019), the President determined:

> it is in the national interest of the United States to waive the application of the prohibition in section 404(a) of the CSPA with respect to Afghanistan and Iraq; to

waive the application of the prohibition in section 404(a) of the CSPA with respect to the Democratic Republic of the Congo to allow for the provision of International Military Education and Training (IMET) and Peacekeeping Operations (PKO) assistance, to the extent the CSPA would restrict such assistance or support; to waive the application of the prohibition in section 404(a) of the CSPA with respect to Mali to allow for the provision of IMET and PKO assistance, the issuance of licenses for direct commercial sales of military equipment, and Department of Defense (DOD) support provided pursuant to 10 U.S.C. 333, to the extent the CSPA would restrict such assistance or support; to waive the application of the prohibition in section 404(a) of the CSPA with respect to Somalia to allow for the provision of IMET and PKO assistance and DOD support provided pursuant to 10 U.S.C. 333, to the extent the CSPA would restrict such assistance or support; to waive the application of the prohibition in section 404(a) of the CSPA with respect to South Sudan to allow for the provision of PKO assistance, to the extent the CSPA would restrict such assistance or support; and, to waive the application of the prohibition in section 404(a) of the CSPA with respect to Yemen to allow for the provision of PKO assistance and DOD support provided pursuant to 10 U.S.C. 333, to the extent the CSPA would restrict such assistance or support …

2. Rights of the Girl Child

On November 15, 2019, Courtney R. Nemroff, acting U.S. representative to the UN Economic and Social Council, delivered the U.S. statement on "The Girl Child." Her statement is excerpted below and available at https://usun.usmission.gov/united-states-statement-on-agenda-item-66-a-the-girl-child/.

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We thank Tanzania for its resolution, "The Girl Child." The United States joins consensus today.

With regard to this resolution's references to the 2030 Agenda for Sustainable Development; the Addis Ababa Action Agenda; the UN Framework Convention on Climate Change; and economic, social, and cultural rights, including those involving education and health, we addressed our concerns in two previous statements: one delivered November 7th on Third Committee resolutions, and another delivered October 10th concerning the SAMOA Pathways political declaration.

The United States defends human dignity and supports access to high-quality health care for women and girls across the lifespan. We do not accept references to "sexual and reproductive health," "sexual and reproductive health-care services," "safe termination of pregnancy," or other language that suggests or explicitly states that access to legal abortion is necessarily included in the more general terms "health services" or "health care services" in particular contexts concerning women. As President Trump has stated, "Americans will never tire of defending innocent life." Each nation has the sovereign right to implement related programs and activities consistent with their laws and policies. There is no international right to abortion, nor is there any duty on the part of States to finance or facilitate abortion. Further, consistent with the 1994

International Conference on Population and Development Programme of Action and the 1995 Beijing Declaration and Platform for Action, and their reports, we do not recognize abortion as a method of family planning, nor do we support abortion in our global health assistance.

The United States supports, as appropriate, optimal adolescent health and locally-driven, family-centered sex education provided in a context that increases opportunities for youth to thrive, and which empowers them to avoid all forms of sexual risk.

However, inclusion of the terms "comprehensive education … with information on sexual and reproductive health" is unacceptable. The application of these terms often normalizes adolescent sexual experimentation, fails to incorporate family, faith and community values, and is inconsistent with public health messages that promote the highest attainable standard of health.

The United States notes, with regard to PP 22, that harassment, while condemnable, is not necessarily physical violence. To the extent that OP 24 refers to school-related punishment, we read it to refer to punishment that rises to the level of child abuse, in line with domestic law.

With respect to PP16, OP23, and OP25, we prefer the phrase "child sexual abuse material or child sexual abuse imagery, often referred to or criminalized as child pornography" over "child pornography and other child sexual abuse material." The United States also has concerns regarding the use of the term "child prostitution" in PP16 and OP23. Any involvement of children in prostitution is non-consensual and criminal. The United States prefers to use the terms ""child sex trafficking," the "commercial sexual exploitation of children" or "exploitation of children in prostitution".

On OP 23, the wording "trafficking and forced migration" seem to imply movement. The crime of trafficking in persons, however, as defined in the widely ratified Trafficking protocol, is not movement based.

Finally, regarding OP 18, we understand that when the resolution calls on States to enact and enforce laws concerning the minimum age of consent and marriage, this is done in terms consistent with our respective federal and state authorities.

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3. Optional Protocols to the Convention on the Rights of the Child

a. Sale of Children, Child Prostitution, and Child Pornography

See Chapter 4 for discussion of the *Park* case, which involves the application of the U.S. statute implementing the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

On May 6, 2019, the United States provided comments on the draft guidelines on the implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Excerpts follow (with footnotes omitted) from the May 6 submission.

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The United States appreciates the Draft Guidelines' identification of several important issues concerning implementation of the OPSC. Much of the discussion in the Draft Guidelines reflects sound practices that can promote effective implementation of obligations contained in the OPSC. In addition, we appreciate the Committee's important role in assisting States parties in their efforts to implement obligations under the OPSC and making nonbinding recommendations on making such implementation more effective. In an effort to support these useful efforts, the United States offers numerous recommendations and suggested language for inclusion in the Draft Guidelines. These recommendations and suggested language do not represent acceptance of the Draft Guidelines in whole or in part or that the United States is indicating its approval of future work on the Draft Guidelines.

In a number of instances the Draft Guidelines contain observations on matters beyond the Committee's mandate. Although the OPSC does not address the Committee's mandate in detail, Article 43(1) of the Convention on the Rights of the Child (CRC) indicates generally that the Committee is established "for the purpose of examining the progress made by States parties in achieving the realization of the obligations undertaken" in the CRC. Assuming this mandate also applies to the OPSC, its focus on "the obligations undertaken" in the OPSC would mean that the Committee's mandate is limited to matters in which the OPSC creates obligations for States parties, and does not extend to other matters involving the protection of children as to which the OPSC does not establish obligations. In addition, it is important to bear in mind that the Committee does not have the mandate or authority to issue authoritative interpretations of the CRC and its Optional Protocols. This authority rests with the States parties to these treaties, and the Committee's views, while meriting due consideration, are not binding on States parties.

In a number of places the Draft Guidelines express views—often in extraordinarily prescriptive terms— on topics beyond the bounds of State parties' obligations under the OPSC. Examples of such overreach range from statements that indicate general measures of implementation that are both prescriptive and overreach by requiring training on gender identity by caregivers (paragraph 15); to double criminality "should not be applied" to crimes covered by the OPSC (paragraph 88); to the assertion that specialized training for police, lawyers, prosecution, and judiciary professionals "must" include online issues (paragraph 41). More broadly, sections of the Draft Guidelines relating to comprehensive policy and strategy; coordination, monitoring, and evaluation; allocation of resources; and training (sections III-C, D, E, and G, respectively) go far beyond the scope of OPSC obligations, recommending broad policy reforms for States parties in addressing child sexual exploitation. There is no question that broad policy recommendations such as these may have merit in the broader context of addressing child sexual exploitation; indeed, many of the Committee's recommendations reflect existing U.S. practice or U.S. views on what constitutes best practices. However, such recommendations, particularly when couched in prescriptive and mandatory terms, overstep the bounds of the Committee's role in relation to the OPSC. To be clear, the Committee is not a legislative body. Its focus should be limited and not prescriptive.

The Committee also exceeds its mandate in suggesting that specific terms adopted by the States parties for use in the OPSC are inappropriate for use in domestic legislation implementing the OPSC. In this regard, the Committee's role is to address itself to the obligations contained in the text of the OPSC adopted by the States parties, and not to attempt to rewrite what the States parties have written. The United States is supportive of States reconsidering the dated terminology used to describe child sexual exploitation, such as "child prostitution" and "child sex tourism," in domestic legislation and elsewhere. However, including such recommendations

in these nonbinding Draft Guidelines related to implementation of the OPSC's obligations could give the misimpression that they relate to, or are required in connection with, States parties' obligations under the OPSC. The Committee is not empowered to change these legal terms of art, which have specific definitions laid out in the OPSC itself; rather, it is for States parties to amend the OPSC if they believe that doing so is appropriate to modernize its terminology or for other reasons.

In other instances, the Draft Guidelines misstate or advance flawed interpretations of obligations established in the OPSC. For example, in paragraph 103, the Committee purports to "remind" States parties of their obligation to ensure that criminal justice proceedings "are carried out in the best interest of the child." Article 8 of the OPSC, in contrast, requires only that States parties "ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the [OPSC], the best interest of the child shall be a *primary consideration*." Moreover, the Draft Guidelines go on to state "this [obligation] includes" a variety of measures, including providing free legal aid. Many of these measures may be commendable, but none of them are required as a matter of law under the OPSC. Such misstatements, whether deliberate or inadvertent, undermine the Committee's credibility on this important topic.

More generally, the United States disagrees with the Committee's characterization of the OPSC as a "living instrument" to which a "dynamic interpretation" is to be applied. The OPSC is a treaty which, in accordance with international law, is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose. While there may be occasion to apply the OPSC in a variety of factual settings as situations implicating its provisions arise over time, absent amendment, the text and appropriate interpretation of the treaty's provisions are not subject to change. The United States will continue to view the text of the OPSC—rather than these Draft Guidelines—as setting forth the United States' obligations, in conjunction with the reservations, understandings, and declarations that accompanied U.S. ratification of the OPSC. The United States reiterates that the foundation of international law is State consent, and that international law has binding force only to the extent that it is based on that consent.

The United States further notes the complexities raised by the assumption underlying the Draft Guidelines that States parties to the OPSC are also all parties to the CRC. For example, Paragraph 14 of the Draft Guidelines states that "measures of implementation of the provisions in the OPSC should fully comply" with the CRC. The United States is not party to the CRC and emphasizes that such references to implementation of the OPSC complying with the CRC, or the obligations therein, do not apply to the United States.

Beyond concerns regarding the scope and mandate, the United States notes that in several places the Draft Guidelines raise serious federalism concerns. The United States does not have centralized law enforcement, or centralized law-making in the way the Draft Guidelines contemplate, and would have difficulty implementing several suggestions, including those related to legislation, prosecution, sentencing, data collection, and analysis. In addition, aspects of the Draft Guidelines could conflict with U.S. obligations under international human rights law and the U.S. Constitution. This is a particular concern with regard to restrictions on speech and other expression, which is generally protected by Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and the First Amendment of the U.S. Constitution.

The United States prefers use of the terms "women and men" and "girls and boys" to "gender" in appropriate situations where they provide greater clarity and focus in the Draft Guidelines

Finally, the United States notes that the Draft Guidelines could benefit from additional discussion of the OPSC in the context of new threats to which its obligations may apply. For example, other than in passing (paragraphs 2–3), the Draft Guidelines do not address the Dark Net (or Darknet); nor do the Draft Guidelines discuss newer forms of child sexual exploitation such as live streaming of abuse.

Some additional examples of the concerns raised above, together with comments on some more specific matters, relate to the following paragraphs:

- Paragraph 15 provides guidance on the drafting process for legislative and policy measures and gender training for caregivers. We suggest omitting the last sentence of paragraph 15 and replacing it with the following: States parties should make best efforts to consider the unique needs of the child during the drafting process of legislative and policy measures, and should make efforts to include the representative views of all vulnerable children, taking into consideration their age and maturity to gauge the level of participation by the child.
- Paragraph 18 and Paragraph 54 both emphasize that children should not be prosecuted for any conduct related to their exploitation, but in both instances, the phrasing is awkward. In addition, Paragraph 18 uses the phrase "trafficked across borders," which implies that trafficking in persons is strictly a movement-based crime that only occurs across international borders. To more clearly express the point and avoid any inaccurate implications regarding trafficking, we suggest the following edits: Paragraph 18: "The Committee urges States parties to ensure that **the child victims of the offenses set forth in the OPSC are not inappropriately arrested or prosecuted for unlawful acts committed as a direct result of their exploitation**." Paragraph 54 (final sentence): "The Committee underscores that all children who are sexually exploited in prostitution shall be considered victims, **and should not be inappropriately arrested or prosecuted for unlawful acts committed as a direct result of their exploitation**."
- Paragraphs 29, 30, 31, 42, 95, 97, 102, 103, and 110 add the awkward and unclear phrase "child and gender-sensitive" before other descriptive terms. However, we urge a clarification that is more sensitive to all children: "**age appropriate information, being sensitive to the age and sex of the child".**
- Paragraph 29(c) suggests that States parties should "ensure that all persons, especially those caring for children, have adequate knowledge of the different forms of sexual exploitation and abuse of children ..." The United States questions how it is possible to "ensure" all persons caring for children have access to relevant information and comply. Some type of a licensing system might address this point, but there are unlicensed caregivers.
- In connection with the Committee's suggestions in paragraph 29(d), we recommend broadening the last sentence as follows: "Information should be provided in collaboration with **instructors (with parental consent),** parents**, and caregivers**." We also suggest adding a new subparagraph to paragraph 29 following (a) on dissemination and awareness-raising on the perpetrators of the crimes (the demand) and the impact of trauma inflicted on the victims and survivors. The new subparagraph (b) would read: **(b) Raise awareness about the perpetrators of the crimes to reduce the demand for the sexual exploitation of minors. Anti-demand efforts should address online exploitation, street-**

based exploitation, and exploitation by family members, community members, or other persons of trust.

- In paragraph 30, we recommend adding a subparagraph (e): **"Encourage training and effective responses for victims of offenses proscribed by the OPSC include services that are both victim-centered and survivor-led."**
- In paragraph 31(c), we recommend changing "deal with" to "**identify and respond to**." As edited, the subparagraph would read: "Train all police units investigating child sexual exploitation and abuse offences, including cases associated with the use of ICTs, as well as prosecutors and the judiciary, to **identify and respond to** child victims in a child- and gender-sensitive manner and
- In paragraph 33, we suggest changing the phrase "particularly with regard to complex notions related to masculinity and gender, which" to **"that serve to foster, normalize, or."**
- In paragraph 34, we recommend removing the unclear phrase "with due attention to the gender dimension" and editing paragraph 34(b) as follows: "Provide social protection and financial support, including income generating activities, to enable the economic empowerment of vulnerable **children, youth, and their** families." The term "victim-centered" refers to an approach to practice that focuses on the safety, security, stability, and tailored needs of the victim rather than the roles, expectations, or desires of the service provider(s). In a victim-centered approach, the victim's wishes, safety, and holistic well-being take priority in all matters and procedures. U.S. Department of Justice Office of Justice Programs, *Human Trafficking Task Force e-Guide: Strengthening Collaborative Responses*, *available at* https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/. The term "survivor-led" refers to an approach that equips and empowers survivors to take a leadership role in their own life and in the larger movement against the form of abuse and/or exploitation they have endured and overcome. *See* Karen Countryman-Roswurm & Bailey Patton Brackin, *The Journey to Oz: How Practice, Research, and Law Have Been Used to Combat Domestic Minor Sex Trafficking in Kansas*, 5(2) JOURNAL OF APPLIED RESEARCH ON CHILDREN: INFORMING POLICY FOR CHILDREN AT RISK (2018).
- In paragraph 43, the Draft Guidelines urge "States parties to ensure that internet service providers control, block and ultimately remove" illegal content. In the United States, the government is generally prohibited from requiring private parties to monitor speech. Moreover, it is very difficult to remove this type of content from the internet once it is posted, not to mention the other means by which a subject could send or share the material. If possible, this statement should be qualified so that States parties should "ensure**, consistent with their national legal systems,** that internet service providers ..."
- Paragraph 51 is not consistent with the OPSC and the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption and should be clarified. Through both of these Conventions, it should not be possible for an adoption that followed "applicable rules of international law" to have involved sale of a child.
- Paragraph 52 should omit "and to ensure that the best interests of the child is upheld at all times." The term is highly subjective and open to interpretation. In addition, the stated purpose of the Draft Guidelines is to help States prevent the sale of a child; they are not aimed at addressing broader child welfare issues, child custody determinations, or parental responsibility proceedings, or societal determinations of children's rights, and do not have the aim of emancipating minors or undermining parents' rights. The "best interests of the child"

standard is not directly related to preventing the sale of a child and is, in particular, not appropriate for use in all phases of the regulation of surrogacy.

. In paragraph 54, we believe that the Draft Guidelines intend to say that "survival sex" is a form of child prostitution within the meaning of the OPSC, but the language could be clearer in that regard. We propose the following edits to avoid confusion: "Moreover, such remuneration or consideration can be paid or given to any third person, and the child does not receive anything **directly. O**r the 'consideration' **can be provided directly to the child in the form of** basic survival needs such as food or shelter."

. Paragraphs 61 to 63 should be qualified to indicate that States parties should define their laws or prohibit those activities "consistent with their national legal systems." In the United States, we can only criminalize activity related to drawings, cartoons, etc., if they are obscene as defined under our law. Anything that does not meet the obscenity standard is protected speech under our Constitution, and therefore cannot be the basis of criminal prosecution.

. Paragraph 62: "... urges States parties to prohibit, by law, child sexual abuse material in any form .... including when such material represents realistic representations of non-existing children." In the United States, federal law provides that it is illegal to create, possess, or distribute a visual depiction of any kind, including a drawing, cartoon, sculpture or painting, that depicts a minor engaging in sexually explicit conduct and is obscene. However, visual depictions (CGI, anime, etc.) where there is not a "real" child are typically protected by the First Amendment (unless the visual depictions are obscene) and the United States' obligations under the ICCPR. We suggest editing the paragraph as follows: "... urges States parties to prohibit, by law, **consistent with their national legal systems**, child sexual abuse material in any form .... including when such material represents realistic representations of non-existing children."

. Paragraph 63 states that "'simulated explicit sexual activities' should be interpreted as including any material, online or offline, that depicts or otherwise *represents* any person appearing to be a child engaged in real or simulated sexually explicit conduct and realistic and/or virtual depictions of a child engaged in sexually explicit conduct." As noted above, such visual depictions are typically protected by the First Amendment (unless the visual depictions are obscene) and the United States' obligations under the ICCPR. As a result, this language could complicate bilateral law enforcement engagement where other States expect the United States to investigate or prosecute leads based on activity that is not criminal and in fact protected expression in the United States. We suggest editing the paragraph as follows: "'simulated explicit sexual activities' should be interpreted**, consistent with their national legal systems,** as including any material, online or offline, that depicts or otherwise *represents* any person appearing to be a child engaged in real or simulated sexually explicit conduct and realistic and/or virtual depictions of a child engaged in sexually explicit conduct."

. Paragraph 70 refers to self-generated sexual content, such as sexting. The United States notes for purposes of this paragraph and elsewhere, that in States parties such as the United States, the production by a child of self-generated sexual content/material representing herself or himself can be a criminal offense.

. Paragraph 92 states that "... the Committee encourages States parties to establish universal jurisdiction for all offences covered by the OPSC ..." We note that the term "universal jurisdiction" is an imprecise term that can mean different things in different countries. The United States Criminal Code does contain some provisions that allow the U.S. government to exercise jurisdiction over those present in the United States for certain crimes committed in other

territories; however, enacting this kind of statute is not always appropriate. Paragraph 92 should be discretionary under the Draft Guidelines. Therefore, we recommend editing the language to read: "... the Committee encourages States parties to **consider** establish**ing** universal jurisdiction for all offences covered by the OPSC ..."

. Paragraph 93(a) should be edited to recognize that domestic law in some countries requires a bilateral treaty: "As a consequence, as far as these offences are concerned, and in accordance with article 5.2 OPSC, States parties do not need to have an extradition treaty with other States parties to be able to grant an extradition request**, except for those countries in which domestic law requires a bilateral treaty**."

. In paragraph 98, the Draft Guidelines urge States parties "institute a formal 'best interests of the child' determination process, in accordance with article 12 CRC and General Comment No. 14, to ensure that the criminal prosecution of an alleged offender does not adversely affect the health and recovery of the victim." We recommend editing the sentence to urge States parties to "**incorporate** a 'best interests of the child' **consideration into the** process, in accordance with article 12 CRC and General Comment No. 14, **in an effort to protect against** adversely affect**ing** the health and recovery of the victim."

. In paragraph 103(d), the Draft Guidelines urge States parties to avoid calling children to testify in court. The Confrontation Clause in the U.S. Constitution—which provides that a criminal defendant generally has the right to have witnesses against him or her testify in his or her presence—prevents or limits our ability to take many of the Committee's recommended approaches. We again suggest that the Draft Guidelines clarify that States parties should take actions to the extent they are consistent with their domestic laws.

. Paragraph 119 mentions supporting alliances such as the Virtual Global Taskforce (VGT). We note that VGT rules limit participation by allowing only one law enforcement representative per country. The same paragraph encourages States parties to establish a global task force to combat child sexual exploitation. We note that since 2014, the U.S. Federal Bureau of Investigation has overseen a task force that appears to meet this description. The Violent Crimes Against Children International Task Force currently includes 56 active members from 46 countries.

. Finally, the United States appreciates the Draft Guidelines' discussion of "child sex tourism," but notes that the Draft Guidelines place far too much emphasis on travel, without any acknowledgement of an increasingly serious concern: expatriates, or offenders who move abroad and never return (sometimes moving from country to country without returning to their home country). Some minor edits could incorporate this idea into the Draft Guidelines.

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b. Children Born from Surrogacy Arrangements

On June 21, 2019, the United States provided comments to the Special Rapporteur on the Sale and Sexual Exploitation of Children. The U.S. comments address the Special Rapporteur's upcoming thematic report, intended to develop "safeguards for the protection of the rights of children born from surrogacy arrangements." The U.S. comments appear below (with footnotes omitted).

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The United States takes seriously our obligations under the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC). As a threshold matter, the United States respectfully disagrees with the Special Rapporteur's assertion that the OPSC creates obligations related to surrogacy. Because surrogacy, as a practice, does not involve any of the forms of exploitation included in Article 3 of the OPSC, it is the view of the United States that surrogacy falls outside the scope of the OPSC. Nonetheless, the United States has among the world's strongest laws aimed at protecting and advancing the rights of children without distinction of any kind, and these apply equally to children born via surrogacy arrangements.

No federal legislation exists or is pending in the United States regarding payments to surrogate mothers, as such. Generally, family law matters—including the establishment, recognition, and contestation of legal parentage—are matters controlled by state law in the United States, and state laws regarding surrogacy vary widely. Surrogacy is illegal in some states and is expressly permitted and regulated in others. Thirty-one states have laws that in some fashion address surrogacy. Michigan and New York, as well as Washington, D.C., have criminalized surrogacy. Other states have laws that provide that surrogate contracts are invalid. Still other states set up elaborate mechanisms to approve contracts or to regulate the payment of fees to surrogates. In the states that permit surrogacy agreements, rules and regulations may address issues such as the marital status of the parties, the age of the parties, their medical conditions, the method of obtaining informed consent, the content of surrogacy agreements, the type of compensation that is permitted for surrogates, and the processes required to obtain a parentage order or a birth certificate.

The question of whether or how a "best interests of the child" standard is used varies by U.S. state and by the type of proceeding that is involved. In addition, … the United States is not party to the [Convention on the Rights of the Child or] CRC, so it does not have an international law obligation to make the best interests of the child a primary consideration in all actions involving children. However, as a general matter, States would use the "best interests of the child" standard in proceedings that involve custody, care, or guardianship of a child, not the establishment of parentage. Parentage is established by operation of state law, based on factors such as the person who gave birth to the child, whether the child was born in wedlock, and whether a father executes a valid affidavit of paternity, among other factors.

As discussed above, surrogacy and other family law matters are governed by state law in the United States and laws vary widely. Because of the lack of federal oversight, data on surrogacy-related matters is limited. Fertility clinics in the United States are required to report certain data on assisted reproductive technology (ART) cycles performed to the Center for Disease Control and Prevention (CDC) within the U.S. Department of Health and Human Services (HHS). Fertility clinics reported to HHS/CDC that in 2016, ART cycles resulted in 65,996 live births in the United States. However, these ART statistics do not isolate surrogacy births from other types of in vitro fertilization (IVF) procedures. A report published by the CDC found that between 1999 and 2013 about two percent of all ART cycles used a gestational carrier. State law would govern any licensing, certification, or registration of surrogacy "intermediaries."

On the question of children born from a surrogacy arrangement who enter the United States, generally a child born overseas is permitted to enter the United States if she or he has been documented as a U.S. citizen or has a valid visa. If the U.S. citizen parent or parents of a

child meet the statutory requirements for transmission of citizenship to a child born overseas, or if they are eligible to apply for immigration benefits for their child, then the United States will issue the child the relevant documentation regardless of whether the parents used a surrogate or other forms of ART. In general, if parentage was established properly in the country where the child was born, U.S. officials do not question the legal parentage of the child. We are not aware of any cases where the legal parentage of a child born through a legal surrogacy arrangement was not recognized in the United States.

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4. Child Labor

On July 25, 2019, Jason Mack provided the U.S. explanation of position on the adoption by the General Assembly of a resolution establishing an international day for the elimination of child labor. The explanation of position is excerpted below and available at https://usun.usmission.gov/explanation-of-position-on-adoption-of-ga-plenary-resolution-establishing-an-international-day-for-the-elimination-of-child-labor/.

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The United States joins consensus on this resolution on the International Year for the Elimination of Child Labor. We envision a world in which all children are free from deprivation, violence, and danger, regardless of religious affiliation, ethnicity, disability, or other factors.

The United States does not, however, share the view that the Convention on the Rights of the Child "constitutes the standard" for child protection.

We join consensus on this resolution with the express understanding that it does not imply that States must become parties to instruments to which they are not a party, or implement obligations under human rights instruments to which they are not a party, including, in the case of the United States, the Convention on the Rights of the Child. Furthermore, to the extent that it is implied in this resolution, the United States does not recognize the creation of any new rights we have not previously recognized; the expansion of the content or coverage of existing rights; or any other changes to its or other States' obligations under the current state of treaty or customary international law or under the current state of domestic law that implements such treaty or customary international law.

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D. SELF-DETERMINATION

On November 19, 2019, Mordica Simpson, adviser for the U.S. Mission to the UN, delivered a statement on the right of peoples to self-determination. Her statement follows and is also available at https://usun.usmission.gov/statement-on-agenda-item-69-universal-realization-of-the-right-of-peoples-to-self-determination/. For the November 7 general statement referenced below, see section A.2 *supra*.

> The United States recognizes the importance of the right of self-determination of peoples and therefore joins consensus on this resolution. We note, however, as frequently stated by the United States and other delegations, that this resolution

contains many misstatements of international law and is inconsistent with current state practice.

We also refer to our general statement made on November 7.

E. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

1. Safe Drinking Water and Sanitation

On November 18, 2019, Brian Kelly, adviser to the U.S. Mission to the UN, delivered the U.S. statement on the human rights to safe drinking water and sanitation. Mr. Kelly's remarks are excerpted below and available at https://usun.usmission.gov/united-states-statement-on-agenda-item-70-the-human-rights-to-safe-drinking-water-and-sanitation/. For the November 7 general statement referenced below, see section A.2 *supra*.

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The United States recognizes the importance and challenges of meeting basic needs for water and sanitation to support human health, economic development, and peace and security. The United States is committed to addressing the global challenges relating to water and sanitation and has made access to safe drinking water and sanitation a priority in our development assistance efforts.

In joining consensus on this resolution today we reiterate the understandings in our statements in New York at the UN General Assembly's meeting on this topic in 2015 and 2017, as well as our explanations of position on the Human Rights Council's September 2012, 2013, 2014, and 2016 resolutions on the human right to safe drinking water and sanitation. Our previously stated concerns extend to Human Rights Council resolution 39/8 of 5 October 2018, which we do not affirm.

The United States joins consensus with the express understanding that this resolution, including its references to human rights to safe drinking water and sanitation, does not alter the current state of conventional or customary international law, nor does it imply that states must implement obligations under human rights instruments to which they are not a party. The United States is not a party to the International Covenant on Economic, Social, and Cultural Rights, ICESCR, and the rights contained therein are not justiciable in U.S. courts. As the ICESCR provides, each State Party undertakes to take the steps set out in Article 2(1) "with a view to achieving progressively the full realization of the rights." We interpret references to the obligations of States as applicable only to the extent they have assumed such obligations, and with respect to States Parties to the Covenant, in light of its Article 2(1).

We disagree with any assertion that the right to safe drinking water and sanitation is inextricably related to or otherwise essential to enjoyment of other human rights, such as the right to life as properly understood under the International Covenant on Civil and Political Rights (ICCPR). To the extent that access to safe drinking water and sanitation is derived from the right to an adequate standard of living, it is addressed under the ICESCR, which imposes a different standard of implementation than that contained in the ICCPR. We do not believe that a State's duty to protect the right to life by law would extend to addressing general conditions in society or nature that may eventually threaten life or prevent individuals from enjoying an adequate standard of living.

In addition, while the United States agrees that safe water and sanitation are critically important, we do not accept all of the analyses and conclusions in the Special Rapporteur's reports mentioned in this resolution. We would also note, with respect to preambular paragraphs 28 and 29, that the potential impacts from climate change are only one factor among many that affect access to safe drinking water and sanitation. The United States supports a balanced approach that promotes economic growth and improved energy security while protecting the environment.

With regard to this resolution's references to the 2030 Agenda for Sustainable Development and the outcome documents of ICPD and Beijing review conferences, the United States addressed its concerns in the statement delivered on November 7. We restate our position here that the United Nations must respect the independent mandates of other processes and institutions, including trade negotiations, and must not involve itself in resolutions and actions in other forums, including at the World Trade Organization. The UN is not the appropriate venue for these discussions, and there should be no expectation or misconception that the United States would heed decisions made by the General Assembly on these issues. This includes calls that undermine incentives for innovation, such as technology transfer that is not voluntary and on mutually agreed terms.

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2. Food

On November 18, 2019, Daniel Thompson, adviser for the U.S. Mission to the UN, delivered the U.S. statement on the right to food. The statement is excerpted below and available at https://usun.usmission.gov/statement-on-agenda-item-70-b-the-right-to-food/.

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This Committee is meeting at a time when the international community is confronting one of the most serious food-security emergencies in modern history. Hunger is on the rise for the third year in a row, after a decade of progress. Over 35 million people in South Sudan, Somalia, the Lake Chad Basin, and Yemen are facing severe food insecurity, and in the case of Yemen, potential famine. The United States remains fully engaged and committed to addressing these conflict-related crises.

This resolution rightfully acknowledges the hardships millions of people are facing, and importantly calls on States to support the emergency humanitarian appeals of the UN. However, the resolution also contains many unbalanced, inaccurate, and unwise provisions the United States cannot support. This resolution does not articulate meaningful solutions for preventing hunger and malnutrition, or avoiding their devastating consequences.

The United States supports the right of everyone to an adequate standard of living, including food, as recognized in the Universal Declaration of Human Rights.

Moreover, we note that as the International Covenant on Economic, Social, and Cultural Rights provides, each state party undertakes to take the steps set out in Article 2(1) "with a view to achieving progressively the full realization of the rights."

The United States is concerned that the concept of "food sovereignty" could justify protectionism or other restrictive import or export policies that will have negative consequences for food security, sustainability, and income growth. Improved access to local, regional, and global markets helps ensure food is available to the people who need it most and smooths price

volatility. Food security depends on appropriate domestic action by governments, including regulatory and market reforms, that is consistent with international commitments.

We also do not accept any reading of this resolution or related documents that would suggest that States have particular extraterritorial obligations arising from any concept of a "right to food," which we do not recognize and has no definition in international law.

For these reasons, we request a vote and we will vote against this resolution

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F. LABOR

On November 20, 2019, Assistant Secretary of State for Democracy, Human Rights, and Labor Robert A. Destro delivered remarks at the centennial conference of the International Labor Organization on the impact of rights in the world of work. His remarks are excerpted below and available at https://www.state.gov/remarks-on-the-impact-of-rights-in-the-world-of-work/.

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As we look to the second century of ILO's service, we must consciously remind ourselves that, while "production systems are increasingly fragmented and spread over many countries and regions," the work gets done by actual human beings who live and work in local communities defined by kinship, language, faith, and culture. An assault on these aspects of our humanity is an assault on labor.

Our tendency to focus on labor "as a commodity" also conditions our thinking—so it is appropriate, on occasions like this one, to remind ourselves that men and women are not economic units. Human beings do not always make perfectly rational decisions to maximize utility or profit. We strike balances between and among the demands of our own talents and needs, and those of our families, communities, and co-workers. Men and women are more accurately described as members of the species *Homo faber*. Man, the maker. Men and women build things, we interact with our environments, and we create ideas, buildings, works of art and literature, useful objects, and things of beauty. We create, not solely for ourselves, but also for the enjoyment and comfort of others. We can do this if, and only if, each of us is free, as Michelangelo put it, to see the angel in the block of marble, and "carv[e] until [we] set him free."

This is the human face of labor, and it is the aspect of the labor market regularly ignored in the debate over the merits of a global economy. We neglect the human factor at our peril. Real human communities are decimated when governments and business prioritize the efficiency of global supply chains over the welfare of their own people.

The theme of today's event shows us the way forward: "Creating a Brighter Future of Work, Together." As a labor lawyer, I especially like that last word—*Together*. It resonates. It is at the heart of the ILO's model. The ILO's tripartite governance structure reflects its founders' understanding that human flourishing and peace depend on our working together for the common good: workers, employers, and communities alike. We are bound together.

The greatest challenge facing the ILO in its second century will be to navigate the treacherous cross-pressures that define the politics of the modern economy. We can only do that together.

As a multilateral organization, the ILO is pressed by donor and member states. Some of that pressure can certainly be justified on the grounds that accountability requires pressure, but much of it cannot. Unless we focus clearly, we will not see how member and donor nations will try to shift the ILO's vision for the future.

To whose vision of "the good" will the ILO be accountable in the next hundred years? Powerful economic interests? Or the needs of ordinary workers around the globe?

We will know the answer by looking at the priorities of ILO leadership. If their priority is the freedom of workers to flourish, ILO's leadership will become constant and highly vocal advocates for the freedom of individuals, labor associations and local communities.

They will also be advocates for the democratic systems that protect those freedoms.

The founders of the ILO explicitly recognized the connection between strong labor rights and human flourishing. They recognized that democracy was the system most capable of protecting those aims. They understood, from the bitter experiences that necessitated the ILO's creation, that the strongest, most brutal repression of labor rights happens in nations where the interests of leaders, driven by ideology or self-interest, stand squarely at odds with the vision of the ILO.

At this, the celebration of the ILO's second century, we must stand firmly against any and all efforts [to] accommodate the aims or practices of such nations and ideologies. Technical assistance is important, but it is not enough. Moral leadership and example must come first.

The ILO's record speaks for itself. Some of its greatest achievements on behalf of workers' rights have come when it stood with workers against repressive regimes seeking to crush those seeking freedom and democratic change.

ILO supported Solidarity in Poland. By doing so, it empowered the Polish people and gave new hope to the Polish nation.

ILO supported efforts to end the inhuman and repressive regime of apartheid in South Africa. By doing so, it gave South African labor leaders and workers the freedom to envision a better future for themselves and their children.

It is no exaggeration to say that the ILO's successes have changed the course of millions of lives and the futures of nations. For exactly the same reason, ILO's efforts to challenge repression must continue.

This year, the ILO's Commission of Inquiry helped to spotlight the attacks on workers and employers by the former Maduro regime in Venezuela. I urge this body to keep up that international pressure. The people of Venezuela are counting on us.

In Iran, the ILO must further elevate the voices of striking truckers and teachers and leverage its influence to protect them—until the Iranian regime realizes their oppressive tactics are futile and fruitless.

And in Xinjiang, China, ethnic Uighurs and members of other minority groups are subjected to forced labor in violation of international standards, Chinese law, and fundamental human rights. The Communist Party calls this "vocational training." It isn't.

What is happening in Xinjiang is an affront to the fundamental principles of the ILO. The ILO must stand against such practices wherever they occur. The United States will stand with the ILO—in word and deed.

Last month, United States Customs and Border Protection sent a powerful message when it announced a Withhold Release Order for garments produced at a factory in Xinjiang that relies on forced labor. Goods produced by forced labor have no place in the American market or in any other.

We call on the ILO to continue to stand with us on this issue. The challenge of forced labor, among the many other challenges the ILO will face in its second century, will test the resolve of its leaders as never before. How it responds to this challenge will speak volumes about its institutional commitment to its founding principles.

Authoritarian systems that crush their own people will pressure that ILO to remain silent, and, if it does not, attempts to dominate and control will follow. ILO's efforts will be resisted by countries and political leaders who fear the power of organized labor, and the potential that ILO-sponsored programs offer. ILO must choose, but it should understand that accommodating nations and systems that repress and crush men and women around the globe into commodities is not really an option. The pressure will be intense, and the advocates of the dark path I have described will use every trick in the book to convince ILO's leaders that their vision of the good is preferable.

This is why we must remember our shared humanity. We must reject the understandable, but insidious, tendency to evaluate the worth of working men and women only by measuring the value they add to raw materials in an extended, global supply chain.

The ILO's moral center is the protection of human persons and of their right and duty to organize to advance their personal, economic, and political interests. The national and commercial forces arrayed against them are formidable, but they cannot succeed if the ILO remains anchored in the principles that have made its first 100 years such a resounding success.

The United States of America is firmly committed to advancing those principles. We are proud to be the largest financial supporter of the ILO, and strive to demonstrate our own commitment protect the dignity and worth of our own workers on a daily basis.

If, a hundred years from now, the world is a freer, fairer, more prosperous place; If dysfunctional national and transnational systems that oppress workers and the associations they form have crumbled under the weight of their own moral and economic bankruptcy; I am confident it will be because of the work and moral clarity of the member nations in this room, and because of the commitment and devotion of the men and women who are, together, the International Labor Organization.

Thank you again for the opportunity to speak, and to join with you in this celebration of the next 100 years of the ILO!

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G. TORTURE AND EXTRAJUDICIAL KILLING

See the November 7 general statement, discussed in section A.2, *supra*.

On June 26, 2019, the State Department issued a statement in support of the International Day in Support of Victims of Torture. That statement is available at https://www.state.gov/international-day-in-support-of-victims-of-torture/.

On July 16, 2019, the United States sent a letter to Nils Melzer, the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for the Human Rights Council, responding to a May 28, 2019 letter in which Mr. Melzer expressed concerns regarding the treatment of Julian Assange. The July 16, 2019 U.S.

response follows and is available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=34784. The May 28 letter from the special rapporteur (not excerpted herein) is available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24642.

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As a preliminary matter, the United States notes that your characterization of Mr. Assange's self-imposed time in the Ecuadorian Embassy in London as "prolonged arbitrary confinement" is fundamentally wrong. Mr. Assange voluntarily stayed in the Embassy to avoid facing lawful criminal charges pending against him. As such, his time in the Embassy did not constitute confinement and was in no way arbitrary.

Further, the United States does not accept the assertion on page eight of your letter that the United States bears international responsibility for "patterns of cruel, inhuman or degrading treatment or punishment" and "psychological torture" of Mr. Assange. Mr. Assange is not, and never has been, in the custody of the United States, nor has the United States instigated, consented to, or acquiesced in the alleged torture or cruel, inhuman or degrading treatment or punishment of Mr. Assange. The assertion to the contrary in your letter appears to rest on the allegation that there has been "sustained and unrestrained public mobbing, intimidation and defamation" of Mr. Assange in the United States. The letter refers to alleged public statements by, among others, the mass media, influential private individuals, current and former political figures, and senior government officials, and suggests that the United States was obligated to publicly disapprove or prevent such statements. The United States rejects the proposition that the types of public statements listed in your letter constitute cruel, inhuman or degrading treatment or punishment, much less torture, as defined by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Further, the United States is deeply concerned by the suggestion that independent reporting or other commentary and discourse on public figures could amount to torture or cruel, inhuman or degrading treatment or punishment. Such a position by the Special Rapporteur has dangerous implications for freedom of expression, democracy, and the rule of law. The United States also rejects the suggestion that it has an obligation to suppress protected speech in order to uphold its obligations under the CAT and notes in this regard its firm commitment to freedom of expression, including for members of the media, consistent with the U.S. Constitution and the United States' obligations under international human rights law. Finally, and contrary to the allegations in your letter, the U.S. legal system provides redress for individuals who wish to assert claims of defamation.

In addition, the United States categorically rejects the claims in your letter that the United States will torture or otherwise mistreat Mr. Assange if he is extradited to the United States to face criminal prosecution. The United States takes its obligations under international human rights law very seriously. Individuals extradited to the United States are afforded due process under U.S. law and fair trial guarantees; U.S. law protects individuals in the U.S. justice system from torture and cruel, inhuman or degrading treatment or punishment, including through protections under the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. It is

inarguable that our system of law is consistent with our obligations under international human rights law.

* * * *

On October 14, 2019, Sofija Korac, adviser for the U.S. Mission to the UN, delivered the U.S. statement in a Third Committee meeting on the report of the special rapporteur on torture and other cruel, inhumane or degrading treatment. Ms. Korac's statement is excerpted below and available at https://usun.usmission.gov/statement-in-the-third-committee-meeting-on-the-report-of-the-special-rapporteur-on-torture-and-other-cruel-inhumane-or-degrading-treatment/.

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The United States remains appalled by the many instances of torture around the globe.

We are deeply concerned by reports of violence in Cameroon by all sides of the Anglophone crisis, including reported torture by government authorities, to intimidate individuals in detention and outside alike.

The United States deplores the reports of torture in Nicaragua's prisons, particularly of protesters detained since April 2018.

The United States again condemns the reports of torture by Iranian authorities against labor activists, members of ethnic and religious minorities, prisoners of conscience, and dual nationals.

We are dismayed by the lack of accountability for the reported campaigns of pervasive torture and extrajudicial killings in Russia's Republic of Chechnya, in addition to February's credible reports of torture by criminal investigators in Surgut, who later received promotions after the alleged torture of Jehovah's Witnesses.

The United States condemns the nearly 7,000 extra-judicial killings allegedly committed by the former Maduro regime since 2018, according to the UN High Commissioner for Human Rights Michelle Bachelet's July 4 report on human rights abuses in Venezuela. Additionally, we condemn the reported use of torture against Venezuelan civilian and military detainees, including the death in custody of Venezuelan Navy Captain Rafael Acosta Arevalo in June 2019.

The Assad regime has tortured nearly 14,000 Syrians to death since 2011, according to the Syrian Network for Human Rights. The United States condemns in the strongest terms the Assad regime's continued use of arbitrary detention, torture, and extrajudicial killing. Crematoriums will not hide Syrian government atrocities which are tantamount to crimes against humanity.

In China, Uighurs and other Muslims detained in Xinjiang internment camps face torture and cruel, inhuman or degrading treatment, and psychological abuse in an attempt to erase their ethnic and religious identities. The US condemns these abuses.

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Also on October 14, 2019, at a Third Committee Meeting, Ms. Korac offered remarks on the Committee Against Torture. Those remarks are excerpted below and

available at https://usun.usmission.gov/remarks-in-a-un-third-committee-meeting-on-the-committee-against-torture/.

* * * *

Thank you, Chair. The US applauds the adoption of a mechanism to prevent, monitor and follow up to cases of reprisal against civil society organizations, human rights defenders, victims and witnesses after their engagement with the treaty body system.

The United States has no tolerance for torture and cruel, inhuman or degrading treatment or punishment. We hold ourselves to our founding principles and will continue to hold others to their international obligations.

We demonstrate our commitment to the fight against torture by funding support programs and organizations that provide assistance to torture victims, as well as taking seriously our obligations under the International Covenant on Civil and Political Rights and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

We emphasize that torture and other cruel, inhuman or degrading treatment or punishment are unacceptable, counterproductive and destructive to any community that allows such abuse.

The United States urges all countries to strengthen their capacity to prevent torture and cruel, inhuman or degrading treatment or punishment, including through the establishment of accountability mechanisms.

We'd like to end by asking the committee chair the following question: What effect has the problem of reprisals against those who work with the UN, including UN rapporteurs and NGO staff, had on the daily work of the Committee?

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On October 24, 2019, Acting U.S. Representative to the United Nations Economic and Social Council Courtney R. Nemroff delivered remarks at a UN Third Committee dialogue with the special rapporteur on extrajudicial killings. Ms. Nemroff's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-third-committee-dialogue-with-the-special-rapporteur-on-extrajudicial-killings/.

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[T]he United States is deeply concerned that impunity for extrajudicial killings has become common around the world.

In Burundi, security forces and members of the ruling party's youth wing reportedly continue to perpetrate unlawful killings against perceived members of the opposition. This situation appears to be worsening in the lead up to the country's 2020 elections.

In the Philippines, there are credible allegations that security forces, vigilantes and others conduct extrajudicial killings in the government's war on drugs.

In Venezuela, the United Nations reports that the Maduro regime has committed almost 7,000 extrajudicial killings since 2018.

We have been clear that the murder of Jamal Khashoggi was a heinous act. It is crucial that the Saudi government continue to ascertain the facts, conduct a fair and transparent judicial process, and hold accountable those responsible for the murder of Mr. Khashoggi.

In Syria, the Assad regime is responsible for innumerable atrocities, some of which rise to the level of war crimes and crimes against humanity. These atrocities include the use of chemical weapons, killings, torture, enforced disappearance, and other inhumane acts.

In Northeast Syria we are deeply troubled by reports suggesting that Turkish Supported Opposition forces have deliberately targeted civilians. Such acts—if verified—are barbarous and contrary to the laws of armed conflict. We urge Turkey to immediately investigate these incidents, ensure its forces and any other forces under its command and control act in accordance with the law of armed conflict.

We are also concerned about credible reports of extrajudicial killings in Libya, Bangladesh, and Nicaragua.

We urge governments to conduct thorough and transparent investigations into all reports of extrajudicial killings.

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H. BUSINESS AND HUMAN RIGHTS

On October 16, 2019, the U.S. Mission to the UN in Geneva issued a statement regarding the U.S. government's continued opposition to the process of developing a business and human rights treaty. The statement is excerpted below and available at https://geneva.usmission.gov/2019/10/16/the-united-states-governments-continued-opposition-to-the-business-human-rights-treaty-process/.

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The United States once again will not participate in this week's session of the Open-Ended Intergovernmental Working Group (OEIGWG) on the articulation of a business and human rights treaty in Geneva, because it remains opposed to the treaty process and the manner in which it has been pursued. This process continues to detract from the valuable foundation laid by the UN Guiding Principles (UNGPs), a framework for preventing and addressing adverse human rights impacts that involve business activity. The international community has spoken clearly on this topic, emphasizing the need for the voluntary, multi-stakeholder, and consensus-based approach developed through the UNGPs. The OEIGWG process runs counter to the consensus of the international community.

We appreciate many of the concerns that have motivated some in civil society to support the treaty initiative, including how to improve access to effective remedies for those impacted by business-related human rights abuses. We continue to believe, however, that the one-size-fits-all approach represented by the proposed treaty is not the best way to address all adverse effects of business activities on human rights. The revised version of the proposed treaty does not remedy the flaws that plagued last year's draft. Rather, some of these flaws have become worse. The

UNGPs were painstakingly crafted to avoid the unworkable approach represented by the draft treaty.

Furthermore, negotiations around the draft treaty continue to be highly contentious, resulting in a crippling lack of participation from many key stakeholders—most notably a sizable percentage of the States that are home to the world's largest transnational corporations. Indeed, like the United States, several such States chose to absent themselves from last year's OEIGWG session and have done the same this year. The process has become irreconcilably broken and dissenting voices are routinely silenced by those running the process, including by omitting dissenting views from the annual reports, ostensibly to project an appearance of greater consensus.

By contrast, the work being done by companies, governments, civil society, and others—including through partnerships, multi-stakeholder initiatives, National Action Plans, standard-setting, rankings, consumer education, and procurement—is innovative, constructive, and continues to bear practical fruit. The Office of the High Commissioner for Human Rights' Accountability and Remedy Project, and the numerous informative thematic and country reviews undertaken by the UN Working Group on Business and Human Rights, are also positively contributing to the development of a rich body of best practices for implementing the UNGPs.

In sum, we believe the consensus approach offered by the UNGPs—rather than the OEIGWG approach, which ignores the legitimate concerns of key stakeholders and will not achieve consensus—is without question the right one to take, and is necessary for continued progress.

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On October 29, 2019, John Giordano, public delegate for the U.S. Mission to the UN, delivered the U.S. delegation's statement at a meeting of the Third Committee's business and human rights working group. Mr. Giordano's statement is excerpted below and available at https://usun.usmission.gov/statement-by-the-delegation-of-the-united-states-of-america-in-the-third-committee-un-business-and-human-rights-working-group/.

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The UN Guiding Principles on Business and Human Rights represent an important global consensus on both the state duty to protect and the corporate responsibility to respect human rights. We stand behind efforts to strengthen and improve the implementation of the UN Guiding Principles by states and businesses, including focus on pillar three access to remedy.

We look forward to seeing the Working Group's report regarding actions states and businesses can take to safeguard and support human rights defenders in line with the Guiding Principles. This work is more relevant than ever given global restrictions on civic space, both within countries' borders and through limiting civil society's participation in international fora such as the UN system. The U.S. government supports this initiative.

We are pleased to see the Working Group's continued efforts to encourage sovereign governments to develop National Action Plans on business and human rights, known as "NAPs." As mentioned in the Working Group's most recent report, NAPs are an important tool that governments can use to strengthen the rule of law and strengthen policy coherence around

business and human rights-related issues. We are seeing more governments around the world develop NAPs, including several in Southeast Asia and Africa.

We look forward to continue working with other members to measure and strengthen implementation of the Guiding Principles across sectors and regions.

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I. INDIGENOUS ISSUES

1. UN General Assembly Third Committee Resolution

On October 11, 2019 at a meeting of the Third Committee of the UN General Assembly, Jason Mack delivered remarks on the rights of indigenous peoples. His remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-third-committee-meeting-on-agenda-item-69-rights-of-indigenous-peoples/.

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Under the agenda item "Rights of Indigenous Peoples," it is appropriate to call attention to the continuing violence, discrimination, persecution, and human rights abuses that indigenous peoples face around the world. Indigenous peoples themselves are outspoken critics of these abuses, while also being subject to attempts to discredit indigenous human rights defenders. For example, at this past spring's Permanent Forum on Indigenous Issues (PFII), Dolkun Isa of the World Uighur Congress criticized the Chinese government's policy of ending bilingual education in Xinjiang. In response, the Chinese delegation made unfounded and inappropriate accusations against him. We see this as part of a disturbing pattern in which China seeks to suppress the voices of religious and ethnic minorities and indigenous peoples. They should be able to stand before the United Nations and other international fora to share their experiences without intimidation or harassment.

The Chinese government has continued its highly repressive campaign against its indigenous populations—including Uighurs, ethnic Kazakhs, Kyrgyz, and other Muslims in Xinjiang. We estimate that since April 2017, the Chinese government has detained over one million individuals in internment camps for periods of months to years. They are forced to renounce their ethnic identities, religious beliefs, or cultural and religious practices, and are subjected to forced labor, torture, inhumane conditions, and even death. China's assertion that detention is necessary to counter violent extremism is not credible in light of known facts, and its policies are likely to fuel the very resentment and radicalization to violence the policy [purportedly] seeks to avoid. Chinese authorities harass Uighurs, ethnic Kazakhs, Kyrgyz, and other members of Muslim minority groups abroad, in order to compel them to return to Xinjiang or to keep silent about the human rights situation there. China is also pressuring governments to return asylum-seekers belonging to these groups.

We ask those governments who have asylum-seekers in custody belonging to these groups to give the UN office of the High Commissioner for Refugees (UNHCR) access to them, in order to assess their protection needs and provide assistance.

We are also concerned about the ongoing abuses against indigenous peoples in Venezuela. According to a July report by the UN High Commissioner for Human Rights (OHCHR), there are abuses of indigenous peoples' collective rights to their traditional lands and resources. Their traditional lands have been militarized, and in recent years the state's presence has led to violence, insecurity, illness, and environmental degradation. Often-illicit mining operations in Venezuela's indigenous communities have disproportionately affected indigenous women and girls, who are at increased risk for sexual assault, exploitation, and human trafficking. State actors have threatened and attacked indigenous authorities and leaders, including women. In Bolivar State, Pemon communities—particularly indigenous authorities and leaders—who oppose the Maduro regime face targeted repression by State actors. OHCHR has documented seven deaths of indigenous individuals under violent circumstances in 2019. The regime must cease such attacks on Venezuela's indigenous community and respect the human rights of all people in Venezuela.

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2. UN General Assembly

On November 7, 2019, Jordyn Arndt, adviser for the U.S. Mission to the UN, delivered the U.S. explanation of position on the resolution on the rights of indigenous peoples. The explanation of position is available at https://usun.usmission.gov/united-states-explanation-of-position-on-rights-of-indigenous-peoples/ and excerpted below.

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We thank Bolivia and Ecuador for their resolution entitled "Rights of Indigenous Peoples." The United States reaffirms its support for the UN Declaration on the Rights of Indigenous Peoples. As explained in our 2010 Statement of Support, the Declaration is an aspirational document of moral and political force and is not legally binding or a statement of current international law. The Declaration expresses aspirations that the United States seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.

The United States wishes consensus agreement could have been reached on wording to promote repatriation of ceremonial objects and human remains. We continue to encourage States to develop national mechanisms, such as laws or museum policies, in consultation with indigenous peoples concerned. In 1990, the United States established a mechanism for the U.S. government to work in consultation with Native Americans to repatriate human remains and ceremonial objects. As a result, U.S. institutions have returned approximately 1.9 million items to Native American communities that depend on them for their well-being.

With regard to OP 21, the United States notes that sexual harassment, while condemnable, is not necessarily violent. In U.S. law, the term violence refers to physical force or the threat of physical force.

Finally, with regard to this resolution's references to the 2030 Agenda for Sustainable Development; the Global Compact for Safe, Orderly, and Regular Migration; and what we view as the non-consensus based Conclusions of the Commission on the Status of Women's 63rd session, we addressed our concerns in a statement immediately preceding this debate.

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3. UN Permanent Forum on Indigenous Issues

On April 26, 2019, Linda Lum, advisor to the U.S. Mission to the UN, delivered the U.S. statement at the UN Permanent Forum on Indigenous Issues on the agenda item on participation of indigenous peoples. Ms. Lum's statement is excerpted below and available at https://usun.usmission.gov/u-s-statement-un-permanent-forum-on-indigenous-issues-18th-session-agenda-item-12-participation-of-indigenous-peoples/.

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The United States continues to champion ensuring the diversity of views in the United Nation system, through pushing for robust participation of various stakeholders including civil society and indigenous peoples. Unfortunately, the General Assembly's enhanced participation process ended without creating a separate category for indigenous peoples at the UN, and indigenous representatives still have to register as NGOs [representatives] in order to participate at UN meetings. The United States continues to support having a wide array of views heard at the UN. We think that this enriches the debate and leads to more informed outcomes—indigenous peoples have valuable knowledge and expertise on a variety of topics addressed at the United Nations, and we need to ensure that this expertise is heard here and not stifled by some member states.

To this end, we would like to highlight our concerns about certain indigenous populations beyond our borders, particularly those in Tibetan Autonomous Region and the Xinjiang Uighur Autonomous Region of the People's Republic of China. The United States is deeply concerned by severe restrictions on the expression of cultural and religious identities in these areas, including with respect to use of the Tibetan and Uighur languages. We are alarmed by the mass detention of Uighurs, ethnic Kazakhs, Kyrgyz, and other Muslims in detention camps, where they are required to renounce their ethnic identities and cultural practices. We again call on the Chinese government to close the internment camps in Xinjiang and demonstrate respect for the human rights of members of Xinjiang's indigenous communities.

This is why, for example, we take the work of the Permanent Forum so seriously. The forum will have open seats on May 7th and we encourage all ECOSOC members to vote for those members running who protect and promote the human rights of all indigenous peoples and support their participation at the UN. We do not want to walk back efforts on this topic by electing members who will not ensure that the goals of the Forum are fulfilled.

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J. FREEDOM OF EXPRESSION

1. Statement on Christchurch Call for Action

On May 15, 2019, the White House issued the U.S. statement on the Christchurch Call for Action. The United States did not endorse the Call for Action due to concerns for

freedom of expression and freedom of the press. The U.S. statement is available at https://nz.usembassy.gov/statement-on-christchurch-call-for-action/ and excerpted below.

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The United States stands with the international community in condemning terrorist and violent extremist content online in the strongest terms. Underscored by the horrific terror attacks in Christchurch, New Zealand on March 15, we agree with the overarching message of the Christchurch Call for Action, and we thank Prime Minister Ardern and President Macron for organizing this important effort.

While the United States is not currently in a position to join the endorsement, we continue to support the overall goals reflected in the Call. We will continue to engage governments, industry, and civil society to counter terrorist content on the Internet.

The U.S. policy position remains unchanged and consistent with our long-standing ideals: We encourage technology companies to enforce their terms of service and community standards that forbid the use of their platforms for terrorist purposes. We continue to be proactive in our efforts to counter terrorist content online while also continuing to respect freedom of expression and freedom of the press. Further, we maintain that the best tool to defeat terrorist speech is productive speech, and thus we emphasize the importance of promoting credible, alternative narratives as the primary means by which we can defeat terrorist messaging.

We welcome the continued momentum provided by support for the Christchurch Call as we work with international partners towards our mutual objectives for an open, interoperable, reliable, and secure internet.

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2. Statement at Third Committee Dialogue with Special Rapporteur

On October 22, 2019, Mr. Mack delivered remarks at a UN Third Committee dialogue with the special rapporteur on freedom of expression. Mr. Mack's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-third-committee-dialogue-with-the-special-rapporteur-on-the-freedom-of-expression/.

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Hate speech, while deserving of the strongest condemnation, should not be justification for undue restrictions on freedom of expression.

In the United States, our experience has taught us that broad speech restrictions are not effective. Instead, they all too often constrain democratic engagement, diminish respect for human dignity, and stifle change and social advancement. Banning offensive speech has often served to protect those interested solely in maintaining the status quo or their own political preferences.

We are gravely concerned that decisions by governments to ban offensive speech might serve—intentionally or unintentionally—to undermine human rights and democracy. Unfortunately, we see examples of intentional abuse of such restrictions all over the world.

In China, we condemn the government's methods to limit and dismantle freedom of expression and create a pervasive surveillance state—particularly in Xinjiang.

We are troubled by systematic actions the Turkish government has taken to restrict Turkey's media environment, including closing media outlets, jailing media professionals, and blocking critical online content.

We are concerned that Bangladesh's Digital Security Act is used to suppress and criminalize free speech, to the detriment of Bangladesh's democracy.

Democracy and prosperity depend on the free exchange of ideas and the ability to dissent. The United States robustly protects freedom of expression because the cost of stripping away individual rights is far greater than the cost of tolerating hateful words. We believe the best way to combat intolerant ideas is to have them fall of their own weight when challenged by well-reasoned counter arguments.

We welcome the Secretary-General's Strategy and Plan of Action on Hate Speech. As noted in the guiding principles for the Strategy, governments, the private sector, and civil society all have a role in combatting hate speech.

The United States stands ready to support implementation of the Plan of Action and looks forward to continuing dialogue on this important issue.

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K. FREEDOM OF RELIGION OR BELIEF

1. U.S. Annual Report

On June 21, 2019, the U.S. Department of State submitted the 2018 International Religious Freedom Report to the United States Congress. The report is available at https://www.state.gov/international-religious-freedom-reports/. Secretary Pompeo delivered remarks on the release of the 2018 Report, available at https://www.state.gov/secretary-of-state-michael-r-pompeo-at-the-release-of-the-2018-annual-report-on-international-religious-freedom/ and excerpted below.

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I'm pleased to announce … the release of the … International Religious Freedom Report for 2018. It's like a report card—it tracks countries to see how well they've respected this fundamental human right. I'll start with the good news:

In Uzbekistan, much work still remains to be done, but for the first time in 13 years, it's no longer designated as a Country of Particular Concern.

This past year, the government passed a religious freedom roadmap. Fifteen hundred religious prisoners have been freed, and 16,000 people that were blacklisted for their religious affiliations are now allowed to travel. We look forward to seeing legal reforms to registration requirements, so more groups may worship freely, and so children may pray at mosques with their parents.

In Pakistan, the supreme court acquitted Asia Bibi, a Catholic, of blasphemy, sparing her the death penalty after she spent nearly a decade in prison. However, more than 40 others remain jailed for life, or face execution on that very same charge. We continue to call for their release,

and encourage the government to appoint an envoy to address the various religious freedom concerns.

And in Turkey, at President Trump's urging, they released Pastor Andrew Brunson, who had been wrongfully imprisoned on account of his faith. We continue to seek the release of our locally employed staff there. In addition, we urge the immediate reopening of the Halki Seminary near Istanbul.

Look, we welcome all of these glimmers of progress, but demand much more. 2018, unfortunately, was far from perfect.

As in previous years, our report exposes a chilling array of abuses committed by oppressive regimes, violent extremist groups, and individual citizens. For all those that run roughshod over religious freedom, I'll say this: The United States is watching and you will be held to account.

In Iran, the regime's crackdown on the Baha'is, Christians, and others continues to shock the conscience.

In Russia, Jehovah's Witnesses were absurdly and abhorrently branded as terrorists, as authorities confiscated their property and then threatened their families.

In Burma, Rohingya Muslims continue to face violence at the hands of the military. Hundreds of thousands have fled or been forced to live in overcrowded refugee camps.

And in China, the government's intense persecution of many faiths—Falun Gong practitioners, Christians, and Tibetan Buddhists among them—is the norm.

The Chinese Communist Party has exhibited extreme hostility to all religious faiths since its founding. The party demands that it alone be called God.

I had a chance to meet with some Uighurs here, but unfortunately, most Chinese Uighurs don't get a chance to tell their stories. That's why, in an effort to document the staggering scope of religious freedom abuses in Xinjiang, we've added a special section to this year's China report.

History will not be silent about these abuses—but only if voices of liberty like ours record it.

Finally, I'll mention just one more reason this report matters so much: It will inspire conversations leading up to our second annual Ministerial to Advance Religious Freedom that I'll be hosting here in mid-July.

This year, we'll welcome up to 1,000 individuals who will renew their zeal for the mission of religious freedom, and I'm proud to be one of them.

I'm crossing the days off my calendar waiting for this. Last year was the first time in history that there had been such a foreign-ministerial level conference on religious freedom.

We brought together representatives and activists and religious leaders from virtually every corner of the world. It was truly a stunning show of unity—people of all faiths standing up for the most basic of all human rights. It was so successful that I immediately committed to hosting it the next year on the very day.

Look, the good work that was done didn't stop at the end of that conference. Both the United Arab Emirates and Taiwan demonstrated impressive leadership by hosting follow-on conferences. And the International Religious Freedom Fund, which we launched to support victims of persecution and give groups the tools to respond, has already received millions of dollars. I'm looking forward to this year's ministerial being inspiring, and I know that it will be.

And I'll now turn it over to my friend and our Ambassador-At-Large for International Religious Freedom, Sam Brownback, to take your questions. Thank you, all.

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2. Designations under the International Religious Freedom Act

On December 18, 2019, the Department of State re-designated Burma, China, Eritrea, Iran, North Korea, Pakistan, Saudi Arabia, Tajikistan, and Turkmenistan as "Countries of Particular Concern" under the International Religious Freedom Act of 1998, as amended. 84 Fed. Reg. 71,064 (Dec. 26, 2019). The "Countries of Particular Concern" were so designated for having engaged in or tolerated "particularly severe violations of religious freedom," *id.*, which the Act defines as "systematic, ongoing, egregious violations of religious freedom." 22 U.S.C. § 6402(13). The Department renewed the placement of Comoros, Russia, and Uzbekistan on a Special Watch List ("SWL") for governments that have engaged in or tolerated "severe violations of religious freedom," and added Cuba, Nicaragua, Nigeria, and Sudan to this list. 84 Fed. Reg. 71,064. The "Presidential Actions" or waivers designated for each of the countries designated by the Secretary as Countries of Particular Concern are listed in the Federal Register notice. *Id.* The Department also designated al-Nusra Front, al-Qa'ida in the Arabian Peninsula, al-Qa'ida, al-Shabab, Boko Haram, the Houthis, ISIS, ISIS-Khorasan, and the Taliban as "Entities of Particular Concern," under section 301 of the Frank R. Wolf International Religious Freedom Act of 2016 (Pub. L. 114–281). *Id.* at 71,064-65.

The State Department issued a press statement on December 20, 2019, available at https://www.state.gov/united-states-takes-action-against-violators-of-religious-freedom/, announcing the designations. The press statement explains that the Department moved Sudan to the SWL due to the civilian-led transitional government's steps to address the previous regime's "systematic, ongoing, and egregious violations of religious freedom," and states:

> These designations underscore the United States' commitment to protect those who seek to exercise their freedom of religion or belief. We believe that everyone, everywhere, at all times, should have the right to live according to the dictates of their conscience. We will continue to challenge state and non-state entities that seek to infringe upon those fundamental rights and to ensure they are held to account for their actions.
>
> This month, the U.S. Government announced designations of 68 individuals and entities in nine countries for corruption and human rights abuses under the Global Magnitsky Act, among them four Burmese military leaders responsible for serious human rights abuses against the Rohingya Muslims and other religious and ethnic minorities. In October, we placed visa restrictions on Chinese government and Communist Party officials who are believed to be responsible for, or complicit in, the detention or abuse of Uighurs, Kazakhs, or other members of Muslim minority groups in Xinjiang, China.

L. OTHER ISSUES

1. Purported Right to Development

On November 18, 2019, Daniel Thompson, adviser to the U.S. Mission to the UN, delivered the U.S. statement on "The Right to Development." Mr. Thompson's statement is excerpted below and available at https://usun.usmission.gov/statement-on-agenda-item-70-b-the-right-to-development/.

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The United States is firmly committed to the promotion and advancement of global development efforts. The U.S. government collaborates with developing countries, other donor countries, non-governmental organizations, and the private sector in order to alleviate poverty and aid development efforts across all dimensions. However, the United States maintains its long-standing concerns over the existence of a "right to development" within existing human rights law.

We note that the "right to development" discussed in this resolution is not recognized in any of the core UN human rights conventions, does not have an agreed international meaning, and, unlike with human rights, is not recognized as a universal right held and enjoyed by individuals and which every individual may demand from his or her own government. Indeed, we continue to be concerned that the "right to development" identified within the text protects states instead of individuals.

States must implement their human rights obligations, regardless of external factors, including the availability of development and other assistance. Lack of development may not be invoked to justify the abridgement of internationally recognized human rights. To this end, we continually encourage all states to respect their human rights obligations and commitments, regardless of their levels of development.

Additionally, the United States cannot support the inclusion of the phrase "to expand and deepen mutually beneficial cooperation." This phrase has been promoted interchangeably with "win-win cooperation" by a single Member State to insert the domestic policy agenda of its Head of State in UN documents. None of us should support incorporating political language targeting a domestic political audience into multilateral documents—nor should we support language that undermines the fundamental principles of sustainable development.

For these reasons, we request a vote and we will vote against this resolution.

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Cross References

Asylum, Refugees, and Migrant Protection Issues, **Ch. 1.C.**
Prosecution in the United States for Female Genital Mutilation, **Ch. 4.C.1.**
Aguasvivas v. Pompeo (asylum claim based on CAT), **Ch. 3.A.4.**
Trafficking in Persons, **Ch. 3.B.3.**
Alien Tort Statute and Torture Victims Protection Act, **Ch. 5.B.**
Accountability of UN Officials and Experts on Mission, **Ch. 7.A.1.**
ICJ Opinion on the British Indian Ocean Territory, **Ch. 7.B.2.**
ILC Draft Articles on Crimes Against Humanity, **Ch. 7.C.1.**
Inter-American Commission on Human Rights, **Ch. 7.D.3.**
Sustainable Development, **Ch. 13.C.3.**
Sanctions relating to human rights in Iran, **Ch. 16.A.1.c.(4)**
Venezuela sanctions, **Ch. 16.A.5.**
Magnitsky and other corruption and human rights sanctions, **Ch. 16.A.11.**
China (Xinjiang) sanctions, **Ch. 16.A.12.a.**
Atrocities prevention, **Ch. 17.C.**
Responsibility to Protect, **Ch. 17.C.4.**
International humanitarian law, **Ch. 18.A.5.**

CHAPTER 7

International Organizations

A. UNITED NATIONS

1. Accountability of UN Officials and Experts on Mission

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

* * * *

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

Each of us has a role in promoting accountability for alleged criminal activity and, in that regard, we appreciate opportunities for cooperation. In particular, we welcome the United Nations' cooperation with U.S. authorities on various criminal investigations, even those that do not involve allegations against a UN official, but about which the UN may have relevant information. The UN Office of Legal Affairs (OLA) continues to implement the General Assembly's request for more follow up with Member States to which referrals of criminal allegations have been made when no response has been received, and we appreciate their readiness to assist, when requested, on all referrals.

The responsibility to take action on referrals lies with us, the Member States, and the Secretary-General's report clearly reflects that some of us are not living up to that

responsibility. Member States need to do better. In this regard, we note that earlier this year, the State Department provided proposed legislation to our Congress that, if enacted, will close jurisdictional gaps in our domestic laws so that U.S. authorities can take appropriate steps to follow up on *all* referrals of criminal allegations involving U.S. citizens serving with the United Nations abroad. One case of impunity is one case too many. We reiterate our call on other Member States to take similar steps.

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

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

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2. Administration of Justice

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

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

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

the Principal Registrar and Executive Director of the Office of the Administration of Justice to provide independent and autonomous support of the tribunals through this critical period.

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

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

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

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

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

Regarding accessibility for non-staff, we note the Office of UN Ombudsperson and Mediation Services will be providing an assessment of the feasibility of institutionalizing the pilot project in its report for the 75th session. The United States appreciates the Office's work to proactively build competency in conflict resolution.

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

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3. Charter Committee

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

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We welcome this opportunity to provide a few observations on the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, and the Committee's work in 2019. Overall, the Special Committee's work lacks the flow and movement of years past. The Committee has considered at least two of the proposals on its agenda every year, for more than twenty years. Committee members may have legitimate disagreements over the substantive issues before them, but we share an interest in the need to rationalize the Committee's work. The Special Committee should take steps in 2020 to improve the efficiency and productivity of the Committee, including giving further scrutiny to proposals with an eye toward updating its work and making the best use of scarce Secretariat resources. Committee members should also give serious consideration to biennial meetings or shortened sessions. In the current reform-minded environment in which we operate, with tighter budgets and increased focus on improving the efficiency of the United Nations, the Special Committee should recognize that these steps are reasonable and long overdue.

With respect to items on the Committee's agenda regarding the maintenance of international peace and security, the United States thanks the Department of Political Affairs for its briefing on sanctions during the Committee meeting in February, which we attended with interest. The United States emphasizes that targeted sanctions adopted by the Security Council in accordance with the Charter of the United Nations remain an important instrument for the maintenance of international peace and security. We would support further discussion on options to strengthen implementation.

Regarding other topics under the maintenance of international peace and security, the United States continues to believe that the Committee should not pursue activities in this area that would be duplicative or inconsistent with the roles of the principal organs of the United Nations as set forth in the Charter. This includes consideration of a long-standing working paper that calls for, among other things, legal study of General Assembly functions and powers. This also includes a long-standing proposal regarding UN reform, as well as the question of the General Assembly requesting an advisory opinion on the use of force from the International Court of Justice, a proposal that the United States has consistently stated it does not support. As we have noted before, if a proposal such as that of Ghana could add value by helping to fill gaps, then it should be considered.

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

The United States continues to be cautious about adding new items to the Committee's agenda. While the United States is not opposed in principle to exploring new items, they should be practical, non-political, not duplicate efforts elsewhere in the United Nations, as well as respect the mandates of the principal organs of the United Nations. With this in mind, the Special Committee is not the appropriate forum to debate the sufficiency of communications submitted pursuant to Article 51 of the Charter, nor to debate the role of the Security Council with respect to such communications.

Finally, we welcome the Secretary-General's report A/74/194, regarding the Repertory of Practice of the United Nations Organs and the Repertoire of the Practice of the Security Council. We commend the Secretary-General's ongoing efforts to reduce the backlog in preparing these works. Both publications provide a useful resource on the practice of the United Nations organs, and we much appreciate the Secretariat's hard work on them.

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4. Rule of Law

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

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

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

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

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

With respect to the forthcoming negotiation on the resolution for this agenda item, we hope that the Sixth Committee will once again be able to reach consensus on a subtopic for next

year. We think that the past practice of selecting subtopics can lead to more focused and productive debates on the rule of law in this forum.

Finally, let me say that this Committee has a long history of consensus-based decision making. We are optimistic that it will endure. At a time when the rule of law is under attack in many parts of the world, even where it was once considered sacrosanct, this practice is a welcome reminder of the power of collaborative legal discourse.

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5. UN World Tourism Organization

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

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

B. INTERNATIONAL COURT OF JUSTICE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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C. INTERNATIONAL LAW COMMISSION

1. ILC Draft Articles on Crimes Against Humanity

On April 26, 2019, the United States provided written comments on the International Law Commission's ("ILC") draft articles on "Crimes Against Humanity" ("CAH") as adopted by the commission in 2017 on first reading ("Draft Articles"). The U.S. comments are excerpted below (with most footnotes omitted). The full submission is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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

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

The United States acknowledges that the concept of CAH has been part of international law and the domestic laws of various foreign States for a number of years. The United States has a long history of supporting justice for victims of CAH and other international crimes. The

adoption and widespread ratification of certain multilateral treaties regarding serious international crimes—such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide—have been a valuable contribution to international law, and the United States shares a strong interest in supporting justice for victims of atrocities.

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

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

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

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

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

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

United States would not be bound by it and would reject any claim of authority to impose its terms on the United States absent its consent.

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

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

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

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

Preamble

The preamble should be adjusted in line with the objectives outlined above. We recommend adding a preambular paragraph modelled after language in the preamble to the 1977 Additional Protocol I to the 1949 Geneva Conventions clarifying that nothing in the Draft Articles may be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations. Such language is noticeably absent from the Draft Articles and could help assuage concerns that any convention would be used as a pretext to otherwise unlawful uses of force. Similarly, the Draft Articles, and any convention that follows, should not seek to infringe upon the sovereign rights of any State. Therefore, we propose adding preambular paragraphs that recognize the sovereign equality of States and that States should seek to resolve disputes concerning how to address CAH through peaceful means and in accordance with relevant and applicable domestic and international law.

Article 1: Scope

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

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

Article 2: General Obligation

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

Article 3: Definition of crimes against humanity

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

references encompass, for example, all the rights enshrined in the Universal Declaration of Human Rights or all rights enshrined in the International Covenant on Civil and Political Rights.

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

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

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

Article 4: Obligation of Prevention

Draft Article 4 further defines the obligation to prevent CAH. Subparagraph 1(a) requires a State to undertake to prevent CAH via effective legislative, administrative, judicial, or other preventive measures in any territory under its jurisdiction. First, we note that the Draft Article itself expressly limits a State's obligation to take measures to those measures in "any territory under its jurisdiction." This language differs from the language in conventions in which the territorial limitation on the obligation to prevent is explicitly applied to the crimes to be

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

prevented.[18] We recommend adhering to the more established approach as the formulation in the Draft Article might be interpreted to suggest an obligation to prevent CAH that occur abroad. The Commentary suggests, based on a similar provision of the Genocide Convention, that the obligation to prevent in the Draft Articles requires that States follow a "due diligence standard", whereby "the State party is expected to use its best efforts…when it has a 'capacity to influence effectively the action of persons likely to commit, or already committing'" CAH. It is the United States' strong belief that an obligation to undertake to prevent would be a general undertaking by its clear terms and, in accordance with common practice, would express the general purpose and intent of States parties rather than creating an independent obligation to take specific actions. To suggest that a very general obligation in the Draft Articles would create an unclear array of specific requirements that are not reflected in the remainder of the Draft Articles, which does articulate specific requirements, would pose an undue burden on States in implementing the convention and could discourage States from ratifying it. Moreover, there are existing procedures, including action under Chapter VII of the UN Charter, that are available where States assess that risks of CAH merit collective action, or, as appropriate, the need for a dispute resolution mechanism provided in Draft Article 15. We suggest clarifying as such in the Commentary.

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

Article 5: Non-Refoulement

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

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

Article 5 would, in many circumstances, offer narrower protection than would be provided by existing international instruments.

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

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

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

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

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

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

Article 6: Criminalization under national law

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

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

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

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

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

[28] *See generally* United Nations Convention against Corruption art. 4, Dec. 9, 2003; United Nations Convention against Transnational Organized Crime art. 4, *adopted by resolution* Nov. 15, 2000; United Nations Convention

Article 7: Establishment of national jurisdiction

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

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

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

Article 8: Investigation

As drafted, Draft Article 8 creates an obligation to investigate whenever there are reasonable grounds to believe that acts constituting CAH have been or are being committed in any territory under its jurisdiction. The United States notes that a State should investigate allegations that its officials have committed CAH abroad. Moreover, in contrast to Draft Article 7(1)(a), Draft Article 8 and other Draft Articles address only "territory under its jurisdiction," not ships and aircraft registered in that State. This distinction generally makes sense, given that in certain circumstances another State may be better positioned than the State of registry to take

against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 2, *adopted by the Conference* Dec. 19, 1988.

relevant action (*e.g.*, to conduct an investigation). We would suggest that to avoid any confusion, the Commentary highlight and clarify this distinction expressly, consistent with the ordinary meaning of "territory" and with the unique phrasing of Draft Articles 7 and 8. The United States also suggests considering more generally whether an additional provision is needed in the Draft Articles to clarify the scope of their provisions with respect to ships and aircraft.

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

Article 9: Preliminary measures when an alleged offender is present

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

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

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

Article 10: *Aut dedere aut judicare*

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

In addition, although the United States supports the Draft Articles' aim to help facilitate domestic accountability processes and extraditions and strengthen the ability of immigration authorities to ensure that such persons are not able to find safe haven in the United States, the United States does not support the creation of new obligations under Draft Article 10 that vary in

meaningful ways from current extradition practice. For example, Draft Article 10 is modeled on the text of Article 44 the United Nations Convention Against Corruption (UNCAC); under Article 44(6)(a) of the UNCAC, if a State declines to extradite the alleged offender solely on the ground that he or she is one of its nationals, the State shall pursue prosecution if the State seeking extradition so requests. In contrast, Draft Article 10 requires that, if a State does not act to extradite an offender, it *must* use the Draft Articles as a basis for domestic prosecution. Such a shift is problematic, and the United States does not support its inclusion, as it would no longer allow for the requesting State to exercise discretion as to whether their cases are submitted for prosecution. To be consistent with UNCAC Article 44, we suggest revising the draft article to allow requesting States to choose whether their cases are submitted for prosecution in requested States.

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

Article 11: Fair treatment of the alleged offender

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

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

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

Article 12: Victims, witnesses and others

Draft Article 12 requires that States take necessary measures to ensure an individual right to complain to competent authorities regarding CAH. As a general matter, the United States supports a broad range of options for individuals to bring attention generally to CAH being committed anywhere. However, for purposes of the Draft Article, it is necessary to articulate explicitly temporal, geographical, or jurisdictional limits. In the same vein, the individual "right" of complaint in Draft Article 12 should be reframed as a duty of competent authorities to allow and consider complaints rather than an individual right. Such a framing avoids a focus on the

individual making the complaint, which could invite abusive complaints or invite limitations on such a right. Instead, we think the more important aspect to emphasize is that the competent authorities be open to receiving complaints and assessing them.

We further suggest adding "or other unlawful sanctions" to subparagraph (b) of paragraph (1) of Draft Article 12. Such an addition clarifies that ill-treatment or intimidation refers to actions prohibited by law, and also clarifies that it may be appropriate to subject someone to lawful sanctions for giving false testimony or other offense against the administration of justice.

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

Article 13: Extradition

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

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

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

Article 14: Mutual legal assistance

Draft Article 14 provides obligations with regards to mutual legal assistance for prosecutions of CAH. However, the article should more closely track the model for mutual legal assistance in the UNTOC and UNCAC, with adaptions to the specific context of CAH. Both of these conventions include far more complete provisions governing mutual legal assistance than the Draft Articles. In particular, they more clearly define the relationship between the multilateral obligation to provide mutual legal assistance and bilateral treaties and, when no such bilateral treaty exists, they define the grounds on which mutual legal assistance may be denied.

One illustration of why this is important is that in certain cases, the United States has received requests to provide mutual legal assistance in relation to proceedings that the United States believes to be objectionable, such as efforts to prosecute U.S. service members for alleged war crimes in foreign courts. Although existing bilateral treaties have provisions that allow the United States to reject these and similar requests, as do the UNTOC and UNCAC, the Draft Articles could benefit from a tailoring to the context and level of international tensions that are likely to arise in the context of requests from mutual legal assistance in relation to efforts against current or former government personnel for CAH.

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

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

Annex

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

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2. ILC's Work at its 71st Session

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

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

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

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

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

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

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

rigorous approach would have the greatest probability of a successful outcome that strengthens the ability to provide justice for victims of crimes against humanity.

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

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

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

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

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

Fifth, we are confused by the inclusion of draft conclusion 21, the dispute resolution clause. In principle, we appreciate the idea of establishing procedural safeguards as a check on meritless assertions of a breach of a jus cogens norm. It is, however, unclear how the current proposal would work in practice if there were not agreement, at step 4, between the affected states to submit the matter to dispute resolution. More fundamentally, in our view it is

inappropriate to include draft conclusion 21 for two reasons: First, international law imposes no obligation on states to agree to submit disputes relating to jus cogens—or disputes related to any other matter—to binding third-party dispute resolution. Second, and relatedly, these are draft conclusions that purport to reflect the existing state of the law rather than draft articles proposed for inclusion in a convention to be negotiated by states. Because international law imposes no obligation on states to agree to submit disputes relating to jus cogens to binding dispute settlement, there is no basis for the ILC to reach a "conclusion" to this effect.

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

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

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

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

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

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

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

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

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Mark Simonoff, minister counselor for the U.S. Mission to the UN, discussed the "Cluster II" issues in the work of the ILC's 71st Session on November 5, 2019. His remarks are excerpted below and available at https://usun.usmission.gov/statement-at-the-sixth-committee-debate-agenda-item-79-report-of-the-international-law-commission-on-the-work-of-its-71st-session-a-74-10/.

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

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

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

- First, draft principle 8 purports to introduce new substantive legal obligations in respect of peace operations.
- Second, draft principle 27 purports to expand the obligations under the Convention on Certain Conventional Weapons to mark and clear, remove, or destroy explosive remnants of war to include "toxic or hazardous" remnants of war, despite the previous commentary on this draft principle recognizing that the term "toxic remnants of war" does not have a definition under international law.
- And third, the draft principles applicable in situations of occupation similarly go beyond what is required by the law of occupation.

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

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

The United States refers to and reiterates its serious concerns detailed in prior years' statements, including, in particular, that we do not agree that draft Article 7 is supported by consistent State practice and opinio juris and, as a result, it does not reflect customary international law. We also underscore our desire for the Commission to work by consensus on this difficult topic, as that would be the approach most likely to produce draft articles that accurately reflect existing law or that reflect sound progressive development addressing all the relevant concerns.

The most recent report on procedural aspects of immunity reflects some of the same methodological challenges that also affected prior reports—there is generally very little visibility

on prosecutions not brought (either due to immunity or for other reasons), and case law in this area is exceedingly sparse. Against this backdrop, the most recent report expounds on what the Special Rapporteur believes would be appropriate procedures without the benefit of significant State practice. Most provisions are best viewed as suggestions, not law, and the drafting of the articles should reflect this. For example, it would be more appropriate to use the word "should" rather than "shall."

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

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

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

Further consideration should also be given to the relationship between the procedural provisions and safeguards in Part Four and the provisions in Parts One through Three of the draft articles. For example, the draft articles do not clearly address the legal effect of an invocation of immunity by a foreign State. We would also note in passing that Draft Article 9, paragraph 2,

refers to the immunity of the foreign State rather than the immunity of the foreign State officials, and the reason for this is not clear. In addition, we believe that paragraph 4 of Article 11 merits further consideration. The concept of a waiver being "deduced" seems inconsistent with the concept of an express waiver.

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

Madam Chair, with respect to the topic of "sea-level rise in relation to international law", the United States continues to have concerns that the topic as proposed to the ILC did not meet two of the Commission's criteria for selection of a new topic. In particular, we continue to have questions regarding whether the issues of Statehood and protection of persons as specifically related to sea level rise are at a sufficiently advanced stage of State practice.

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

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

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

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

item-79-report-of-the-international-law-commission-on-the-work-of-its-71st-session-a-74-10-2/.

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

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

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

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

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

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

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

Finally, we note that the report addresses two categories of general principles of law: those derived from national legal systems and those formed within the international legal system. We have a number of questions and concerns about whether there is support for the latter

category and whether there is sufficient State practice in the international legal system to determine whether a particular principle may be considered a general principle of law.

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

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D. REGIONAL ORGANIZATIONS

1. Inter-American Treaty of Reciprocal Assistance

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

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

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

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

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

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

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

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

Now, the Venezuelan people have asked their democratic neighbors for mutual assistance in "maintaining inter-American peace and security" as outlined in the Treaty. Not only does the brutal dictatorship and narco-state of Nicolás Maduro's illegitimate regime pose a grave threat to

the Venezuelan people, it also directly threatens the "common defense" and "peace and security of the Continent" as these terms are defined in the Rio Treaty.

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

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

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

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

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

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

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

Words on paper are only as good as the actions that flow from them. The Rio Treaty affords an opportunity to the region to finally take corrective action. We strongly encourage everyone to support the draft resolution to allow for the region to hold the former Maduro regime

officials responsible for violations of human rights, corruption, narcotics trafficking, and their many financial crimes.

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

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

* * * *

The States Parties to the Rio Treaty adopted a subsequent resolution on December 3, 2019, in Bogotá, Colombia. Among other things, in this resolution, States Parties adopted a consolidated list of certain persons affiliated with the former Maduro regime relevant to the commitments in the September 23 resolution noted above, and initiated a process to define parameters and conditions for adding or removing names to the list in the future. In the resolution, States Parties also resolved to instruct their competent authorities to apply, in accordance with applicable national laws and international obligations, measures restricting entry and transit in the territories of the States Parties to the TIAR. OAS, The Crisis in the Bolivarian Republic of Venezuela and its Destabilizing Effects on the Hemisphere, RC.30/RES. 2/19 (Dec. 3, 2019), http://scm.oas.org/IDMS/Redirectpage.aspx?class=II.30%20RC.30/RES.&classNum=2&lang=e. Michael G. Kozak, Acting Assistant Secretary for the State Department's Bureau of Western Hemisphere Affairs, delivered the U.S. statement at the December 3 meeting of the TIAR Organ of Consultation that adopted the resolution. Ambassador Kozak's remarks are excerpted below.

* * * *

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

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

Notwithstanding our collective bilateral and multilateral efforts up to now, the former, illegitimate regime of Nicolás Maduro has selfishly clung to power, essentially burrowing and

barricading itself in. Of course, the word "illegitimate" does not capture the true nature nor the cruel reality of the regime.

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

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

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

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

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

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

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

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

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

* * * *

2. Organization of American States

a. Venezuela

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

* * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * *

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

* * * *

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

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

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

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

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

* * * *

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

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

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

* * * *

b. General Assembly

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

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

approved a reform package that increases transparency and auditing to improve the effectiveness of the organization, as well as a resolution supporting religious freedom.

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

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

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

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

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

Significant U.S. activity in matters, cases, and other proceedings before the IACHR in 2019 is discussed below. The United States also corresponded in other matters and cases not discussed herein. The 2019 U.S. briefs and letters discussed below, along with several of the other briefs and letters filed in 2019 that are not discussed herein, are

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

a. Petition No. P-561-12: Robinson

On April 3, 2019, the United States made a further submission in the *Robinson* case. The Submission reiterates arguments made in the 2016 U.S. submission. See *Digest 2016* at 305-07 for discussion of and excerpts from the 2016 submission by the United States. The following excerpts from the 2019 submission also address the attempt to add a new claim. The April 3, 2019 submission in *Rogovich* (not excerpted herein) includes a similar response regarding that petitioner's attempt to insert new claims into "additional observations on the merits." Petition No. P-1663-13.

* * * *

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

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

* * * *

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

On April 3, 2019, the United States provided further observations on the petition in response to communications provided by petitioner Mr. Loza. The petition alleges defective consular notification, among other claims. The excerpts below relate to the

consular notification claim and also assert that the Commission should apply the notion of a "margin of appreciation" for local discretion when considering petitioner's claim that the protocol used for administering the death penalty constitutes cruel and unusual punishment. For discussion of, and excerpts from, the 2016 U.S. submission in this case, see *Digest 2016* at 300-04.

* * * *

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

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

* * * *

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

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

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

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

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

* * * *

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

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

* * * *

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

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

i. Prohibition on Retroactive Application of the American Declaration

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

ii. Events at Issue Do Not Constitute a Continuing Act

The Commission has held that events predating the relevant commitments may only be considered if they constitute continuing acts. However, by their very nature, the acquisition of property in 1941-1943 is not a continuing act. The acquisition of land on Vieques by the United States Navy was a discrete event. Moreover, the ten petitioners identified in the Petition have presented no facts to suggest any claim to the land purchased by the Navy and, in fact, no Petitioner was even alive at the time that the Navy acquired land on Vieques. It is therefore

impossible as a factual matter for Petitioners to articulate a claim that the acquisition of property in 1941-1943 constitutes a continuing act in violation of their rights.

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

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

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

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

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

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

Article 20 of the Statute of the Commission sets forth the Commission's powers that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights, including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to

examine communications and make recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted. The Commission lacks competence to issue a binding decision vis-à-vis the United States on matters arising under other international human rights treaties, whether or not the United States is a party, or under customary international law.

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

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

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

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

The Petition is filed on behalf of ten residents of Vieques: Zaida Torres, Wanda Bermúzed, Ivis Cintrón Díaz, Ida Vodofsky Colón, Norma Torres Sanes, Cacimar Zenón, Asunción Rivera, Ismael Guadalupe, Ilsa Ortiz Ortiz, and Nilo Adams Colón. Therefore, the Commission only has competence to review particularized claims with respect to these ten individuals. As it has explained on numerous occasions, the Commission has competence to review individual petitions that allege "concrete violations of the rights of specific individuals, whether separately or as part of a group, in order that the Commission can determine the nature and extent of the State's responsibility for those violations ... ." The Commission's governing instruments "do not allow for an *actio popularis*." Consequently, an individual petition is not the proper means by which to request a decision about alleged violations suffered by particular industries in Vieques (e.g., "the commercial fishing industry"), the "people of Vieques" as a whole, or indeed, in the absence of an allegedly aggrieved individual or group of individuals altogether. While the matters Petitioner complains about may be a proper subject for a thematic hearing before the Commission, they are improper in the context of an individual petition.

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

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

The Commission has repeatedly emphasized that a petitioner has the duty to pursue all available domestic remedies. Article 31(1) of the Rules states that "[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law." As the Commission is aware, the requirement of exhaustion of domestic remedies stems from customary international law, as a means of respecting State sovereignty. It ensures that the State on whose territory a human rights violation allegedly has occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system. A State conducting judicial proceedings for its national system has the sovereign right to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before resorting to an international body. The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance "in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction." The Commission has repeatedly made clear that petitioners have the duty to pursue *all* available domestic remedies.

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

Therefore, even if some residents of Vieques have pursued some remedies under U.S. law alleging the Navy was negligent because it violated particular statutes and regulations and did not alert residents of Vieques to certain safety risks related to military operations, Petitioners have failed to demonstrate that they have pursued or exhausted all available domestic remedies in several ways. First, with respect to claims based on property rights, Petitioners have not pursued or exhausted Constitutional remedies for alleged takings. Second, with respect to claims based on environmental contamination, Petitioners have not pursued or exhausted statutory

mechanisms for judicial review. Third, and more broadly, Petitioners have not pursued or exhausted avenues to challenge U.S. Government action. Finally, with respect to claims based on access to information, Petitioners have failed to pursue existing mechanisms to receive the information they appear to desire. Each of these avenues of redress that Petitioners have failed to pursue will be described in turn.

* * * *

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

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

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

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

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

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

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

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

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

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

Regarding alleged health impacts of U.S. operations at Vieques, Petitioners' claims are also without merit. … Petitioners offer tragic but individual anecdotal situations as evidence, and

information from now-dated sources that was used in previous litigation on a narrower question of law only tangentially related to the larger cleanup. In fact, the United States Government and independent researchers have analyzed whether health on the island is impacted by historic naval activities. Repeated studies have shown no causal link.

* * * *

iii. Article VI (Right to Freedom of Expression)

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

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

* * * *

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

iv. Article XVIII (Right to a fair trial)

Article XVIII of the American Declaration provides that "[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." Petitioners plainly fail to articulate any violation of their right to resort to courts in the United States. …

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

* * * *

v. Article VIII (Right to residence and movement)

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

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

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

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

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

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

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

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

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

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

* * * *

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

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

* * * *

B. THE PETITION IS INADMISSIBLE AND SHOULD BE DISMISSED

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

1. The Petitioners Have Not Pursued or Exhausted Domestic Remedies

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

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

The Petitioners in this case failed to pursue or exhaust all available domestic remedies in several ways. First, the Petitioners chose not to appeal the Ninth Circuit's affirmation of the denial of their asylum claims to the U.S. Supreme Court. Second, the Petitioners' habeas corpus petitions challenging the [immigration judges' or] IJs' decisions failed to exhaust administrative remedies. After the [Board of Immigration Appeals or] BIA had concluded that the INS met its burden of demonstrating a material change in the Petitioners' circumstances that warranted a change in their custody status, the burden then shifted to the Petitioners to demonstrate that their release would not pose a danger to property or persons and that they were not a flight risk. However, the Petitioners did not carry this burden and the BIA therefore declined to reconsider the Attorney General's custody decision. The Petitioners chose not to challenge the BIA's decision, which illustrates yet another way that they did not pursue or exhaust all domestic remedies. Third, although the Petitioners have made numerous allegations about the conditions of their detention, claiming that the conditions were "cruel, inhuman, and punitive," the Petitioners voluntarily settled these claims rather than pursue remedies in court. The Petitioners thus chose to settle claims that they now bring up before this Commission.

For these reasons, the Petitioners have failed to exhaust their local remedies and the Petition is inadmissible under Article 31.

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

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

Petitioners allege that the United States has violated Article I (Right to Liberty), Article II (Right to Equality Before the Law), Article IV (Right to Freedom of Expression), Article XVII (Right to Recognition of Juridical Personality), Article XVIII (Right to Civil Rights), Article XXI (Right of Assembly), Article XXII (Right of Association), Article XXV (Right of Protection from Arbitrary Arrest or Detention), and Article XXVI (Right to Due Process) of the American Declaration.

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

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

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

Yet, even if such denial of bond could be construed in terms of arbitrary arrest or detention, the Petitioners challenged their detention through five levels of administrative and judicial review: IJs, the BIA, a magistrate judge, the District Court, and the Ninth Circuit. U.S. immigration laws and regulations provide a "comprehensive scheme for [Petitioners] to challenge their bond revocation and detention," as they were represented by counsel at the bond revocation hearing, who cross-examined Special Agent Castillo and presented rebuttal evidence. The "L.A. Cell" list—which Petitioners claim to have been fabricated and therefore wrongfully relied upon by detaining officials—was also not the only piece of evidence considered when the IJ determined that the Petitioners constituted a risk to persons or property and should have their bond revoked: the IJ considered the "totality of the information" in reaching this conclusion. The Petitioners were thus provided with a process that was not arbitrary: they were afforded a hearing before an impartial judge, "given an opportunity to present evidence and to know and meet the claims of the opposing party," and the proceedings complied with the rules of procedural fairness.

Moreover, the Petitioners either entered or remained in the United States unlawfully and now seek to transform their own wrongdoing into the source of a "right" not to be held accountable for their fraudulent actions. Nothing in the American Declaration recognizes a human right to unlawfully enter or remain in a State without facing the immigration consequences for these actions. On the contrary, the American Declaration affirms that "[i]t is the duty of every person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be." It is also a general principle of law recognized by international courts and tribunals that an unlawful act cannot serve as the basis for

a claim under international law. The Petitioners nevertheless seek to use their own wrongful entry or over-staying of their visas in violation of U.S. law as the basis for asserting that they have an alleged right that was violated by their detention pending the outcome of their immigration proceedings. The Commission should not allow itself to be used for such a purpose.

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

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

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

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

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

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

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

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

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

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

Furthermore, the Petition plainly constitutes an effort by the Petitioners to use the Commission as a "fourth instance" body to review claims already heard and rejected by U.S. courts. The Commission has repeatedly stated that it may not "serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic

courts acting within their jurisdiction," a doctrine the Commission calls the "fourth instance formula."

* * * *

C. THE PETITION IS MERITLESS

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

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

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

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

* * * *

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

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

* * * *

Petitioners raise three primary arguments. First, Petitioners claim that [uranium] mining pursuant to the [U.S. government agency] license at issue would, should it commence, have the effect of infringing upon their rights to life and health under Articles 1 and 11 of the American Declaration on the basis of environmental contamination that may arise from the proposed

mining. Second, Petitioners claim, *inter alia*, that such mining would, should it commence, have the effect of infringing upon their rights to religion and cultural participation under Articles 3 and 13 of the American Declaration because possible environmental contamination that may arise from the proposed mining could negatively impact Petitioner's ability to participate in traditional practices. Finally, Petitioners argue that such mining would, should it commence, infringe upon Petitioners' right to property under Article 23 of the American Declaration.

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

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

I. The competence of the Commission is limited

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

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

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

As a factual matter, it is the potential future mining operation of a private entity, HRI, rather than the Federal licensing procedures administered by the NRC under the Atomic Energy Act (AEA), that forms the basis of Petitioners' claims. Even so, Petitioners' ostensible hook to

implicate a failure on the part of the United States to live up to its commitments under the American Declaration lies with the NRC's administration of the AEA and, specifically, the license granted to HRI. To the extent that Petitioners seek to challenge that license, the issues raised by Petitioners have been fully adjudicated before the courts of the United States and there has been no failure by the United States to live up to its political commitments under the American Declaration with respect to that license.

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

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

It is not the Commission's place to sit in judgment as another layer of appeal, second-guessing the considered decisions of a State's domestic courts in weighing evidence and applying domestic law, nor does the Commission have the resources or requisite expertise to perform such a task. The United States' administrative process, including the availability of judicial review of administrative decisions, afforded petitioners the opportunity to participate in, and indeed challenge, the NRC license to HRI. Petitioners, over an extended period of time spanning more than a decade, both participated in the NRC licensing process and appealed the outcome of that process in Federal court.

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

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

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

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

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

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

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

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

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

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

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

IV. Failure to state a claim under the American Declaration

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

Petitioners raise three primary arguments. …

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

In this case, however, "a cognizable violation of a protected human right" has not been set forth by Petitioners. Instead, the claims presented in the Petition are predicated upon a series of interdependent assumptions of future events: that HRI will successfully complete the

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

* * * *

f. Petition No. 1075-06: Schneider

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

* * * *

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

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

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

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

Although the jurisprudence of the European Court of Human Rights is entirely beyond the scope of the Commission's competence, it should be noted that Petitioner's selective citations to the Court's jurisdictional reasoning in the *Al-Skeini* case are profoundly misleading. In *Al-*

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

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

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

* * * *

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

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

* * * *

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

Petitioner turns to a host of other instruments to buttress his claim under this provision, including the International Covenant on Civil and Political Rights, the American Convention, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the African Charter on Human and Peoples' Rights. However, as noted above, under Article 34(a),

the Commission may only consider petitions that state facts tending to establish a violation of the rights referred to in Article 27 of the Rules. Article 27, in turn, directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights [('American Convention')] and other applicable instruments ... ." Article 20 of the Commission's Statute and Article 23 of the Rules identify the American Declaration as an "applicable instrument" with respect to nonparties to the American Convention such as the United States. Again, the United States is not a party to any of the other instruments listed in Article 23, and in any event, Article 23 does not list the ICCPR or other instruments cited by Petitioner.

Moreover, Petitioner's reliance on interpretations of Article 13 (Freedom of Thought and Conscience) of the American Convention by the Inter-American Court are not relevant to the present assessment. Judgments of the Inter-American Court of Human Rights construing the American Convention on Human Rights do not govern U.S. commitments under the American Declaration. States party to the American Convention have undertaken obligations under international law that cannot be applied to the United States because the United States has undertaken no such obligations. Because, in the judgments cited by Petitioner, the Inter-American Court is applying the provisions of Article 13 of the American Convention—an instrument distinct from the American Declaration whose terms are far broader and more particular than those of Article IV of the American Declaration—the court's interpretation of such provisions, even by analogy, are not applicable to the claims stated in the Petition.

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

* * * *

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

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

* * * *

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

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

The United States military today includes approximately 1.3 million active duty members and more than 800,000 reservists. The Petition collects 20 allegations that service members were sexually assaulted between 2001 and 2010. Together, those allegations relate to 0.0015% of today's U.S. military population; they comprise a far smaller percentage of U.S. service members over the time span from which they are drawn. We condemn sexual assault in the U.S. military in the strongest terms, and the robust system of justice in place to protect victims and promote accountability for perpetrators reflects our commitment to preventing and appropriately punishing sexual assault. That there exists some level of crime, including sexual assaults, however, does not constitute a failure of the United States to meet its commitments under the American Declaration of the Rights and Duties of Man ("the American Declaration"). Nor has the U.S. military's response to those individual cases or incidents of sexual assault in the U.S. military as a whole violated the American Declaration. On the contrary, the U.S. Government's response has been driven by care for its service members affected by sexual assault and a commitment to the careful investigation and adjudication of such allegations to promote appropriate accountability. This response has also been characterized by steady evolution as the U.S. Government considers and implements additional sexual assault prevention and response measures, as detailed below.

* * * *

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

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

* * * *

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

To the extent that Petitioners articulate generalized allegations of violations of the American Declaration beyond those cognizable in relation to Petitioners, the Petition must be dismissed

because the Commission lacks competence *ratione personae* to entertain claims based on a theory of *actio popularis*.

* * * *

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

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

* * * *

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

III. The Petition is Inadmissible because it is Untimely

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

* * * *

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

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

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

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

Instead, Petitioners claim that, by removing them to Haiti "without due consideration of the humanitarian and human rights crisis in Haiti … and the individual circumstances of the deportees," the United States violated Article I (right to life, liberty, and security of person), Article V (right to protection of honor, personal reputation, and private and family life), Article

VI (right to a family and to protection thereof), Article VII (right to protection for mothers and children), Article XI (right to the preservation of health and to well-being), Article XVIII (right to a fair trial), and Article XXVI (prohibition on cruel or unusual punishment) of the American Declaration.

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

* * * *

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

* * * *

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

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

* * * *

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

* * * *

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

The Petition plainly constitutes an effort by Petitioners to use the Commission as a "fourth instance" body to review claims already heard and rejected in administrative and judicial proceedings in the United States. The Commission has repeatedly stated that it may not "serve as an appellate court to examine alleged errors of internal law or fact that may have been committed

by the domestic courts acting within their jurisdiction," a doctrine the Commission calls the "fourth instance formula."

* * * *

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

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

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

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

* * * *

j. Request by Colombia for an Advisory Opinion

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

* * * *

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

In the light of international law, conventions and common law, and in particular, the American Declaration of the Rights and Duties of Man of 1948: *What obligations in the matters*

in matters [sic] *of human rights does a member State of the Organization of American States have when it has denounced the American Convention on Human Rights?*

The second question elaborates on the first:

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

The third question is presented as:

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

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

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

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

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

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

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

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

So long as the human rights treaties in the Inter-American system remain in force, a State party to such instruments would continue to be bound by those treaties unless and until the State suspended, terminated or withdrew from the instrument in accordance with the terms of the treaty or as otherwise consistent with customary international law.

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

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

functions, such as the Universal Declaration of Human Rights. The Court should also refrain from addressing customary international law pursuant to Article 64.1.

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * *

Cross References

Temporary Protected Status, **Ch. 1.C.1.**
UN Commission on Narcotic Drugs, **Ch. 3.B.2.c.(1)**
International Tribunals and Accountability Mechanisms, **Ch. 3.C.**
ILC Draft Guide to Provisional Application of Treaties, **Ch. 4.A.2.**
Universal Postal Union, **Ch. 4.B.2.**
Remarks on State Responsibility at the UN Sixth Committee, **Ch. 8.A.1.**
Remarks on Diplomatic Protection at the UN Sixth Committee, **Ch. 8.A.2.**
Recognition of Juan Guaido as interim president of Venezuela, **Ch. 9.A.2.**
Immunity of International Organizations, **Ch. 10.D.**
UN Convention on the Law of the Sea, **Ch. 12.A.1.**
UN Framework Convention on Climate Change ("UNFCCC"), **Ch. 13.A.1.**
*ILC Draft Guidelines on Protection of the Atmosphere***, Ch. 13.A.3.**
UNCITRAL, **Ch. 15.A.1.**
Venezuela sanctions, **Ch. 16.A.5.**
UNSCR 2449 on humanitarian aid to Syrians, **Ch. 17.B.2.**
Responsibility to Protect, **Ch. 17.C.4.**

CHAPTER 8

International Claims and State Responsibility

A. STATE RESPONSIBILITY

1. Remarks on State Responsibility at the UN Sixth Committee

Julian Simcock, deputy legal adviser for the U.S. Mission to the UN, delivered remarks on
October 14, 2019 at a UN General Assembly Sixth Committee meeting on "Agenda Item 75: Responsibility of States for Internationally Wrongful Acts." His remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-general-assembly-meeting-of-the-sixth-committee-on-agenda-item-75-responsibility-of-states-for-internationally-wrongful-acts/.

* * * *

The draft articles on the responsibility of States for internationally wrongful acts, with commentaries, were adopted in 2001. Since that time, they have been relied upon by States and other litigants, as well as by international courts and tribunals, as providing guidance on the customary international law of state responsibility. Indeed, the United States has itself cited to certain of the draft articles and the ILC commentaries in its pleadings before international courts and tribunals.

At the 71st session of the Sixth Committee (2016), the draft articles were discussed at length, with some countries favoring a diplomatic conference to convert the draft articles into a convention, and others preferring to leave the articles in draft form. The U.S. position in 2016 was that the articles are most valuable in their current draft form, and our position has not changed.

The United States remains particularly concerned that the negotiation of a convention poses risks to important existing rules. In opening the draft articles to the debate necessary to arrive at a convention, well-accepted rules that are documented in the draft articles and their commentaries could be re-drafted, questioned, or undermined. On the other hand, those draft articles that represent the progressive development of international law, and which are not necessarily accepted by all States, may not be ready for negotiation. It would be better to allow the topics covered by those rules an opportunity to be subject to State practice, to ascertain whether the draft articles may gain broader acceptance and crystalize into customary international law, or may be disregarded. New rules that are utilized by States in practice are

much more likely to gain widespread acceptance, as opposed to a convention negotiated under the pressure of a condensed timeframe.

We also believe that a negotiated convention ultimately would not enjoy widespread acceptance by States, in part because certain articles go beyond existing customary international law. This result would lead not to clarity regarding state responsibility, but to confusion over an area of law that includes both settled customary international law and areas of continuing progressive development. Consequently, the best option is to allow the articles to continue to guide States and other litigants as to the content of settled law, and to assist States in the progressive development of law.

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2. Remarks on Diplomatic Protection at the UN Sixth Committee

On October 14, 2019, Deputy Legal Adviser Simcock delivered remarks at a UN General Assembly meeting of the Sixth Committee on Agenda Item 80—Diplomatic Protection. His remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-general-assembly-meeting-of-the-sixth-committee-on-agenda-item-80-diplomatic-protection/.

* * * *

First, let me thank the Secretary General for his helpful report compiling the written comments of States on possible future action on the draft articles on diplomatic protection.

As we indicated in 2016, the United States shares the view that where the draft articles on diplomatic protection reflect State practice, they represent a substantial contribution to the law on the topic and are thus valuable to States in their current form. The United States has concerns, however, that certain draft articles are inconsistent with well-settled customary international law. For more details, please see the statement delivered by the United States on October 19, 2007, as reported in document A/C.6/62/SR.10.

To highlight just one significant remaining concern, we would point to Article 15 on exceptions to the local remedies rule. Draft Article 15 would not require exhaustion where there is no reasonably available local remedy for effective redress or the local remedies provide no reasonable possibility of such redress. In our comments to the International Law Commission, we opposed this standard as too lenient, noting that the customary international law standard was that the exhaustion requirement was excused only where the local remedy is "obviously futile" or "manifestly ineffective." While the ILC, in its commentary, regarded the customary international law rule as too burdensome—a conclusion with which we respectfully disagree—we maintain that any articles considered in a convention on diplomatic protection should reflect the well-established customary international law on this subject.

We maintain similar concerns regarding, for example, Articles 10 and 11, which were also detailed in our previous written submissions and our 2007 statement. As we stated in 2007, the United States is also concerned that the negotiation of a convention risks undermining contributions already achieved by the draft articles.

* * * *

B. HOLOCAUST-ERA CLAIMS

On February 6, 2019, the State Department issued a media note announcing that additional payments would issue to individuals based on claims in connection with the Holocaust Deportation Claims Program. The media note is excerpted below and available at https://www.state.gov/additional-payments-under-holocaust-deportation-claims-program/. See *Digest 2014* at 313-15 for a discussion of the U.S.-France Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are Not Covered by French Programs ("U.S.-France Agreement"), which was concluded in December 2014.

* * * *

The U.S. Department of State is pleased to announce that it will soon make additional payments to individuals with approved claims in connection with the Holocaust Deportation Claims Program. Within the next few days, all individuals whose claims were previously approved will receive a letter from the Department notifying them that they will receive an additional payment of 97% of their prior approved claim amount. This amount is based on the funds remaining for approved claims. The letter will provide instructions for receiving the additional payment.

While no payment can provide complete justice for all who were impacted by deportation from France, we hope those affected by one of history's darkest eras will receive some additional relief from these further payments. The Department's Office of the Legal Adviser, through its International Claims and Investment Disputes Office, has administered the Holocaust Deportation Claims Program since its inception.

The program was established in connection with the U.S.-France Agreement … following negotiations led by the Office of the Legal Adviser and Office of the Special Envoy on Holocaust Issues. Under the Agreement, France provided a lump-sum of $60 million to the United States to distribute to survivors of deportation, surviving spouses of deportees, and representatives of the estates of survivors and surviving spouses who are no longer living. The Department accepted claims in two filing periods and approved and paid claims that were eligible based on the requirements of the Agreement.

The Department is now nearing completion of the program. The following initial payments were made to those whose claims were deemed eligible under the terms of the program: $204,000 to living survivors of deportation; $51,000 to living surviving spouses of deportees whose deportee spouse died before 1948, and a pro rata amount if the deportee spouse died after 1948; and a portion of those amounts to heirs of survivors and surviving spouses based on how long the relevant survivor or surviving spouse lived. Payments to date on approved claims total $30,028,500. With the additional payment of 97% of their prior approved claim amount, living survivors would receive in total $401,880; living surviving spouses would receive up to $100,470; and heirs of survivors and surviving spouses would receive a portion of these amounts.

* * * *

C. IRAN CLAIMS

As discussed in *Digest 2018* at 317-18, the Iran-U.S. Claims Tribunal ("Tribunal") hearings on Case B/1 (regarding the former U.S. foreign military sales program with Iran) began in 2018. The series of hearings on Case B/1 concluded in June 2019. In December 2019, the United States submitted to the Tribunal its response brief in Case B/61, pertaining to the United States' obligation to arrange for the transfer of Iranian export-controlled property held by private parties in the United States.

D. CUBA CLAIMS

In April 17, 2019 remarks to the press, available at https://www.state.gov/remarks-to-the-press-11/ and excerpted below, the Secretary of State announced that, effective May 2, 2019, the Secretary would no longer suspend Title III of the Cuban Liberty and Democratic Solidarity ("LIBERTAD") Act of 1996. With certain exceptions, Title III of the LIBERTAD Act permits U.S. nationals with claims to property confiscated by the Cuban government to file suit in U.S. courts against persons or entities "trafficking" in that property. LIBERTAD gives the President the authority to suspend the right to file suit under Title III for periods of not more than six months if he or she determines and reports to Congress that suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba. That suspension authority was delegated to the Secretary of State in 2013. Title III was suspended in full from the time of enactment until May 2, 2019, with a partial suspension from March 19, 2019 to May 2, 2019.

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* * * *

In 1996, Congress passed the Cuban Liberty and Democratic Solidarity Act, also known as Libertad. [Under] Title III of that act, United States citizens who had their property confiscated by the Castro regime were given the right to file suit against those who traffic in such properties.

But those citizens' opportunities for justice have been put out of reach for more than two decades. For now more than 22 years, every president, every secretary of state has suspended Title III in the hope that doing so would put more pressure on the Cuban regime to transition to democracy.

* * * *

More broadly, the regime continues to deprive its own people of the fundamental freedoms of speech, press, assembly, and association. Indeed, according to NGO reports, Cuban thugs made more than 2,800 arbitrary arrests in 2018 alone. In the run-up to the country's recent sham constitutional referendum, one that enshrined the Communist Party as the only legal political party in Cuba, the regime harassed, beat, and detained … opposition leaders and activists. Three hundred and ten people were arbitrarily detained according to the Cuban Commission on Human Rights and National Reconciliation.

Cuba's behavior in the Western Hemisphere undermines the security and stability of countries throughout the region, which directly threatens United States national security interests. The Cuban regime has for years exported its tactics of intimidation, repression, and violence. They've exported this to Venezuela in direct support of the former Maduro regime. Cuban military intelligence and state security services today keep Maduro in power.

* * * *

For these reasons, I'm announcing that the Trump administration will no longer suspend Title III. Effective May 2nd, the right … to bring an action under Title III of the Libertad Act will be implemented in full. I have already informed Congress of my decision.

Implementing Title III in full means a chance at justice for Cuban Americans who have long sought relief for Fidel Castro and his lackeys seizing property without compensation. For the first time, claimants will be able to bring lawsuits against persons trafficking in property that was confiscated by the Cuban regime. Any person or company doing business in Cuba should heed this announcement.

In addition to being newly vulnerable to lawsuits, they could be abetting the Cuban regime's abuses of its own people. Those doing business in Cuba should fully investigate whether they are connected to property stolen in service of a failed communist experiment. I encourage our friends and allies alike to likewise follow our lead and stand with the Cuban people.

* * * *

Today we are holding the Cuban Government accountable for seizing American assets. We are helping those whom the regime has robbed get compensation for their rightful property. And we're advancing human rights and democracy on behalf of the Cuban people.

* * * *

E. IRAQ CLAIMS UNDER THE 2014 REFERRAL TO THE FCSC

The Foreign Claims Settlement Commission ("FCSC" or "Commission") began issuing decisions in 2016 in the Second Iraq Claims Program, which was established by a referral dated October 7, 2014, from the State Department's Legal Adviser under a 2010 claims settlement agreement between the United States and Iraq. Most of the claims under the referral were brought under "Category A," which consists of "claims by U.S. nationals for hostage-taking by Iraq in violation of international law prior to October 7, 2004 … ." The final value of all awards in the program is $121,425,000. See http://www.justice.gov/fcsc/current-programs. For background on the 2014 referral, see *Digest 2014* at 315-16. The following discussion focuses on some of the more noteworthy decisions in 2019. The full text of the decisions is available at https://www.justice.gov/fcsc/final-opinions-and-orders-5#s3.

1. Claim No. IRQ-II-383, Decision No. IRQ-II-317 (2019)

This claim under Category A involves a U.S. national who was living with his family in Kuwait when Iraq invaded on August 2, 1990. He asserted that he remained a hostage of Iraq even after Iraq allowed U.S. nationals to leave because of the presence of Iraqi forces in the vicinity of his apartment. The Commission rejected this argument, finding that, "[u]nder the international law applicable to armed conflict … the mere presence of an occupying or belligerent force, including the establishment of a military checkpoint, is not sufficient to establish the injury of detention." For this reason, the Commission found that claimant was not "seized or detained" beyond the date when Iraq allowed U.S. nationals to leave, and therefore was not held hostage under international law beyond that date. He was awarded $785,000 for the 127 days he was held hostage before Iraq allowed U.S. nationals to leave.

2. Claim No. IRQ-II-143, Decision No. IRQ-II-314 (2019)

This claim, also under Category A, was brought by a U.S. national who alleged that she was held hostage by Iraq from August 2, 1990 (when she was six years old) until February 26, 1991, the day of Kuwait's liberation. Claimant argued that, although Iraq had announced on August 28, 1990, that all foreign national women and children could leave Iraq and Kuwait, she continued to be detained because, *inter alia*, travel was dangerous, there was a continuous Iraqi military presence, she was not aware of the announcement, and, in any event, she could not leave because she could not travel alone. The Commission denied claimant's hostage claim beyond August 28 on the basis that none of claimant's assertions related to attempts by Iraq to restrict her movements. Excerpts follow (with most footnotes omitted) from the Commission's decision.

* * * *

Although Claimant may have been legally permitted to leave Kuwait on August 28, 1990, her detention did not necessarily end on that date. As the Commission has previously recognized, a claimant's detention ends only on the date that she is released from the control of the person or entity that detained her. In this regard, any attempt by Iraq "to restrict [the] movements" of a claimant establishes control, whereas a claimant who has a reasonable opportunity to leave the site of his or her captivity is deemed no longer to be under [Iraq's] control.

Here, while Claimant advances several reasons why she remained under Iraq's control after August 28, 1990, only one of these reasons concerns acts allegedly committed by the Iraqi government: Claimant argues that due to several "actions and pronouncements" of the Iraqi government during its occupation of Kuwait it was "not safe" for her to attempt to leave her grandparents' residence prior to February 26, 1991—*i.e.*, the date Kuwait was officially liberated from Iraq.[47] Claimant's primary contention in this regard is that Iraq continued its policy of

[47] *See* Memorandum In Support of Claim IRQ-II-143 in Response to Commission Request for Information, dated September 19, 2016 ("Claimant Mem."), at 15, 18. Claimant also argues that: 1) she was not aware of the August 28, 1990 announcement; 2) the State Department did not provide her with information about the announcement or evacuation flights chartered by the U.S. government; 3) evacuation via air was impractical because no one was

seizing and detaining women and children of U.S. nationality even after the August 28, 1990 announcement and, thus, she reasonably feared that Iraq would have seized or detained her had she attempted to leave after that date.

Claimant, through counsel, has submitted a memorandum contending that Iraq continued its policy of seizing and detaining women and children of U.S. nationality after the August 28, 1990 announcement, that the announcement was a "hollow" and "public relations-driven" promise that Iraq did not apply in practice, and that while Iraq allowed a "few hundred Americans" to leave Iraq "in mid-September," it did so only "because it was forced to by Rev. Jesse Jackson and the publicity he brought to the dire situation." Claimant cites several sources showing that Iraq continued to detain foreign nationals after August 28, 1990. None of these sources, however, address whether Iraq had a policy of seizing and detaining *women or minors* of U.S. nationality after the August 28, 1990 announcement. They are thus not determinative here.

Claimant also cites a December 7, 1990 *Washington Post* chronology of the Gulf War that states that on or around August 30, 1990, "[d]iplomats in Baghdad [said] Iraq will allow planes to pick up Western women and children only if the aircraft fly food and medicine into Iraq." While it is clear that Iraq imposed restrictions on air travel that prevented some women and minors from leaving Kuwait and Iraq immediately after August 28, 1990, Claimant cites no evidence to suggest that Iraq, in practice, enforced the conditions noted in the August 30 account. To the contrary, Claimant's contention in this regard directly contradicts contemporaneous statements and communications from State Department officials, none of which indicate that women or minors of U.S. nationality were prevented from leaving Iraq and/or Kuwait because Iraq imposed restrictions on air travel related to the import of food and medicine. As noted above, statements made by senior State Department officials in September 1990 establish that, as a result of the August 28, 1990 announcement, the vast majority of U.S. nationals in Kuwait—including several hundred women and children—left on evacuation flights between September 1, 1990, and September 22, 1990. These statements indicate that women and children of U.S. nationality who remained in Kuwait after September 22, 1990, chose to stay in the country.

State Department communications also show that Iraq continued to allow women and children to leave on evacuation flights in October 1990, November 1990, and December 1990. According to … State Department officials, the 285 women and children of U.S. nationality who, like Claimant, remained in Kuwait after the last U.S. government chartered evacuation flight departed on December 13, 1990, had decided to stay despite having had many opportunities to leave, and in most cases, were dependents of Kuwaiti, Iraqi, or Arab nationals who had also decided not to leave.

We conclude that Claimant has failed to establish that Iraq acted to restrict her movements after August 28, 1990. She has therefore failed to establish that Iraq detained her after August 28, 1990.

* * * *

available to accompany her on an evacuation flight; and 4) the only escape route from Kuwait was through the desert. None of these arguments, however, involve an attempt *by Iraq* to restrict Claimant's movements after August 28, 1990. We thus make no findings on these issues.

3. Claim No. IRQ-II-138, Decision No. IRQ-II-334 (2019)

The Category A claimant in this case was a journalist who was detained by Iraqi soldiers in northern Iraq on March 29, 1991 and held for about two weeks. He claimed that, for most of this time, he was detained in an Iraqi prison and was held incommunicado. The Commission denied the claim because Claimant failed to prove the third element of the Commission's hostage standard—that Iraq's actions were done in order to compel a third party to do or abstain from doing any act as a condition for his release. Excerpts follow (with footnotes omitted) from the Commission's decision.

* * * *

(1) Armed Conflict: Claimant alleges that Iraq took him hostage in Kirkuk, Iraq, on March 29, 1991, and held him hostage for 18 days, until April 15, 1991. In its first decision awarding compensation for hostage-taking under the 2014 Referral, the Commission held that between August 2, 1990, and April 8, 1991, Iraq was engaged in an armed conflict with Kuwait. Claimant therefore satisfies this element of the standard for at least the first 11 days of his captivity, *i.e.*, from March 29, 1991, to April 8, 1991.

(2) Hostage-taking: To satisfy the hostage-taking requirement of Category A of the 2014 Referral, Claimant must show that Iraq (a) seized or detained him and (b) threatened him with death, injury or continued detention (c) in order to compel a third party, such as the United States government, to do or abstain from doing any act as an explicit or implicit condition for his release. Claimant fails to satisfy this standard because he has failed to provide evidence sufficient for the third prong of this test, *i.e.* that Iraq's actions were done in order to compel a third party to do or abstain from doing any act as a condition for his release.

(a) Detention/deprivation of freedom: As noted above, a claimant can establish the first element of the Commission's hostage-taking standard by showing that the Iraqi government confined the claimant to a particular location or locations within Iraq or Kuwait, or prohibited the claimant from leaving Iraq and/or Kuwait. Here, there is no doubt that Claimant satisfies this element of the standard based on his sworn statement and the contemporaneous evidence provided in support of the claim. He was physically seized on March 29, 1991, by Iraqi soldiers while reporting on hostilities between the Iraqi government and Kurdish rebels in Kirkuk, Iraq. He was then forcibly taken to a safe house in Baghdad, where he was interrogated by Iraqi intelligence officers. He remained there for three days, and was then blindfolded and placed in a prison west of Baghdad where other detainees were being brutally tortured until his release on April 15, 1991. Given these facts, Claimant was clearly "confined … to a particular location or locations within Iraq or Kuwait … ."

In sum, Iraq thus detained Claimant from March 29, 1991, to April 15, 1991.

(b) Threat: The second element of the hostage-taking standard requires that Iraq "threatened [Claimant] with death, injury or continued detention …." The evidence shows that Iraq clearly made such threats. After Claimant's arrest, according to one news article, the soldiers threatened to place a grenade down his jacket. He was forcibly moved from place to place before being imprisoned near Baghdad. While in prison, according to the newspaper article, an Iraqi official told Claimant and his colleague that "their chances of getting out alive would be improved if they consented to give a television interview" about the activities of Kurdish guerillas. After apparently giving such an interview, they were still not released. As the

Commission has previously stated, "[t]o constitute a threat for purposes of a hostage-taking claim under international law, it suffices for a threat to have been made 'at any time during the detention.'" Claimant has thus established that Iraq threatened to kill or injure and continue to detain him between March 29, 1991, and April 15, 1991.

(c) Third party coercion: As the Commission has noted previously, Iraq detained U.S. nationals within Iraq and Kuwait for varying lengths of time between August 2, 1990, and December 6, 1990, and threatened them with continued detention in order to compel the United States government to act in certain ways as an explicit and/or implicit condition for their release. By the second week of December 1990, however, all remaining U.S. national hostages had been formally released. There is no evidence in the record that Iraq continued to make demands of the United States after December 1990 as a condition for the release of any remaining U.S. nationals detained in Iraq or Kuwait. Claimant's period of detention occurred long after the hostage crisis of 1990 was over and towards the end of military operations between coalition forces and Iraq, which ended with a formal ceasefire on April 8, 1991.

Here, Claimant has presented little evidence that his detention in March and April 1991 was intended to compel the U.S. government (or another third party) to do or abstain from doing any act. Indeed, he has not even asserted this in his Statement of Claim. Claimant instead relies on the affidavit of Andrew Winner, which he contends "provides evidence relating to the Claimant's detention and third party compulsion as an implicit condition for Claimant's release." In his affidavit, Mr. Winner states that, sometime around the time of Claimant's capture, he "received a communication relating to the fact that certain persons had been taken hostage by Iraq forces[,]" and that "among those captured was [Claimant] … ." He further states: "I believe that [Claimant's] case became the subject of U.S. military to Iraq military negotiations … and it may have also been part of discussions with the Iraqi government through diplomatic channels or through the International Committee of the Red Cross."

Although Mr. Winner appears to suggest that these negotiations also involved the subject of certain Iraqi prisoners of war then being held by the United States, he does not state that Claimant's detention was used as leverage in negotiations with the U.S. government or was otherwise used to coerce action on the part of the U.S. government or any other third party. Such coercion is a necessary element of the Commission's hostage-taking standard. In any event, Mr. Winner's statements appear to be based on uncorroborated hearsay and were made in May 2018, more than two years after the claim was filed. Under these circumstances, the Commission finds this affidavit insufficient to prove that Claimant's detention was used to compel the United States to do or abstain from doing any act. Claimant has therefore failed to establish the third element of the Commission's hostage-taking standard, and his claim thus does not satisfy the elements of the Commission's standard for claims brought under Category A of the 2014 Referral. Accordingly, this claim must be and is hereby denied.

* * * *

4. Claim No. IRQ-II-204, Decision No. IRQ-II-332 (2019)

The Category A claimant in this case was living with her husband in Kuwait at the time of the August 2, 1990 invasion. Despite Iraq's announcement on August 28, 1990, that American women and children could leave, claimant remained in Iraq until November 18, 1990. She argued that she was detained during this entire time, including after the August 28 announcement, for a variety of reasons. Among these were: she was confused

about the announcement; she was concerned that her husband might be detained if they made arrangements to get to the airport; she had only intermittent phone access and limited access to news reports; and she did not want to leave her husband alone in Kuwait. The Commission rejected most of these arguments on the basis that they "[did] not reflect an intentional effort by Iraq to restrict Claimant's movements after August 28, 1990." Claimant also argued that a decree mandating the death penalty for persons assisting American prevented her from being evacuated. However, the Commission found no evidence that this applied to foreign national women and children after August 28, 1990. Finally, claimant argued that, "her 'personal and moral obligations' compelled her to remain with her husband in response to Iraq's actions in Kuwait," citing decisions from the Second Libya Claims Program in which compensation was awarded to crew members of a hijacked plane who stayed on the plane prior to escaping in order to disable it and prevent further harm. The Commission found the analogy inapt because in "the Libya decisions, it was clear that the crew members would have been detained had they not escaped." By contrast, the claimant here presented no evidence that Iraq forced her to remain in Kuwait after August 28 by detaining her husband; indeed, "many female claimants … left Iraq and Kuwait even while their husbands stayed behind." The Commission therefore denied the portion of the hostage claim for the period following the release of women and children because she was not "seized or detained" during that time as required by the Commission's standard.

F. LIBYA CLAIMS

Alimanestianu v. United States

As discussed in *Digest 2018* at 342-44, *Digest 2017* at 350-56, and *Digest 2016* at 350-56, the United States prevailed on summary judgment and on appeal in *Alimanestianu v. United States*. The Alimanestianu plaintiffs brought a federal suit against Libya, but their lawsuit was dismissed after the United States reached a claims settlement agreement with Libya. Although the Alimanestianu estate and family received nearly $11 million from the settlement fund, they claimed that the lost opportunity to pursue their suit in federal court constituted a taking. On January 4, 2019, the United States filed its brief in opposition to the petition for certiorari. *Alimanestianu v. United States*, No. 18-295. On February 19, 2019, the Supreme Court denied the petition. Excerpts follow (with record citations omitted) from the U.S. brief filed in the Supreme Court.

* * * *

Petitioners renew their argument that this Court's decision in *Horne* v. *Department of Agriculture*, 135 S. Ct. 2419 (2015), requires a finding that a per se taking occurred and that the court of appeals therefore should not have applied the factors set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), for determining whether compensation is due. As an initial matter, petitioners lack a cognizable property right in their tort claims and non-final judgment against Libya, and their takings claim fails on that basis alone. Moreover, even assuming (as the court of appeals did) that petitioners had a cognizable property

right, the court correctly concluded that the actions of the Executive and Legislative Branches in espousing petitioners' claims and compensating their injuries through a settlement do not amount to a per se taking. That reasoning, based on longstanding precedent and historical practice, does not conflict with any decision of this Court or another court of appeals. And this case would be a poor vehicle for addressing the question presented because petitioners ultimately dispute the amount of compensation they received from the settlement fund—a nonjusticiable question. Further review is unwarranted.

1. The Fifth Amendment prohibits the taking of "private property * * * for public use, without just compensation." U.S. Const. Amend. V. "To state a claim for a taking," therefore, petitioners must first establish "that they had a cognizable property interest." [S]ee, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 674 n.6 (1981). The government argued in the court of appeals that petitioners had not adequately alleged a taking because they had not asserted a cognizable property interest. The court of appeals declined to resolve that issue, instead "assum[ing], without deciding, that [petitioners] had a cognizable property interest in their district court claims and non-final judgment." Although that decision is fully correct for the reasons explained below, petitioners' claim fails for the independent and antecedent reason that they "did not acquire any 'property' interest" in their tort claims and non-final district court judgment and therefore cannot "support a constitutional claim for compensation." *Dames & Moore*, 453 U.S. at 674 n.6.

Petitioners identify no authority suggesting that a tort claim of the sort they seek to pursue against Libya is a form of "vested" property right that gives rise to a Fifth Amendment takings claim. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994). To the contrary, courts have consistently held that "a pending tort claim does not constitute a vested right." *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) (citing cases), cert. denied, 519 U.S. 1077 (1997); see, *e.g.*, *Salmon* v. *Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991) ("[A] legal claim for tortious injury affords no definite or enforceable property right until reduced to final judgment.") (brackets and citation omitted); *Hammond* v. *United States*, 786 F.2d 8, 12 (1st Cir. 1986) ("[R]ights in tort do not vest until there is a final, unreviewable judgment."); *Memorial Hosp.* v. *Heckler*, 706 F.2d 1130, 1137-1138 (11th Cir. 1983) (no enforceable property right in non-final judgment); see also *Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1141 (9th Cir. 2009), cert. denied, 560 U.S. 924 (2010). The absence of a cognizable property interest is especially clear here, where petitioners assert a taking arising from changes in the law—namely Congress's restoration of Libya's sovereign immunity. As this Court explained more than a century ago, "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Cent. R.R.* v. *White*, 243 U.S. 188, 198 (1917).

The Court has stated expressly that "[l]aws that merely alter the rules of foreign sovereign immunity, rather than modify substantive rights, are not operating retroactively when applied to pending cases," and therefore do not create a due process violation, because "[f]oreign sovereign immunity 'reflects current political realities and relationships,' and its availability (or lack thereof) generally is not something on which parties can rely 'in shaping their primary conduct.'" *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 864-865 (2009) (quoting *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696 (2004)). Likewise, espousal of claims in conjunction with the restoration of sovereign immunity does not affect any cognizable property interest. Indeed, in *Dames & Moore*, this Court explained that the plaintiffs "did not acquire any 'property' interest in" the attachments of frozen assets that were later nullified by the President as part of a claims settlement. 453 U.S. at 674 n.6; accord *United States* v. *Sperry Corp.*, 493 U.S. 52, 59 (1989). Petitioners accordingly fail to make the threshold showing required for a taking.

2. Even if petitioners could identify a cognizable property interest (as the court of appeals assumed *arguendo* that they could), the court correctly determined that the government actions at issue did not effect a per se taking and that, under the *Penn Central* factors, no taking occurred.

a. The Executive has espoused claims against foreign sovereigns dating back "[a]t least" to 1799. *Dames & Moore*, 453 U.S. at 679 n.8; see *Shanghai Power Co.* v. *United States*, 4 Cl. Ct. 237, 246 (1983) ("[T]he President's power to espouse and settle claims of our nationals against foreign governments is of ancient origin and constitutes a well established aspect of international law."), aff 'd, 765 F.2d 159 (Fed. Cir.), cert. denied, 474 U.S. 909 (1985). Throughout those centuries, "the Supreme Court has never found an executive settlement of private claims to constitute a compensable taking." *American Int'l Grp., Inc.* v. *Islamic Republic of Iran*, 657 F.2d 430, 446 (D.C. Cir. 1981). The Federal Circuit, moreover, has repeatedly held that espousal of claims against foreign sovereigns does not constitute a compensable taking, and this Court has declined to review those decisions. See *Abrahim-Youri* v. *United States*, 139 F.3d 1462, 1465 (1997), cert. denied, 524 U.S. 951 (1998); *Belk* v. *United States*, 858 F.2d 706, 708 (1988); see also *Aviation & Gen. Ins. Co.* v. *United States*, 882 F.3d 1088, 1097 (Fed. Cir.), cert. denied, 139 S. Ct. 412 (2018). That "'established'" and "longstanding practice" strongly supports the conclusion that the government's actions here did not give rise to a taking. *Dames & Moore*, 453 U.S. at 679 (citation omitted).

… [T]he Federal Circuit recently reiterated [this view]… with respect to the restoration of Libyan sovereign immunity under the LCRA and claims settlement agreement at issue here. The court acknowledged that the plaintiffs' ability to maintain their lawsuits was significantly impaired, but explained that "the Government's action nonetheless was not a physical invasion of [their] property rights." *Aviation & Gen. Ins. Co.*, 882 F.3d at 1097. This Court denied review.

The … espousal of a plaintiff 's pending claims against a foreign sovereign as part of broader change in the legal and diplomatic landscape cannot reasonably be described as a "physical appropriation of property." 135 S. Ct. at 2427 (emphasis omitted); cf. *Landgraf*, 511 U.S. at 274 ("Application of a new jurisdictional rule usually 'takes away no substantive right.'") (citation omitted). To the extent that a claim against a foreign sovereign is a property interest at all, it is one "subject to constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights." *Abrahim-Youri*, 139 F.3d at 1468. By entering into an agreement with Libya to normalize relations and settle existing claims, "[t]he President, in the exercise of his constitutional prerogative, struck the bargain he determined would best accommodate all relevant interests. This is a classic[] adjustment of 'the benefits and burdens of economic life to promote the common good,'" *Shanghai Power Co.*, 4 Cl. Ct. at 246 (quoting *Penn Central*, 438 U.S. at 124), not a per se taking.

The absence of a per se taking is especially clear where, as here, the government does not eliminate a plaintiff 's claim entirely, but rather provides "an alternative forum * * * which is capable of providing meaningful relief." *Dames & Moore*, 453 U.S. at 687; accord *Sperry Corp.*, 493 U.S. at 59 & n.6. Just as the agreement in *Dames & Moore* allowed nationals holding settled claims to apply to an international tribunal to receive possible compensation, the agreement at issue here expressly provided for the creation of a fund for "fair compensation" of the claims administered by the State Department and the Foreign Claims Settlement Commission. Indeed, as a result of the government's actions here, petitioners received more than $10 million from that fund for claims that may never have been satisfied by Libya—hardly the equivalent of having their property physically appropriated by the government. *Id.* at 6a.

Petitioners contend that the Takings Clause was originally understood to require compensation in connection with appropriations arising out of foreign affairs and, more specifically, upon the espousal of a claim. But as explained above, neither this Court nor any court of appeals has ever adopted such a holding. See *American Int'l Grp.*, 657 F.2d at 446. The historical sources petitioners cite emphasize the "equitable principles embodied by the just compensation clause," an approach that foreshadows the *Penn Central* factors rather than per se takings analysis. And the primary opinion on which petitioners rely, *Gray* v. *United States*, 21 Ct. Cl. 340 (1886), is a nonbinding "advisory opinion to Congress" that does not establish any rule of constitutional law. *Abrahim-Youri*, 139 F.3d at 1467; see *Aris Gloves, Inc.* v. *United States*, 420 F.2d 1386, 1393 (Ct. Cl. 1970) (en banc) ("All that really needs to be said about the *Gray* case is that the opinion * * * was strictly an advisory opinion which was not binding upon either of the parties and cannot be binding upon subsequent courts. However, it is worth mentioning that, in referring to the 'French Spoliation' claims which were later granted by Congress following the *Gray* opinion, the Supreme Court remarked: 'We think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace and not of right.' ") (quoting *Blagge* v. *Balch*, 162 U.S. 439, 457 (1896)). Moreover, petitioners had the opportunity to "pursue [their] claim * * * in another forum," which "distinguishes this case from *Gray*," where "the United States canceled American claims against France altogether." *Sperry Corp.*, 493 U.S. at 59 n.6.

b. Petitioners do not contest the court of appeals' application of the *Penn Central* factors, and that question would not justify review in any event because the court's application of those factors was correct.

The court of appeals first properly concluded that the reinstatement of Libya's sovereign immunity and espousal of petitioners' claims did not interfere with their "distinct investment-backed expectations." As explained above, there is a long history of the Executive's espousal of U.S. nationals' claims. Moreover, the availability or unavailability of a legal defense, much less a jurisdictional bar to suit like sovereign immunity, is not the type of interest on which a person may reasonably rely. A legislature "remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982)… Nor could petitioners have reasonably expected that the status of Libya's sovereign immunity would remain stable. As this Court explained in *Beaty*, "[f]oreign sovereign immunity 'reflects current political realities and relationships,' and its availability (or lack thereof) generally is not something on which parties can rely 'in shaping their primary conduct.'" 556 U.S. at 864-865 (quoting *Altmann*, 541 U.S. at 696). That reasoning is particularly apt here, because petitioners' claims accrued when "Libya enjoyed sovereign immunity from suit in the United States," and petitioners understood that Congress could always restore the sovereign immunity that it had revoked.

The court of appeals also correctly determined that "the character of the governmental action" further demonstrates that no taking occurred. Indeed, petitioners "provided no evidence that this factor should weigh in their favor," and it is unclear what evidence could tip this factor in favor of petitioners given both the long history of claim espousal and the Executive's "overwhelming interest in conducting foreign affairs." *Ibid.*

Finally, with respect to the economic impact on petitioners, the court of appeals correctly concluded that petitioners' receipt of more than $10 million from the claims settlement fund likely represented "more than they would have without the Government's action." As the CFC explained, it was at best "speculative whether [petitioners] would have secured any recovery

from Libya absent the Government's espousal and settlement of their claims," given that the judgment was on appeal and that any effort at collection from Libya without governmental action would have been highly impractical. *Id.* at 39a…

3. In any event, this case would be a poor vehicle to consider whether the espousal of a plaintiff 's claims against a foreign sovereign can give rise to a taking. Ultimately, petitioners' principal complaint is they are "not satisfied with the settlement negotiated by the Government on their behalf," because it pays them only "pennies on the dollar" compared to their non-final district court judgment. That challenge to the particular distribution of the claims settlement fund in this case is highly factbound and unlikely to recur. It is also a nonjusticiable attempt to second guess the substance of the settlement agreement itself—namely the amount of money secured from Libya and the Executive's judgments about which claims merit compensation. As the Federal Circuit has explained, a "determination whether and upon what terms to settle the dispute with" a foreign country is "necessarily * * * for the President to make in his foreign relations role." *Belk*, 858 F.2d at 710. "A judicial inquiry into whether the President could have extracted a more favorable settlement would seriously interfere with the President's ability to conduct foreign relations" and would present a nonjusticiable political question. *Ibid.*

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Cross References

International Tribunals and Accountability Mechanisms, **Ch. 3.C.**
International Court of Justice, **Ch. 7.B.**
Expropriation Exception to Immunity: de Csepel v. Hungary, **Ch. 10.A.2.**
Investor-State dispute resolution, **Ch. 11.B.**
GE France v. Outokumpu Stainless USA, **Ch. 15.C.**
Cuba sanctions, **Ch. 16.A.4.**

CHAPTER 9

Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues

A. DIPLOMATIC RELATIONS, SUCCESSION, AND CONTINUITY ISSUES

1. Somalia

On October 2, 2019, the United States announced the opening of the U.S. Embassy in Mogadishu, Somalia. The United States reestablished a diplomatic presence in Somalia in 2018. See *Digest 2018* at 348. The reestablishment of U.S. Embassy Mogadishu was described in a press release, available on U.S. Embassy Mogadishu's website, at https://so.usembassy.gov/re-establishment-of-the-united-states-embassy-in-mogadishu/, as follows:

> The United States is proud to announce the reestablishment of the United States Embassy in Mogadishu. Since the closure on January 5, 1991, the United States has maintained its partnership with the Somali people, including the reestablishment of a permanent diplomatic presence in Mogadishu in December 2018 with the U.S. Mission to Somalia. The reestablishment of Embassy Mogadishu is another step forward in the resumption of regular U.S.-Somali relations, symbolizing the strengthening of U.S.-Somalia relations and advancement of stability, development, and peace for Somalia, and the region.
>
> Officiating the transition, Ambassador Donald Yamamoto said, "Today we reaffirm the relations between the American people and the Somali people, and our two nations. It is a significant and historic day that reflects Somalia's progress in recent years, and another step forward in regularizing U.S. diplomatic engagement in Mogadishu since recognizing the federal government of Somalia in 2013. U.S. Embassy Mogadishu will act to enhance cooperation, advance U.S. national strategic interests, and support our overall security, political, and economic development goals and objectives."

2. Venezuela

On January 23, 2019, the State Department issued a press statement by Secretary of State Michael R. Pompeo recognizing Juan Guaido as the interim president of Venezuela. The press statement, excerpted below, is available at https://www.state.gov/recognition-of-juan-guaido-as-venezuelas-interim-president/. For discussion of U.S. actions regarding

Venezuela at international organizations, see Chapter 7. For discussion of U.S. sanctions targeting the Maduro regime, see Chapter 16.

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[The United States] strongly supports [President Guaido's] courageous decision to assume that role pursuant to Article 233 of Venezuela's constitution and supported by the National Assembly…

The Venezuelan people have suffered long enough under Nicolas Maduro's disastrous dictatorship. We call on Maduro to step aside in favor of a legitimate leader reflecting the will of the Venezuelan people. The United States supports President Guaido as he establishes a transitional government, and leads Venezuela, as the country prepares for free and fair elections. We urge all Venezuelans to support peacefully this democratic process, as granted in the 1999 Constitution.

We will work closely with the legitimately elected National Assembly to facilitate the transition of Venezuela back to democracy and the rule of law, consistent with the Inter-American Democratic Charter. The United States also stands ready to provide humanitarian assistance to the people of Venezuela as conditions allow.

The Venezuelan people are clamoring for a free and democratic Venezuela. As we have said before, the United States, with the international community, including the Organization of American States, the Lima Group, and the European Union, support the Venezuelan people as they seek to restore their democracy. We repeat our call to the Venezuelan military and security forces to support democracy and protect all Venezuelan citizens.

The new Venezuelan government carries the flame of democracy on behalf of Venezuela. The United States pledges our continued support to President Guaido, the National Assembly, and the Venezuelan people.

* * * *

An additional press statement by Secretary Pompeo on January 23, 2019 explains the continuity of diplomatic relations with Venezuela through the government of interim President Guaido. That statement is available at https://www.state.gov/continuing-u-s-diplomatic-presence-in-venezuela/, and includes the following:

> We welcome interim President Guaido's directive to all diplomatic missions in Venezuela that Venezuela intends to maintain diplomatic relations with all countries. The United States maintains diplomatic relations with Venezuela and will conduct our relations with Venezuela through the government of interim President Guaido, who has invited our mission to remain in Venezuela. The United States does not recognize the Maduro regime as the government of Venezuela. Accordingly the United States does not consider former president Nicolas Maduro to have the legal authority to break diplomatic relations with the United States or to declare our diplomats persona non grata.

On January 25, 2019 Secretary Pompeo acted to protect Venezuelan assets in accounts in U.S. banks for the benefit of the people of Venezuela. See January 29, 2019 press statement, available at https://www.state.gov/protecting-venezuelas-assets-for-benefit-of-venezuelan-people/. As explained in the press statement, Secretary Pompeo

> certified the authority of Venezuela's interim President Juan Guaido to receive and control certain property in accounts of the Government of Venezuela or Central Bank of Venezuela held by the Federal Reserve Bank of New York or any other U.S. insured banks, in accordance with Section 25B of the Federal Reserve Act.

On January 25, 2019, the United States accepted interim President Guaido's designation of Carlos Alfredo Vecchio as the chargé d'affaires of the Government of Venezuela to the United States. See January 27, 2019 State Department press statement, available at https://www.state.gov/representative-of-the-government-of-venezuela-to-the-united-states/.

On February 4, 2019, the State Department welcomed the decision by several European countries to recognize Juan Guaido as Venezuela's interim president. See press statement by Secretary Pompeo, available at https://www.state.gov/recognition-of-juan-guaido-as-venezuelas-interim-president-by-several-european-countries/.

On March 11, 2019, the United States decided to withdraw all remaining U.S. personnel from the U.S. Embassy in Caracas. See press statement, available at https://www.state.gov/on-the-withdrawal-of-u-s-diplomatic-personnel-from-venezuela/. In a March 14, 2019 press statement, Secretary Pompeo confirmed that all U.S. diplomats remaining in Venezuela had departed the country. The March 14 statement, available at https://www.state.gov/temporary-departure-of-u-s-diplomatic-personnel-from-venezuela/, further explains that, "U.S. diplomats will now continue that mission from other locations where they will continue to help manage the flow of humanitarian assistance to the Venezuelan people and support the democratic actors bravely resisting tyranny." The United States had partially withdrawn its personnel in January 2019, when it withdrew dependents from the U.S. Embassy in Caracas and reduced embassy staff to a minimum. See January 25, 2019 remarks by Secretary Pompeo, available at https://www.state.gov/remarks-on-venezuela/ (relaying the appointment of Elliott Abrams as Special Representative for Venezuela as well as the ordered departure of some Embassy Caracas staff).

On April 5, 2019, the United States and Switzerland reached an arrangement under which the Swiss would act as protecting power for U.S. interests in Venezuela. See State Department media note, available at https://www.state.gov/signing-of-protecting-power-arrangement-for-the-united-states-in-venezuela/. The media note explains that:

> Until further notice that the arrangement is operative, the Swiss will not be able to provide services. Where possible, U.S. citizens in Venezuela who require emergency assistance should continue to visit the nearest U.S. embassy or consulate in another country.

On June 7, 2019, the State Department issued a media note recognizing the actions of Interim President Guaido extending the validity of Venezuelan passports. The media note, available at https://www.state.gov/the-united-states-supports-extension-of-validity-for-venezuelan-passports/, is excerpted below.

> Today, the National Assembly published a decree signed by Interim President Juan Guaido on May 21, to extend the validity of Venezuelan passports for an additional five years past their printed date of expiration. The United States recognizes this extension of passport validity for visa issuance and other consular purposes. Customs and Border Patrol will likewise recognize the passports covered by this decree.
>
> Venezuelan passport holders who have been issued a passport extension will have the validity period extended by five years from the expiration date in their passport and valid for admission to the United States, as long as the traveler is otherwise admissible. Venezuelans in the United States holding passports extended by the decree may use those passports, which will still be considered valid in accordance with the decree, for any appropriate consular purpose. Nothing in this action alters the requirements for obtaining a U.S. visa or for admission to the United States.

On September 17, 2019, the State Department issued a press statement on the suspension of talks, sponsored by Norway, between Venezuela's interim government and the former Maduro regime. The press statement is available at https://www.state.gov/suspension-of-talks-between-venezuelas-interim-government-and-the-former-maduro-regime/, and excerpted below. See Chapter 7 for discussion of the Rio Treaty, referenced in the excerpts.

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[The suspension] reflects the refusal of the regime to negotiate in good faith. Once again, the regime sees negotiations as a delaying tactic and has subverted good-faith efforts to find a peaceful political solution.

The former Maduro regime has sabotaged the negotiations hosted by Norway, refusing to engage seriously on a return to democracy in Venezuela. It has now announced a plan designed to sabotage the National Assembly, the last democratic institution left in Venezuela. Maduro and his cronies lured a small fringe group of politicians to engage in "so called talks" and misrepresented them as speaking for the democratic opposition. The United States continues to support Juan Guaido, the President of the National Assembly and the legitimate Interim President of Venezuela. Any serious negotiations must be between the former regime and Interim President Guaido. As we have said repeatedly, U.S. sanctions will not be lifted until Maduro is gone.

While Oslo negotiations were ongoing, the former regime illegally revoked the parliamentary immunities of over two dozen democratically elected members of the National

Assembly. The former regime has also continued to torture and murder opponents, including naval officer Acosta Arevalo.

The United States commends the interim government for engaging in a good-faith effort on behalf of the Venezuelan people and consistently showing up to the table with serious proposals despite the aggressive attacks against them. Their commitment to the people of Venezuela is clear. The United States continues to support interim President Juan Guaido, the National Assembly, and the Venezuelan people as they seek to restore democracy to their country.

To this end, the United States and our partners have invoked the TIAR/Rio Treaty, which facilitates further collective action to confront the threat posed by the former regime of Nicolas Maduro to the Venezuelan people and to the region. We look forward to coming together with regional partners to discuss the multilateral economic and political options we can employ to the threat to the security of the region that Maduro represents.

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3. Democratic Republic of the Congo

On January 23, 2019, the United States welcomed the certification by the Congolese Constitutional Court of Felix Tshisekedi as president of the Democratic Republic of the Congo ("DRC"). See January 23, 2019 press statement, available at https://www.state.gov/u-s-response-to-constitutional-court-decision-in-the-democratic-republic-of-the-congo/. The State Department's press statement includes the following:

> We are committed to working with the new DRC government. We encourage the government to include a broad representation of Congo's political stakeholders and to address reports of electoral irregularities.
>
> The United States salutes the people of the Democratic Republic of the Congo for their insistence on a peaceful and democratic transfer of power. We also recognize outgoing President Joseph Kabila's commitment to becoming the first President in DRC history to cede power peacefully through an electoral process.

The State Department issued statements earlier in January regarding challenges to the election results (see https://www.state.gov/united-states-calls-for-a-lawful-transparent-process-to-resolve-electoral-disputes-in-the-democratic-republic-of-the-congo/); noting the provisional results of the elections (see https://www.state.gov/the-provisional-election-results-in-the-democratic-republic-of-the-congo/); and calling for transparent and accurate tabulation of votes after the December 30, 2018 elections (see https://www.state.gov/united-states-calls-upon-the-democratic-republic-of-the-congos-electoral-commission-to-release-accurate-results/).

4. Sudan

On April 11, 2019, the State Department issued a press statement regarding the transition in the government of Sudan, with the exit of President Omar al Bashir. The statement follows and is available at https://www.state.gov/sudan-transition-underway/. See Chapter 17 for discussion of U.S. support for the peaceful transition to a civilian-led transitional government in Sudan.

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The United States is closely monitoring the situation unfolding in Khartoum. The recent demonstrations clearly articulated the will of the Sudanese people to end Omar al Bashir's rule. We commend the Sudanese people for maintaining peaceful demonstrations since December 2018. Sudan has the opportunity to set itself on a new path—one that must include legitimate democratic elections, respect for human rights, and a civilian-led government.

The United States strongly supports a peaceful and democratic Sudan. We call on the transitional government to follow the will of the people, work in an inclusive way with all representative parties, and commit to a speedy handover to civilian rule.

We condemn the abuse of force by security services that has resulted in the death of more than 20 civilians. We call on all armed parties to show restraint, avoid conflict, and remain committed to the protection of the Sudanese people.

The U.S. government in the coming days will discuss the situation with government officials and a range of Sudanese stakeholders to encourage a democratic transition. In the interim, we have suspended further Joint Review Committee discussions on Phase II, a process designed to expand bilateral ties with Sudan in six key areas: severing ties with North Korea, expanding counterterrorism cooperation, resolving internal conflicts, expanding humanitarian access, protecting human rights, and addressing outstanding legal claims related to victims of terrorism. These talks were scheduled for the last week of April.

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On April 18, 2019, the State Department issued a further press statement on the transition in Sudan, which is available at https://www.state.gov/supporting-a-transition-to-civilian-rule-in-sudan/, and excerpted below.

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* * * *

The United States supports a transition to a peaceful and democratic Sudan led by civilians who represent the diversity of Sudanese society. The will of the Sudanese people is clear: it is time to move toward a transitional government that is inclusive and respectful of human rights and the rule of law.

We are encouraged by the decision to release political prisoners and cancel the curfew in Khartoum. The United States, along with our international partners, continues to stress with the members of the Transitional Military Council and other armed groups the need to show restraint, avoid conflict, and remain committed to the protection of the Sudanese people.

Sudan's designation as a State Sponsor of Terrorism remains in effect, and Phase II discussions are suspended. We will continue to calibrate our policies based on our assessment of events on the ground and the actions of transitional authorities.

* * * *

On August 17, 2019, the United States issued a statement, available at https://eg.usembassy.gov/the-united-states-welcomes-sudans-adoption-of-the-constitutional-declaration/, welcoming the signing of the political agreement, which was witnessed by U.S. Special Envoy for Sudan Donald Booth, and Constitutional Declaration:

> The United States congratulates the people of Sudan on the August 17 signing of the Constitutional Declaration and political agreement between the Forces for Freedom and Change and the Transitional Military Council. We are encouraged by this first step in the establishment of a civilian-led transitional government. The United States commends the mediators from the African Union and the Government of Ethiopia for their efforts to broker this landmark agreement. Special Envoy for Sudan Donald Booth was honored to witness the signing and will continue to support the process of implementing the agreements.
>
> The Forces for Freedom and Change and the Transitional Military Council have taken an important step forward. We look forward to the swearing-in of the Sovereign Council on August 19 and the appointment of a prime minister on August 20. The United States will continue to support the people of Sudan in their pursuit of a government that protects the rights of all Sudanese citizens and leads to free and fair elections.

On August 21, 2019, the Troika issued a statement on Sudan, welcoming the appointment of a new prime minister. The August 21 Troika statement is excerpted below and available as a State Department media note at https://www.state.gov/troika-statement-on-the-appointment-of-dr-abdalla-hamdok-as-prime-minister-of-sudan/.

* * * *

The Troika countries (United Kingdom, United States and Norway) congratulate Dr. Abdalla Hamdok on his appointment as prime minister by the Sovereign Council and welcome the extensive professional experience he brings to the role. We welcome this step in creating a civilian-led government. As Prime Minister Hamdok begins the process of selecting ministers and identifying the government's priorities, we look forward to working with Sudan's new institutions.

At this historic moment, Sudan has a unique opportunity to establish peace within its borders, draft a constitution that enshrines human rights protections and empowers all Sudanese,

including women and youth, and create the infrastructure for free and fair elections. We encourage all sides to engage in good faith to deliver these goals, in particular urging the armed movements to engage constructively with the new Government to achieve peace.

We will continue to support Sudan's civilian-led transitional government as it conducts an investigation of the violence perpetrated against peaceful demonstrators and holds those responsible to account.

The appointment of a civilian-led government presents an opportunity to rebuild a stable economy and create a government that respects human rights and personal freedoms. Prime Minister Hamdok will have the Troika's support in achieving these objectives.

* * * *

On December 4, 2019, while Sudanese Prime Minister Hamdok was on his first visit to Washington, the State Department issued a press statement by Secretary Pompeo announcing that the United States and Sudan would be initiating the process of exchanging ambassadors for the first time in 23 years. The press statement is available at https://www.state.gov/the-united-states-to-elevate-diplomatic-representation-with-sudan/ and includes the following:

> This decision is a meaningful step forward in strengthening the U.S.-Sudan bilateral relationship, particularly as the civilian-led transitional government works to implement the vast reforms under the political agreement and constitutional declaration of August 17, 2019. We look forward to working with the Senate to confirm an ambassador to Sudan.
>
> Since his August 21 appointment, Prime Minister Hamdok has led Sudan's transitional government, installed a civilian cabinet, and made key personnel changes to break with the policies and practices of the previous regime. He has demonstrated a commitment to peace negotiations with armed opposition groups, established a commission of inquiry to investigate violence against protestors, and committed to holding democratic elections at the end of the 39-month transition period.

5. South Sudan

On November 25, 2019, the United States announced in a press statement that it had called back U.S. Ambassador to South Sudan Thomas Hushek for consultations after the parties failed to meet the November 12 deadline for forming the Revitalized Transitional Government of National Unity. The press statement, available at https://www.state.gov/u-s-ambassador-to-south-sudan-called-back-for-consultations/, further states that the ambassador would meet with "senior U.S. government officials as part of the re-evaluation of the U.S. relationship with the Government of South Sudan given the latest developments."

6. Libya

On June 25, 2019, the State Department published the certification, pursuant to Section 7041(F)(3) of the 2019 Department of State, Foreign Operations, and Related Programs

Act, that Libya's Government of National Accord is cooperating with U.S. efforts to "investigate and bring to justice those responsible for the attack on United States personnel and facilities in Benghazi, Libya in September 2012." 84 Fed. Reg. 29,925 (June 25, 2019).

On November 14, 2019, the U.S.-Libya Security Dialogue concluded a joint statement by the U.S. Government and the Libyan Government of National Accord. The joint statement is excerpted below and available at https://www.state.gov/joint-statement-on-u-s-libya-security-dialogue/.

> The Government of National Accord's delegation expressed grave concerns regarding the security situation and its effect on the civilian population.
>
> The United States calls on the "Libyan National Army" to end its offensive on Tripoli. This will facilitate further U.S.-Libya cooperation to prevent undue foreign interference, reinforce legitimate state authority, and address the issues underlying the conflict.
>
> The U.S. delegation, representing a number of U.S. government agencies, underscored support for Libya's sovereignty and territorial integrity in the face of Russia's attempts to exploit the conflict against the will of the Libyan people.

7. Cuba

On September 19, 2019, the State Department notified Cuba of the required departure of two diplomats from Cuba's mission to the UN. The Department announced the required departure in a media note, available at https://www.state.gov/required-departure-of-cuban-diplomats-from-cubas-permanent-mission-to-the-united-nations/, which includes the following:

> [T]he United States requires the imminent departure of two members of Cuba's Permanent Mission to the United Nations for abusing their privileges of residence. This is due to their attempts to conduct influence operations against the United States.
>
> In addition to the required departures, travel within the United States by all members of Cuba's Permanent Mission to the United Nations will now essentially be restricted to the island of Manhattan.

On November 22, 2019, the State Department issued a press statement condemning allegations made by the Cuban government against Chargé d'Affaires Mara Tekach. The statement is excerpted below and available in full at https://www.state.gov/cuban-government-allegations-of-political-interference-against-u-s-charge-daffaires/.

* * * *

The U.S. government strongly condemns the Castro regime's accusations against our Chargé d'Affaires at the U.S. Embassy in Havana, Mara Tekach. The regime has launched these baseless

allegations against her in an attempt to distract the international community from its abysmal treatment of the Cuban people, especially the ongoing arbitrary detention of dissident Jose Daniel Ferrer. Nevertheless, our Chargé d'Affaires and her team at the U.S. Embassy in Havana remain steadfast as they carry out the President's mission to defend human rights and advance the cause of democracy in Cuba.

A key part of this work is to call out the Castro regime's reprehensible human rights violations and abuses. The dedicated U.S. diplomats at Embassy Havana also meet with human rights defenders in Cuba, as U.S. diplomats do throughout the world.

Cuba's Ambassador in Washington enjoys freedom of expression here in the United States and uses it to publicly criticize our government. We only wish other Cuban citizens, including the over 100 other political prisoners currently incarcerated by the Cuban regime and the hundreds of other dissidents subject to official harassment, could enjoy that same right to freedom of expression and the ability to criticize their own government in Cuba, as they could if Cuba honored its international human rights commitments.

Instead, the Castro regime's first recourse is to dust off obsolete talking points from what should be a bygone era and describe any independent voices as mercenaries, subversives, and spies. The reality is that it is the repression of the Cuban people, the stifling of their dreams, and the denial of their dignity that discredit the communist regime and their revolution.

The United States has, and will continue to, openly and transparently express our grave concerns about the treatment and condition of human rights defenders in Cuba. The United States stands for the fundamental freedoms of expression, religion, association, and assembly—and we will stand by those in Cuba who desire the same.

* * * *

8. Bolivia

On November 13, 2019, the United States congratulated Bolivian Senator Jeanine Anez for assuming the role as Interim President of State during the transition in the government of Bolivia. The U.S. message, issued as a State Department press statement, and available at https://www.state.gov/congratulations-to-bolivian-senator-anez-for-assuming-the-role-of-interim-president/, recognizes the process by which Anez was selected as consistent with "the constitution of Bolivia and in accordance with the principles of the Inter-American Democratic Charter." The press statement further states:

> We look forward to working with the Organization of American States, Bolivia's civilian constitutional institutions, and the Bolivian people as they prepare to hold free, fair elections as soon as possible. We call on all parties to protect democracy during the coming weeks and to refrain from violent acts against fellow citizens and their property.

On November 21, 2019, the State Department issued an additional press statement regarding the transition in the government of Bolivia. The statement is excerpted below and available at https://www.state.gov/the-united-states-supports-the-transitional-government-in-bolivia-to-achieve-free-fair-and-inclusive-elections/.

* * * *

We recognize the importance of Bolivia's political transition to democracy in our hemisphere, and we admire the Bolivian people for standing up for their constitution, their democracy, and for free, fair, and transparent elections.

Those who participated in the egregious irregularities and manipulation of the vote in the flawed October 20 election must, for the good of Bolivia, step aside and let Bolivians rebuild their institutions. Bolivians of every political party deserve to have their voices heard in an electoral process that respects the rights of all citizens. That happens at the ballot box, not by violence.

We support robust press freedoms and peaceful assembly and protest. Violence, repression, and political intimidation have no place in a democracy. We call on all parties to refrain from such violence, to observe the rule of law, and to respect the rights of all citizens to participate in building Bolivia's future, whatever their views. Security services must respect the rights of peaceful protestors, and the Bolivian authorities must ensure accountability for any violations of the right of citizens.

We call on Bolivia's Plurinational Legislative Assembly to support efforts to seat a new Supreme Electoral Tribunal in order to pave the way for all Bolivians to participate as soon as possible in truly free and fair elections that reflect their will.

We call on legislators of all parties, on all Bolivians, and on international partners of goodwill to work together to support a transition in accordance with Bolivia's own constitutional standards and the principles of the Inter-American Democratic Charter.

We pledge our support to the Bolivian people and to the transitional government led by President Jeanine Anez as they prepare for these elections.

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B. STATUS ISSUES

1. Ukraine

On February 27, 2019, the State Department issued a statement by Secretary Pompeo entitled "Crimea is Ukraine." The statement follows and is available at https://www.state.gov/crimea-is-ukraine-2/.

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Five years ago, Russia's occupation of Ukraine's Crimean peninsula fueled an escalation of Russian aggression. Russia attempted to upend the international order, undermined basic human freedoms, and weakened our common security. The world has not forgotten the cynical lies Russia employed to justify its aggression and mask its attempted annexation of Ukrainian territory. Russia's use of force against a peaceful neighbor must not be tolerated by reputable

states. The United States reiterates its unwavering position: Crimea is Ukraine and must be returned to Ukraine's control.

The United States remains gravely concerned by the worsening repression by Russia's occupation regime in Crimea. During the past five years, Russian occupation authorities have engaged in an array of abuses in a campaign to eliminate all opposition to its control over Crimea. As part of this campaign, Russia has arbitrarily detained and wrongfully convicted individuals for peaceful opposition to the occupation, and in some cases has forcibly transferred these individuals from occupied Crimea to Russia. The United States calls on Russia to release all of the Ukrainians, including members of the Crimean Tatar community, it has imprisoned in retaliation for their peaceful dissent. This includes Oleh Sentsov, Oleksandr Kolchenko, Volodymyr Balukh, Ruslan Zeytullayev, and approximately 70 others. We call on Russia to cease all its abuses immediately, to end its occupation of Crimea, and, in the meantime, to comply with its obligations under international law, including the law of occupation.

In the Crimea Declaration of July 25, 2018, the United States reaffirmed its refusal to recognize the Kremlin's claims of sovereignty over Crimea. The United States also condemns Russia's illegal actions in Crimea and its continued aggression against Ukraine. The United States will maintain respective sanctions against Russia until the Russian government returns control of Crimea to Ukraine and fully implements the Minsk agreements. The United States reiterates its unbending support for Ukraine's sovereignty and territorial integrity, within its internationally recognized borders, including its territorial waters.

* * * *

On April 24, 2019, the State Department issued a press statement condemning Russia's decision to grant expedited citizenship to residents of Russia-controlled eastern Ukraine. The press statement, available at https://www.state.gov/russias-decision-to-grant-expedited-citizenship-to-residents-of-russia-controlled-eastern-ukraine/, includes the following:

> …Russia, through this highly provocative action, is intensifying its assault on Ukraine's sovereignty and territorial integrity.
>
> President Putin's decision creates a serious obstacle to the implementation of the Minsk agreements and the reintegration of the Donbas region. The Minsk agreements, signed by Russia, call for the full restoration of Ukrainian government control over eastern Ukraine.

On November 27, 2019, the United States issued a further statement of support for Ukrainian sovereignty and territorial integrity. The statement appears below and is available at https://www.state.gov/u-s-support-for-ukrainian-sovereignty-and-territorial-integrity/.

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* * * *

The United States reaffirms our unwavering support for Ukraine's sovereignty and territorial integrity in the lead up to the December 9 Normandy Format Summit among Ukraine, France, Germany, and Russia — the first since 2016.

The United States is committed to working with our Allies and partners to keep pressure on Russia to live up to its commitments under the Minsk agreements and to begin the process of peacefully restoring Ukraine's full sovereignty over the Donbas. This would be a first step in the full restoration of Ukraine's territorial integrity within its internationally recognized borders, including its territorial waters.

In recent weeks, Ukrainian President Zelenskyy has taken prudent but difficult steps towards peace and reform, which include: engaging diplomatically to advance the peace process; furthering disengagement along the line of contact; strengthening the rule of law; creating a healthier investment climate; and streamlining Ukraine's defense sector. The United States commends Ukraine for instituting reforms necessary for its long-term security and prosperity.

The United States stands with Ukraine as it moves forward with peace negotiations.

* * * *

2. Georgia

Section 7070(c)(1) of the Department of State, Foreign Operations, and Related Programs Appropriations Act of 2018 and section 7047(c)(1) of the Department of State, Foreign Operations, and Related Programs Appropriations Act of 2019 require the State Department to make a determination when another government recognizes or establishes diplomatic relations with the Georgian territories of Abkhazia and South Ossetia, in contravention of the U.S position that those territories are integral parts of Georgia's territory. The determination results in a restriction on U.S. assistance to that government, absent a waiver by the Secretary. On May 23, 2019, the State Department published its determination, "that the Government of Nicaragua has recognized the independence of, or has established diplomatic relations with, the Russian occupied Georgian territories of Abkhazia and Tskhinvali Region/South Ossetia. 84 Fed. Reg. 23,826 (May 23, 2019). See *Digest 2018* at 365 for discussion of prior determinations.

On July 3, 2019, the U.S. Mission in Geneva posted a note, available at https://geneva.usmission.gov/2019/07/03/u-s-participation-in-the-geneva-international-discussions-on-the-conflict-in-georgia-press-statement-by-the-u-s-delegation/, regarding U.S. participation in the Geneva International Discussions on the conflict in Georgia, held July 2-3, 2019. The post is excerpted below.

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At the forty-eighth round of the Geneva International Discussions (GID) on the conflict in Georgia, July 2-3, the United States took positive note of the continued operation of the Incident Prevention and Response Mechanism (IPRM) meetings in Ergneti and welcomed the continued efforts by the GID Co-Chairs and participants to re-convene regular meetings of the IPRM in Gali as soon as possible. The United States also expressed appreciation for the constructive

statements of participants affirming the continuing value of the GID and the IPRMs in addressing the ongoing security and humanitarian consequences of the 2008 war.

The United States recognized the Co-Chairs' continuing efforts to advance and deepen discussion of core GID issues. Noting in particular the usefulness of recent Information Sessions on the role of women in peace processes and on international security arrangements, the U.S. delegation expressed support for proposals to conduct additional Information Sessions at future GID rounds.

The U.S. delegation endorsed continuing information sharing among the de facto authorities in Abkhazia and the Russian and Georgian governments regarding the death of Georgian citizen Irakli Kvaratskhelia, whose death in March in Russian custody underscored the human cost of the ongoing conflict. The United States also reiterated calls for full and transparent investigations into the deaths of Georgian citizens Archil Tatunashvili and Giga Otkhozoria, and emphasized the need for the participants to investigate fully all cases of missing persons and to share the results of those investigations as soon as possible.

The United States appealed to the de facto authorities in Abkhazia to reopen immediately the Enguri Bridge and other crossing points along the administrative boundary line in light of the grave economic and humanitarian consequences imposed by such restrictions on freedom of movement.

The U.S. delegation expressed concern over the continuing failure to implement fully the terms of the 2008 ceasefire agreement, especially with regard to the withdrawal of Russian forces to pre-2008 positions and the establishment of international security arrangements. The United States encouraged the GID participants to refrain from coercive measures and noted particular concern over Russian directives imposing direct and indirect restrictions on the transit of people and goods between Russia and Georgia. The United States regrets that the participants from the Russian Federation and de facto authorities in Working Group II once again refused to engage in discussion of internally displaced persons and chose instead to walk out, thereby precluding discussion of the remainder of the agenda of Working Group II.

Together with Georgia, Russia, and representatives of the de facto Abkhaz and South Ossetian authorities, the United States participates in the Geneva International Discussions, which are co-chaired by the EU, UN, and OSCE.

The United States fully supports Georgia's sovereignty, independence, and territorial integrity within its internationally recognized borders.

* * * *

On August 30, 2019, the Department of State issued a press statement regarding reports of a military buildup in South Ossetia. The statement follows and is also available at https://www.state.gov/military-buildup-in-the-russian-occupied-georgian-region-of-south-ossetia/.

> The United States is monitoring reports of military buildup near the administrative boundary line (ABL) of the Russian-occupied Georgian region of South Ossetia. We call on all sides to avoid escalation and work through the European Monitoring Mission hotline and the Geneva International Discussion Co-Chairs to resolve the situation. Further, we call on the Russian Federation to utilize all available channels to prevent further escalation of the situation along

the ABL.

3. Macedonia

On January 12, 2019, the State Department issued a press statement by Secretary Pompeo, welcoming the decision by Macedonia's Parliament to adopt the constitutional amendments needed to ratify the Prespa Agreement with Greece. The Prespa Agreement relates to the dispute with Greece over the use of the name "Macedonia." See *Digest 2018* at 367. The press statement, available at https://www.state.gov/macedonia-implements-prespa-agreement/, includes the following:

> Macedonia's leaders demonstrated vision, courage, and persistence in their pursuit of a solution to the name dispute, which will allow Macedonia to take its rightful place in NATO and the EU as the Republic of North Macedonia. The United States sees this as a historic opportunity to advance stability, security, and prosperity throughout the region.

On January 25, 2019, the State Department issued a similarly-worded press statement welcoming the decision by Greece's Parliament to ratify the Prespa Agreement. The January 25 press statement is available at https://www.state.gov/greece-ratifies-prespa-agreement/.

4. Montenegro

On May 9, 2019, the State Department issued a press statement welcoming the conviction in Montenegro of two Russian intelligence officers for attempted terrorism. The press statement follows:

> Today's court ruling in Montenegro finding two Russian GRU officers guilty of attempted terrorism is a clear victory for the rule of law, laying bare Russia's brazen attempt to undermine the sovereignty of an independent European nation. Since the thwarted Russian-backed coup attempt on Montenegro's parliamentary election day in October 2016, Montenegro has taken important steps toward integrating with the Transatlantic family, most notably joining NATO in June 2017. The United States is proud to count Montenegro as an Ally and will continue to support Montenegro in its efforts to strengthen the rule of law, protect media freedom, and advance other reforms needed to join the European Union.

5. Israel

a. Jerusalem

In a January 8, 2019 memorandum, President Trump authorized the Secretary of State, "to take the steps necessary to close the United States Consulate General in Jerusalem and to merge its functions into the United States Embassy to Israel." 84 Fed. Reg. 3961

(Feb. 13, 2019). On March 3, 2019, in a press statement available at https://www.state.gov/merger-of-u-s-embassy-jerusalem-and-u-s-consulate-general-jerusalem/, the State Department announced that on March 4, 2019 the U.S. Consulate General Jerusalem would merge into U.S. Embassy Jerusalem. See *Digest 2018* at 368-69 regarding the announcement of the planned merger. The press statement includes the following:

> There will be complete continuity of U.S. diplomatic activity and consular services during and after the merger. We will continue to conduct all of the diplomatic and consular functions previously performed by U.S. Embassy Jerusalem. We will also engage in a wide range of reporting, outreach, and programming in the West Bank and Gaza Strip, as well as with Palestinians in Jerusalem, through a U.S. Embassy Palestinian Affairs Unit (PAU), which will operate from our historic Agron Road location in Jerusalem. …
>
> This decision was driven by our global efforts to increase the efficiency and effectiveness of our diplomatic engagements and operations. It does not signal a change of U.S. policy on Jerusalem, the West Bank, or the Gaza Strip. As the President has stated, the United States continues to take no position on final status issues, including boundaries or borders. The specific boundaries of Israeli sovereignty in Jerusalem are subject to final status negotiations between the parties. The Administration remains fully committed to efforts to achieve a lasting and comprehensive peace that offers a brighter future to Israel and the Palestinians.

On May 8, 2019, the State Department issued a press statement by Secretary Pompeo announcing his determination under the Jerusalem Embassy Act of 1995. The press statement is excerpted below and available at https://www.state.gov/determination-under-the-jerusalem-embassy-act/.

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On May 14, 2018, the U.S. Embassy in Jerusalem officially opened for business. Now, as we near the first anniversary of that momentous event, I am pleased to report that I have provided my determination to Congress that the relevant elements of the Jerusalem Embassy Act of 1995 have been addressed. Accordingly, no further Presidential waiver of the funding restriction under the Act is necessary.

The Jerusalem Embassy Act called on the Department of State to open in Jerusalem not just the offices of the U.S. diplomatic mission to Israel, but also a chief of mission residence for our Ambassador to Israel. In March 2019, in consultation with the Government of Israel, we established a chief of mission residence in Jerusalem. I have therefore determined that the U.S. Embassy in Jerusalem, including the chief of mission residence, is officially open, consistent with the Act.

Twenty-three years ago, Congress overwhelmingly voted in support of moving the U.S. embassy to Jerusalem. Successive administrations refused to move the embassy, and instead exercised Presidential waivers to avoid the Act's restrictions. On December 6, 2017, the President boldly decided to recognize Jerusalem as Israel's capital and instructed the Department

of State to relocate the U.S. embassy to Jerusalem. We proudly continue to implement that decision today.

* * * *

b. Golan Heights

President Trump issued Presidential Proclamation 9852, recognizing the Golan Heights as part of the State of Israel, on March 25, 2019. 84 Fed. Reg. 11,875 (March 28, 2019.) The proclamation states:

> The State of Israel took control of the Golan Heights in 1967 to safeguard its security from external threats. Today, aggressive acts by Iran and terrorist groups, including Hizballah, in southern Syria continue to make the Golan Heights a potential launching ground for attacks on Israel. Any possible future peace agreement in the region must account for Israel's need to protect itself from Syria and other regional threats. Based on these unique circumstances, it is therefore appropriate to recognize Israeli sovereignty over the Golan Heights.

Cross References

Taiwan MOU on Consular Notification and Access, **Ch. 2.A.2.**
Renegotiating Compacts of Free Association, **Ch. 5.E.**
ICJ Opinion on the British Indian Ocean Territory, **Ch. 7.B.2.**
ILC's work on Succession of States in Respect of State Responsibility, **Ch. 7.C.2.**
Maritime claims, **Ch. 12.A.2.**
Venezuela sanctions, **Ch. 16.A.5.**
Sanctions in response to Russia's actions in Ukraine, **Ch. 16.A.7.b.**
Middle East Peace Process, **Ch. 17.A.**
Sudan, **Ch. 17.B.4.**
South Sudan, **Ch. 17.B.5.**
Libya, **Ch. 17.B.6.**

CHAPTER 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1441, 1602–1611, governs civil actions against foreign states in U.S. courts. The FSIA's various statutory exceptions to a foreign state's immunity from the jurisdiction of U.S. courts, set forth at 28 U.S.C. §§ 1605(a)(1)–(6), 1605A, 1605B, and 1607, have been the subject of significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and in which it does not participate. The following section discusses a selection of the significant proceedings that occurred during 2019 in which the United States filed a statement of interest or participated as amicus curiae.

1. Commercial Activities Exception: *Argentine Republic v. Petersen*

The commercial activities exception in the FSIA provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
> ***
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. 1605(a)(2).

On May 21, 2019, the United States filed an amicus brief recommending the U.S. Supreme Court deny certiorari in *Argentine Republic v. Petersen Energia Inversora S.A.* No. 18-581, a case concerning the commercial activities exception. Both the district court and the court of appeals found that Argentina was not immune from suit because its acts (and those of YPF S.A., an Argentine petroleum company) of entering into and repudiating contractual obligations caused the complained-of harm. The Supreme Court denied certiorari on June 24, 2019. Excerpts follow from the U.S. brief.

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* * * *

This Court should deny the petitions for writs of certiorari. The court of appeals correctly ruled that the FSIA's commercial-activity exception applies to this case. Contrary to petitioners' assertions, the court's decision does not conflict with any decision of another court of appeals. To be sure, the scope of the commercial-activity exception is an important issue, but this case would not be a suitable vehicle for addressing the scope of that exception…

1. a. The court of appeals correctly ruled that the commercial-activity exception applies to this case.

The FSIA provides that a foreign state is not immune from suit in any case that is "based" "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2). The key terms for purposes of this case are "based upon" and "commercial." This Court has explained that "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 396 (2015) (citing *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993)). The inquiry "zeroe[s] in" on the "acts that actually injured" the plaintiff. *Ibid.*

This Court has also explained that a foreign state's act is "'commercial'" where the foreign state acts "in the manner of a private player within" a market—in other words, where "the particular actions that the foreign state performs" "are the *type* of actions by which a private party engages in 'trade and traffic or commerce.' " *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992) (citation omitted). Because the FSIA expressly provides that "the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,' " the inquiry turns on the "outward form of the conduct" rather than on "the *reason* why the foreign state engages in the activity." *Id.* at 614, 617 (quoting 28 U.S.C. 1603(d)). In addition, the Court has observed that the commercial-activity exception refers separately to actions that are "based upon a commercial activity * * * in the United States" and actions that are "based upon an act * * * *in connection with* a commercial activity * * * elsewhere." *Nelson*, 507 U.S. at 356-357 (quoting 28 U.S.C. 1605(a)(2)) (emphasis added; ellipsis omitted). The Court has concluded that the phrase "based upon an act *in connection with* commercial activity" extends further than the phrase "based upon a commercial activity." See *id.* at 357-358.

Under these principles, Petersen's claims are "based upon" Argentina's and YPF's alleged breaches of the contractual obligations set out in YPF's bylaws. The "gravamen" of Petersen's claims against Argentina is that Argentina violated its promise to Petersen (and other purchasers of YPF's shares) by repudiating its obligation to extend a tender offer for those shares. And the "gravamen" of Petersen's claims against YPF is that YPF violated its promise to Petersen (and other purchasers of YPF's shares) by failing to enforce the bylaws' provisions and penalties concerning such tender offers.

These alleged breaches are themselves "commercial" —and, *a fortiori*, are acts performed "in connection with a commercial activity." In making promises to induce investors to buy shares, and in later repudiating those promises, Argentina and YPF acted "in the manner of a private player" in a market, engaging in "the type of actions" in which private entities routinely engage. *Weltover*, 504 U.S. at 614 (emphasis omitted). The commercial character of the breach is also reflected in the fact that the bylaws' tender-offer requirement applied to *any* person who

acquired a sufficiently large stake in the company, not just to Argentina. … A private party's failure to comply with the tender-offer requirement would plainly be commercial. Such a failure does not become any less commercial merely because the alleged violator is instead a foreign state.

b. Petitioners' contrary arguments are incorrect.

Petitioners first contend … that this lawsuit falls outside the commercial-activity exception because their alleged violations of the bylaws were "inextricably intertwined with" the sovereign act of expropriating Repsol's shares—that they "directly followed from," were "the direct result of," and occurred "in connection with" the expropriation. Under this Court's cases, however, the " 'based upon' " inquiry "zeroe[s] in on" the "acts that actually injured" the plaintiff. *Sachs*, 136 S. Ct. at 396 (quoting *Nelson*, 507 U.S. at 358). For example, in *Nelson*, an American citizen claimed that Saudi Arabia recruited him to work overseas, but then imprisoned and tortured him. 507 U.S. at 352-354. This Court held that the ensuing lawsuit for unlawful detention and torture was "'based upon'" the alleged detention and torture, not upon the preceding acts of recruitment and employment, even though "these activities led to the conduct that eventually injured" the plaintiff. *Id.* at 358. Similarly, in *Sachs*, an American citizen bought a ticket in the United States for railway travel in Europe, and then suffered an accident while attempting to board a train in Austria. 136 S. Ct. at 393. This Court held that the ensuing personal-injury lawsuit was "'based upon'" the "episode in Austria," not upon the preceding sale of the ticket. *Id.* at 396. Similarly here, Petersen's breach-of-contract lawsuit is based upon the alleged violation of the tender-offer rules in YPF's bylaws. Argentina's sovereign act of expropriation led to that alleged violation, but that does not make the expropriation the basis of the lawsuit.

Petitioners also contend that a lawsuit for the violation of the tender-offer requirements amounts to a challenge to the expropriation itself, and that allowing this lawsuit to proceed would enable plaintiffs to "circumvent the requirements of the [separate] 'expropriation exception' to sovereign immunity" in 28 U.S.C. 1605(a)(3). … That contention is mistaken. Petersen's lawsuit does not contest the validity of the expropriation. The bylaws' tender-offer requirements apply to private parties as well as to Argentina, and they come into play when either a private party or Argentina becomes the owner of more than a specified percentage of YPF's shares "by any means or instrument." … For instance, if Argentina purchased a controlling stake of YPF on the open market, instead of expropriating the stake from Repsol, it would have been required to extend a tender offer for the remaining shares. … The way in which Argentina acquired the shares and the legality of that action are thus irrelevant to the contractual obligation and to Petersen's breach-of-contract claim. For this reason, this lawsuit is not based upon the expropriation, and it is not an indirect means of challenging the propriety of the expropriation.

Petitioners nonetheless insist that a lawsuit based upon the failure to extend a tender offer *does* amount to a challenge to the expropriation, because the Expropriation Law itself required Argentina to acquire "*exactly* 51% of the shares of YPF" and to vote those shares. …This argument is flawed in two respects. First, a breach of a commercial obligation does not cease to be commercial simply because a statute or regulation commands the breach. For example, in *Weltover*, this Court held that the commercial-activity exception covered a lawsuit against Argentina for failing to make timely payments on its bonds, even though Argentina ceased making the payments "[p]ursuant to a Presidential Decree." 504 U.S. at 610; see *id.* at 615-617. The Court emphasized that the bonds were "in almost all respects garden-variety debt

instruments: They [could] be held by private parties; they [were] negotiable and [could] be traded on the international market * * * ; and they promise[d] a future stream of cash income." *Id.* at 615. So too here, the commercial-activity exception covers Petersen's lawsuit against Argentina and YPF for failing to honor contractual promises, even though petitioners contend that they failed to honor those promises because of the Expropriation Law. Shares in YPF are garden-variety equity instruments, and petitioners' promises regarding those shares are garden-variety contractual commitments.

Second, the court of appeals in any event rejected petitioners' premise that the Expropriation Law required Argentina to acquire exactly 51% of the shares of YPF and prohibited it from extending a tender offer for further shares. The court "s[aw] no reason why Argentina could not have complied with both the bylaws' tender offer requirements and the YPF Expropriation Law." … And it determined that "no provision in the YPF Expropriation Law" "compelled Argentina to 'acquire *exactly* 51% ownership in YPF' and no greater ownership position." … Citing this Court's decision in *Animal Science Products, Inc.* v. *Hebei Welcome Pharmaceutical Co.*, 138 S. Ct. 1865 (2018), the court of appeals accorded "respectful consideration to Argentina's [contrary] views," but in the end the court was "not persuaded." …Argentina now contests … the court's interpretation of Argentine law, but a case-specific dispute regarding the meaning of Argentine law does not warrant this Court's review. Quite the opposite, such case-specific and fact-bound disputes make this case a poor vehicle for addressing the scope of the commercial-activity exception.

2. Contrary to petitioners' contentions…, the court of appeals' decision does not conflict with decisions of the D.C. Circuit. Petitioners' claim of a circuit conflict rests principally on *Rong* v. *Liaoning Province Government*, 452 F.3d 883 (D.C. Cir. 2006). In that case, a Chinese province expropriated the plaintiff s' ownership rights in a joint venture, put government officials in charge of the venture, and transferred shares in venture to a different company. *Id.* at 885-887. The plaintiffs sued the province in federal district court, claiming that the province had "wrongfully taken" and wrongfully exercised ownership rights. *Id.* at 889 (citation omitted). The D.C. Circuit held that the commercial-activity exception did not apply to the lawsuit, because it was "based" upon the sovereign act of expropriating the plaintiffs' property. *Id.* at 888; see *id.* at 888-890. The court added that the province's "subsequent acts"—such as putting government officials in charge of the venture and transferring shares in the venture—"did not transform the Province's expropriation into commercial activity." *Id.* at 890.

The court of appeals' decision in this case is consistent with the D.C. Circuit's decision in *Rong*. *Rong* was based upon an expropriation, because the plaintiffs there challenged the expropriation of their shares. In contrast, this case is not based upon an expropriation, because Petersen does not challenge the expropriation of its own or anyone else's shares. Rather, it challenges only the alleged failure to comply with contractual tender-offer requirements.

The decision in this case is also consistent with the D.C. Circuit's treatment in *Rong* of the acts that occurred after the expropriation. The plaintiffs there challenged the post-expropriation acts—such as replacing the joint venture's management and transferring the joint venture's shares—on the ground that the initial expropriation was itself unlawful. They did not contend that the acts were unlawful for any reason apart from the alleged unlawfulness of the expropriation itself. It was thus clear in *Rong* that the expropriation was the gravamen of the lawsuit. In this case, by contrast, Petersen does not challenge Argentina's failure to extend a tender-offer and YPF's failure to enforce the tender-offer requirement on the ground that Argentina's expropriation of Repsol's shares was unlawful. Quite the contrary, Petersen accepts

the validity of the expropriation, contesting only the failure to take further acts (such as extending a tender offer) in addition to that expropriation. So in this case, unlike in *Rong*, the expropriation is not the gravamen of the lawsuit.

Indeed, *Rong* and this case are mirror images of one another. In both cases, the governing legal principle is that the court must focus on the character of "the specific activity upon which the claim is based," not "general activity related to the claim." *Rong*, 452 F.3d at 891 (citation omitted). In *Rong*, the lawsuit fell outside the commercial-activity exception because it was based upon an expropriation, and that result did not change merely because the expropriation had a relationship with commercial activities. Here, the lawsuit falls within the commercial-activity exception because it is based upon a breach of a commercial contractual obligation, and that result does not change merely because the breach has a relationship with an expropriation.

The D.C. Circuit's decision in *de Csepel* v. *Republic of Hungary*, 714 F.3d 591 (2013), which the Second Circuit cited here, … confirms that the decision below does not conflict with the D.C. Circuit's decisions. In *de Csepel*, the D.C. Circuit held that the commercial-activity exception applied to Hungary's alleged breach of bailment agreements to care for artwork expropriated during the Holocaust. 714 F.3d at 599-600. The court reasoned that a "foreign state's repudiation of a contract is precisely the type of activity in which a 'private player within the market' engages." *Id.* at 599 (citation omitted). The court recognized that the initial expropriation was a sovereign act, *id.* at 600, but concluded that the suit was based upon the alleged breach of the bailment agreements rather than the preceding expropriation. The court explained that, by allegedly "entering into bailment agreements" "and later breaching those agreements by refusing to return the artwork," the foreign state "took affirmative acts beyond the initial expropriation." *Ibid.* Likewise here, the lawsuit is based upon distinct conduct—Argentina's failure to extend a tender offer and YPF's failure to enforce the tender-offer requirement—that goes beyond and is separate from the initial expropriation.

Petitioners separately contend … that the Ninth Circuit's 26-year-old decision in *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699 (1992), cert. denied, 507 U.S. 1017 (1993), conflicts with the D.C. Circuit's decision in *Rong*. As an initial matter, the claim that *Siderman* conflicts with *Rong* is not a basis for granting a writ of certiorari in *this* case, which does not conflict with *Rong*. In addition, petitioners overstate the conflict between *Siderman* and *Rong*. In *Siderman*, the Ninth Circuit applied the same legal test that the D.C. Circuit applied in *Rong* and that the Second Circuit applied here; the Ninth Circuit first identified the "activities that form[ed] the basis for the claims," and it asked whether those activities are "'of a kind in which a private party might engage.'" *Id.* at 708-709. Petitioners disagree … with the Ninth Circuit's application of that legal standard to the facts of that case, but disagreement with the application of a legal standard in another case is not a reason for granting review in this case.

3. Petitioners contend … that the scope of the commercial-activity exception involves important issues. This case, however, would be a poor vehicle for addressing the scope of the exception, because much of petitioners' argument rests on a disagreement with the court of appeals' interpretation of Argentine law and YPF's bylaws. Petitioners contend that the alleged breaches of the bylaws are "inextricably intertwined" with the expropriation because the Expropriation Law itself required Argentina to acquire "*exactly* 51% of the shares of YPF" and to vote those shares. … But as discussed above…, the court rejected that interpretation of Argentine law. Argentina maintains … that this Court "need not address any factual disputes as to the meaning of the Expropriation Law or YPF's bylaws," but it is hard to see how that can be so, when its assertions that the commercial activities are inextricably intertwined with the

expropriation rest on the premise … that "[m]aking a tender offer would have been incompatible with the Expropriation Law."

Petitioners contend that the decision below threatens to upset "exceptionally important and sensitive interests," … and to interfere with the United States' "foreign relations," on account of its effects on Argentina and "also countless other foreign states," …. The United States is sensitive to these concerns and agrees that the commercial-activity exception should not be applied in a manner that risks infringing on a foreign state's sovereignty or undermining the carefully calibrated scope of the FSIA's expropriation exception. But the decision below, which turns on the facts of this particular case and the character of Petersen's particular claims, is unlikely to lead to such results. In addition, the United States has a countervailing interest in ensuring that foreign states that enter U.S. markets as commercial actors do not enjoy immunity from lawsuits regarding violations of their commercial obligations. Here, Argentina conducted an initial public offering for YPF on the New York Stock Exchange, and it specifically advertised YPF's bylaws in order to attract investors. The FSIA provides for jurisdiction over Argentina and YPF to resolve this commercial dispute regarding alleged violations of those bylaws that caused a direct effect in the United States.

* * * *

2. Expropriation Exception to Immunity: *de Csepel v. Hungary*

The expropriation exception to immunity in the FSIA provides that a foreign state is not immune from any suit "in which rights in property taken in violation of international law are in issue" and a specified commercial-activity nexus to the United States is present. 28 U.S.C. § 1605(a)(3).

In *de Csepel v. Republic of Hungary*, No. 17-1165, the U.S. Supreme Court denied the petition for certiorari on January 7, 2019. The case concerns the scope of the expropriation exception to the FSIA in the context of an art collection taken during the Holocaust era. The district court held that Hungary was not immune and the court of appeals reversed. The United States amicus brief (filed December 4, 2018), asserting that the court of appeals was correct and that further review is not warranted, is excerpted below (with footnotes and record cites omitted).

* * * *

The United States deplores the acts of oppression committed against the Herzog family, and supports efforts to provide them with a measure of justice for the wrongs they suffered. Nevertheless, consistent with the United States' longstanding position, the court of appeals' decision is correct. The respondent museums and university that possess the artworks are not immune from suit under the FSIA's expropriation exception because of their book sales and other commercial activities in the United States. But those commercial activities of the state museums and university provide no basis for haling Hungary itself into court. The expropriation exception permits courts to exercise jurisdiction over a foreign state for expropriating property only when the property is in the United States in connection with the foreign state's *own*

commercial activities in the United States. The court of appeals' decision also does not conflict with any reasoned decision of any other court of appeals. Further review is unwarranted.

I. THE COURT OF APPEALS' DECISION IS CORRECT

The court of appeals correctly determined that, under the FSIA's expropriation exception, U.S. book sales or other commercial activities by Hungarian state museums and a university may provide a basis for exercising jurisdiction over those entities—but provide no basis for exercising jurisdiction over Hungary itself. A foreign state is a legal entity separate from its agencies or instrumentalities. A foreign state is subject to suit only if the expropriated property is present in the United States in connection with its own commercial activities in the United States. Here, the artworks remain in Hungary, so Hungary is immune from suit.

A. The resolution of the question presented depends on interpreting the "rather abstruse" text of Section 1605(a)(3). … It provides, in relevant part:

> (a) A foreign state shall not be immune from [suit] in any case—
>
> *****
>
> (3) in which [expropriated property is] in issue and that property * * * is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property * * * is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. 1605(a)(3). The exception thus contains two distinct nexus tests. The first (addressing the link to U.S. activities of "the foreign state") is much more demanding than the second (addressing the link to U.S. activities of "an agency or instrumentality"). *Ibid.* The first is satisfied only when the property is present in the United States in connection with commercial activities "carried on in the United States by the foreign state" itself. *Ibid.* The second can be satisfied even if the property is still abroad, and even if the property itself is not being used in the U.S. commercial activities of the agency or instrumentality. See, *e.g.*, *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 947-958 (D.C. Cir. 2008) (concluding the second clause's "commercial activity" requirement was satisfied by contracts for publication of materials unrelated to the allegedly expropriated property).

As this case comes to the Court, it is undisputed that the "foreign state" nexus has not been satisfied. The artworks are in Hungary, not the United States. It is also undisputed that the "agency or instrumentality" nexus has been satisfied as to respondent museums and university, on the basis that those entities possess the artworks and engage in U.S. commercial activities, including through selling books in the United States. *Id.* at 17a. The only question is whether the U.S. commercial activities of the museums and university also provide a basis for suing *Hungary itself* under the second nexus. That is, do the U.S. book sales by a state museum or university provide a basis for subjecting Hungary itself to the jurisdiction of U.S. courts? The court of appeals correctly determined that the answer is no.

B. 1. The statutory text and structure are properly read to support the court of appeals' interpretation. Section 1605(a), which sets forth the general exception to immunity, opens with introductory language indicating the entity that could lose its immunity from suit ("[a] foreign state shall not be immune from" suit"), 28 U.S.C. 1605(a), and the statutory definition of "foreign state" establishes that the entity can be either a foreign state or an agency or instrumentality, see 28 U.S.C. 1603(a). The introduction is then followed by separate paragraphs

setting forth each of those exceptions. Subsection (a)(3) addresses expropriation claims, which contains two distinct commercial-nexus requirements: a more demanding test depending on U.S. activities of "the foreign state," and a more forgiving test depending on U.S. activities of an "agency or instrumentality. 28 U.S.C. 1605(a)(3).

That text and structure as a whole is most naturally read as establishing two distinct tracks for obtaining jurisdiction, depending on the kind of entity whose immunity is at stake. If the entity is the foreign state itself, then the stricter "foreign state" nexus must be satisfied; if the entity is an agency or instrumentality, then the looser "agency or instrumentality" nexus must be satisfied. To put it another way, the statute is naturally read to require that the entity that loses its immunity (the "foreign state" in the introductory paragraph) must be the same entity whose commercial activities in the United States subject it to jurisdiction of a U.S. court. On that understanding, an entity's exposure to suit in U.S. courts depends on the connection between the expropriated property and *that entity's own* U.S. commercial activities. A plaintiff thus cannot mix and match, using the looser "agency or instrumentality" standard to bootstrap jurisdiction over the foreign state itself. …

2. The statutory context, history, and purpose powerfully support that interpretation. At the outset, it is natural to understand a U.S. court's jurisdiction over a foreign defendant to depend on that entity's contacts with the United States—and not the contacts of some other, separate entity. If a private foreign museum engaged in commercial activity in the United States, for example, then that activity would naturally be expected to provide a basis for suing that museum on related claims in a U.S. court. Cf. *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 881 (2011) (opinion of Kennedy, J.); *id.* at 887-888 (Breyer, J., concurring in the judgment). But that activity would not ordinarily provide a basis for suing a separate corporate parent (like a foundation that owns the museum) that did not itself engage in those activities itself. See *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("[J]urisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary"); *Holland Am. Line, Inc.* v. *Wärsilä N. Am., Inc.*, 485 F.3d 450, 459 (9th Cir. 2007) ("[A]s a general rule, where a parent and a subsidiary are separate and distinct corporate entities, the presence of one" in a forum "may not be attributed to the other."); *Escude Cruz* v. *Ortho Pharm. Corp.*, 619 F.2d 902, 905 (1st Cir. 1980) ("The mere fact that a subsidiary company does business within a state does not confer jurisdiction over its nonresident parent, even if the parent is sole owner of the subsidiary."); see also *Daimler AG* v. *Bauman*, 571 U.S. 117, 134-136 (2014) (rejecting argument that a court may exercise general jurisdiction over a corporate parent merely because an in-state subsidiary is engaged in business the parent would do by other means if the subsidiary did not exist).

The expectation that jurisdiction over a foreign entity depends on that entity's own contacts with the United States is particularly strong in the FSIA, a statute addressing the immunity of foreign sovereigns from suit in U.S. courts. As this Court has long recognized, "[d]ue respect for the actions taken by foreign sovereigns and for principles of comity between nations" support a background rule "that government instrumentalities established as juridical entities distinct and independent from their sovereign *should normally be treated as such*." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623, 626- 627 (1983) (*Bancec*) (emphasis added); see H.R. Rep. No. 1487, 94th Cong., 2d Sess. 29 (1976) (House Report) (noting the interest in "respect[ing] the separate juridical identities of different [foreign state] agencies or instrumentalities").

Accordingly, "as a default" under the FSIA, agencies and instrumentalities of a foreign state are "to be considered separate legal entities" from the foreign state itself, and veil piercing is limited to relatively unusual circumstances. *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018); see *id.* at 823 (discussing the *Bancec* test for overcoming the presumption and allowing veil piercing); see also *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 476 (2003); *Bancec*, 462 U.S. at 629-630. The "conduct of an agency or instrumentality" in turn "ordinarily may not be imputed to the foreign state" itself. See Restatement (Fourth) of the Foreign Relations Law of the United States § 452 cmt. g (2018).

When applying other FSIA exceptions to immunity from suit, the courts of appeals have consistently recognized that a foreign state "does not lose immunity merely because one of its agencies and instrumentalities satisfies an FSIA exception." For example, under the FSIA's commercial activity exception, 28 U.S.C. 1605(a)(2), the courts of appeals have applied the presumption to hold that "a foreign sovereign is not amenable to suit based upon the acts" of an instrumentality, unless the *Bancec* presumption is overcome. *Transamerica Leasing, Inc.* v. *La Republica de Venezuela*, 200 F.3d 843, 848 (D.C. Cir. 2000); accord *Hester Int'l Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 175-179 (5th Cir. 1989). Courts of appeals have likewise applied the presumption of separateness in addressing claims under other FSIA exceptions. See *First Inv. Corp. of Marshall Islands* v. *Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 756 (5th Cir. 2012) (applying *Bancec* factors to the FSIA's arbitration exception, 28 U.S.C. 1605(a)(6)); *Doe* v. *Holy See*, 557 F.3d 1066, 1078-1079 (9th Cir. 2009) (per curiam) (same under tortious act exception, 28 U.S.C. 1605(a)(5)), cert. denied, 561 U.S. 1024 (2010). The court of appeals' interpretation here is consistent with that approach…

Moreover, when Congress has departed from that background rule under the FSIA, it has done so expressly. In 28 U.S.C. 1610(g)(1), Congress expressly abrogates the background rule respecting the separateness of different entities, and facilitates veil piercing between the foreign state and its agencies or instrumentalities—but only for the limited purpose of enabling victims of state-sponsored terrorism to enforce certain money judgments. See *Rubin*, 138 S. Ct. at 823 (Section 1610(g) "abrogate[s] *Bancec* with respect to the liability of agencies and instrumentalities of a foreign state where a [terrorism] judgment holder seeks to satisfy a judgment held against the foreign state."). The expropriation exception to immunity from suit, by contrast, includes no language that is even remotely similar. That silence is properly understood to indicate that Congress did not intend to depart from the background rule, and thus did not intend for U.S. courts to assert jurisdiction over a foreign state based on U.S. activities of an agency or instrumentality.

3. The court of appeals' interpretation finds further support in the common-sense point that it is more delicate for a court to exercise jurisdiction over a foreign state than over an agency or instrumentality. This theme permeates the FSIA. For example, the FSIA generally makes the property of a foreign state, agency, or instrumentality immune from execution. See 28 U.S.C. 1609. But the exceptions to immunity from execution are broader for property of an agency or instrumentality. See 28 U.S.C. 1610(b). It is therefore more difficult to execute against the property of the foreign state itself. Similarly, the FSIA permits punitive damages only against agencies or instrumentalities, but not foreign states themselves (with limited exceptions). See 28 U.S.C. 1606. And it provides more permissive procedures for effecting service against an agency or instrumentality than against the foreign state itself. See 28 U.S.C. 1608.

The court of appeals' interpretation of the expropriation exception is consistent with that basic statutory structure, because it provides greater immunity for a foreign sovereign than for an

agency or instrumentality. Petitioners' interpretation, by contrast, would break from that framework: A foreign state and an agency or instrumentality would be equally subject to suit under the second exception. Indeed, so long as an agency or instrumentality is subject to suit, the foreign state would be automatically subject to suit as well. It is very unlikely that Congress adopted in the FSIA such a means for enabling U.S. courts to engage in the delicate task of exercising jurisdiction over a foreign state.

Even more oddly, under petitioners' interpretation, the "agency or instrumentality" nexus would apparently strip immunity from *every* agency or instrumentality whenever *one* such entity owns or operates expropriated property and engages in commercial activity in the United States: That agency or instrumentality would be a "foreign state" under the introductory language in Section 1605(a), and there would be no evident need for that to be the same entity whose contacts satisfy the commercial-nexus requirement. See 28 U.S.C. 1605(a)(3). Accordingly, so long as a plaintiff established jurisdiction over one agency or instrumentality, it could also sue the foreign state itself *and every other agency or instrumentality*, even if they do not "own or operate" the expropriated property or engage in any "commercial activity" in the United States. *Ibid.* Again, it is very unlikely that Congress intended for jurisdiction to be "dispensed in gross," *Gill* v. *Whitford*, 138 S. Ct. 1916, 1934 (2018) (citation omitted), particularly given the background rule respecting the separate juridical status of each agency or instrumentality.

4. The FSIA's provisions for execution immunity further support the court of appeals' interpretation. The FSIA comprehensively addresses both immunity from suit and immunity from execution. *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2255-2256 (2014). For execution, the FSIA provides (subject to certain international agreements) that the property in the United States of a foreign state, agency, or instrumentality is immune from execution, except as provided in 28 U.S.C. 1610 and 1611. See 28 U.S.C. 1609. In general, the FSIA's exceptions to execution immunity parallel its exceptions to jurisdictional immunity. See House Report 27 (noting that Section 1610 was drafted to make execution immunity "conform more closely with the provisions on jurisdictional immunity"). Like Section 1605 for jurisdictional immunity, Section 1610 includes exceptions to execution immunity for cases involving expropriation: a narrower exception for the property of a foreign state, agency, or instrumentality, and a broader exception for the property of an agency or instrumentality. See 28 U.S.C. 1610(a)(3) and (b).

Under the court of appeals' interpretation, Section 1610's execution provisions parallel Section 1605's jurisdictional immunity provisions. For the foreign state itself, there is a narrow exception for both immunity from suit and immunity from execution, which applies if the foreign state brings the expropriated property to the United States in connection with the state's own commercial activity here; the state could be sued and that property executed against when in the United States. 28 U.S.C. 1605(a)(3), 1610(a)(3). For an agency or instrumentality, the exceptions are somewhat broader but still parallel to each other: If an agency or instrumentality owns or operates the expropriated property and it engages in U.S. commercial activities, regardless of whether there is a further connection between the two, then the entity would be subject to suit and its U.S. property would be subject to execution. 28 U.S.C. 1605(a)(3), 1610(b).

Under petitioner's interpretation, however, the parallelism would break down: A plaintiff could hale a foreign state into court based on the U.S. commercial activities of one of its agencies or instrumentalities—but the U.S. commercial activities of the agency or instrumentality would provide no basis for executing against the property of the foreign state.

5. Finally, the historical treatment of expropriation claims before Congress enacted the FSIA supports the court of appeals' view. Before the FSIA, foreign states enjoyed immunity from suit arising out of the expropriation of property within their own territory, see, *e.g.*, *Isbrandtsen Tankers, Inc.* v. *President of India*, 446 F.2d 1198, 1200 (2d Cir.), cert. denied, 404 U.S. 895 (1971), with the possible exception of in rem cases in which U.S. courts took jurisdiction to determine rights to property in the United States. *E.g.*, *Stephen* v. *Zivnostenska Banka*, 15 A.D.2d 111, 119 (N.Y. App. Div. 1961), aff 'd, 186 N.E.2d 676 (1962) (per curiam). In contrast, the State Department had expressed the view that "agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoyed no privileges or immunities not appertaining to other foreign corporations, agencies, or individuals doing business here." *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 200 (S.D.N.Y. 1929). In creating for the first time an exception to the in personam immunity of a foreign state for cases involving expropriated property, Congress adopted an incremental approach granting jurisdiction over foreign states that paralleled those few cases in which title to property in the United States had been in issue, while permitting, as had previously been the case, a broader class of suits against agencies and instrumentalities. The court of appeals' interpretation is consistent with that incremental approach, whereas petitioners' interpretation would mark a dramatic shift from prior practice.

II. THIS COURT'S REVIEW IS NOT WARRANTED

1. As discussed above, the court of appeals correctly determined that a foreign state is not subject to the jurisdiction of U.S. courts under the FSIA's expropriation exception based solely on the U.S. commercial activities of one of its agencies or instrumentalities. That decision is also in accord with the only other court of appeals decision to discuss the question. See *Garb* v. *Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006) (concluding, albeit in dicta, that the first clause of the expropriation exception "sets a higher threshold of proof for suing foreign states in connection with alleged takings").

Petitioners correctly note that the Ninth Circuit has twice permitted the exercise of jurisdiction over a foreign state when only the second clause of the expropriation exception was satisfied. See *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019, 1022, 1028-1034 (2010) (en banc), cert. denied, 564 U.S. 1037 (2011); *Altmann* v. *Republic of Austria*, 317 F.3d 954, 968-969 (2002), aff 'd, 541 U.S. 677 (2004). But neither of those decisions analyzed or explained the basis for exercising jurisdiction over the foreign state itself; they instead examined jurisdiction only as to the agency or instrumentality defendants. See *Arch Trading Corp.* v. *Republic of Ecuador*, 839 F.3d 193, 206 (2d Cir. 2016) (noting that *Cassirer* provided no "independent analysis" of jurisdiction over the foreign state itself). In *Altmann*, for example, the Ninth Circuit concluded that the publication and marketing of books and an art exhibition in the United States by the Austrian Gallery (an agency or instrumentality of Austria) qualified as U.S. commercial activities, and in turn provided a basis for jurisdiction over the Gallery. 317 F.3d at 968-969. But the court did not address why the Gallery's books sales and other U.S. commercial activities rendered Austria itself subject to jurisdiction.

Thus, no reasoned decision of a court of appeals differs from the decision below. A panel of the Ninth Circuit apparently could conclude, after full consideration, that the view taken by the court of appeals in this case is correct—just as the court of appeals here determined that it was not bound by the earlier but unreasoned D.C. Circuit decision in *Chabad*. …

* * * *

3. Noncommercial Tort Exception to Immunity: *Merlini v. Canada*

The noncommercial-tort exception to immunity in the FSIA provides that a foreign state is not immune from any action "not otherwise encompassed" by the commercial-activity exception, in which "money damages are sought against a foreign state for personal injury … occurring in the United States and caused by the tortious act or omission of" that government's employee "while acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5).

In *Merlini v. Canada*, No. 17-2211, the United States filed an amicus brief in the Court of Appeals for the First Circuit on February 25, 2019, recommending the court of appeals reverse the district court's decision that the complaint was based on commercial activity and remand for further proceedings, or, in the alternative, affirm, if the court agrees that the gravamen of the action is Canada's choice of workers' compensation system. On June 10, 2019, the First Circuit reversed the district court, but on grounds other than those advanced in the U.S. brief. *Merlini v. Canada*, 926 F.3d 21 (1st Cir. 2019). On October 23, 2019, by a 3-3 decision, the First Circuit denied rehearing en banc.

4. Terrorism Exception to Immunity: *Sudan v. Opati*

The tort exception to immunity in the FSIA provides that a foreign state is not immune in actions "for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission" of a foreign state. 28 U.S.C. § 1605(a)(5). The FSIA's definitions section specifies that "[t]he 'United States' includes all territory and waters, continental or insular, subject to the jurisdiction of the United States." *Id.* § 1603(c).

The terrorism exception applies, *inter alia*, to cases in which money damages are sought for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act … engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. § 1605A(a)(1). The provision further specifies that "[t]he court shall hear a claim under this section if" certain additional requirements are met, *id.* § 1605A(a)(2), including that "the foreign state was designated as a state sponsor of terrorism at the time the act [at issue] occurred, or was so designated as a result of such act, and … either remains so designated when the claim is filed … or was so designated within the 6-month period before the claim is filed . . . ." *Id.* § 1605A(a)(2)(A)(i). The provision provides a private right of action for U.S. nationals, members of the armed forces, and employees and contractors of the U.S. government to seek damages for personal injury or death resulting from the acts described above. *Id.* § 1605A(c). While the FSIA generally precludes foreign states from liability for punitive damages, 28 U.S.C. § 1606, the terrorism exception specifically permits punitive damages for actions brought under 1605A(c).

On May 21, 2019, the United States filed a brief in the U.S. Supreme Court recommending that the Court grant certiorari on a question presented in *Opati v. Sudan*, No. 17-1268, a case involving the terrorism exception. In addition to the brief filed in *Opati v. Sudan*, the United States filed two related briefs on the same day. The United

States recommended that the Court deny certiorari on a cross-petition in *Sudan v. Opati*, 17-1406, and a related petition in *Sudan v. Owens*, 17-1236.[*]

Claims in *Opati v. Sudan* relate to the August 7, 1998 bombings by al-Qaeda at the U.S. Embassies in Kenya and Tanzania, for which Sudan was alleged to have provided material support. The U.S. District Court for the District of Columbia issued a default judgment against Sudan and awarded damages, including punitive damages. Sudan sought to vacate the judgment. The U.S. Court of Appeals for the District of Columbia affirmed the district court's judgment as to respondents' liability, but vacated the punitive damages awards on the ground that the terrorism exception does not authorize punitive damages for pre-enactment conduct. The Supreme Court granted certiorari on this question concerning the availability of punitive damages. On September 24, 2019, the United States filed a brief, excerpted below (with record citations and footnotes omitted), arguing that plaintiffs suing foreign state sponsors of terrorism under the terrorism exception may recover punitive damages for pre-enactment conduct.[**]

* * * *

The court of appeals correctly recognized that the two-step analysis set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), governs the question whether petitioners may obtain punitive damages under the federal cause of action in 28 U.S.C. 1605A(c) for conduct that predated the current version of the statute. The court erred, however, in concluding that the 2008 amendments lack a clear statement of congressional intent to make punitive damages available for pre-enactment conduct.

1. a. In Landgraf, this Court explained that "[w]hen a case implicates a federal statute enacted after the events in suit," a two-step inquiry generally applies. 511 U.S. at 280. "[A] court's first task is to determine whether Congress has expressly prescribed the statute's proper [temporal] reach." *Ibid*. If the statute reflects "clear congressional intent" that the new law should apply to pre-enactment conduct, the court should honor Congress's determination that "the benefits of retroactivity outweigh the potential for disruption or unfairness," and "there is no need to resort to judicial default rules." *Id*. at 268, 280.

If, however, the statute "does not evince any clear expression of intent" about its temporal application, the court must proceed to *Landgraf*'s second step. 511 U.S. at 264. There, the court should consider whether "the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted [or] increase a party's liability for past conduct." *Id*. at 280. If the statute would operate retroactively, the court should apply the "traditional presumption * * * that it does not govern" pre-enactment events, *id*. at 272, 280, "owing to the 'absen[ce of] a clear indication from Congress that it intended such a result,'" *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37-38 (2006) (quoting *INS v. St. Cyr*, 533 U.S. 289, 316 (2001)) (brackets in original). By contrast, if the rule would not have retroactive effect—for example, because it is a "new jurisdictional" or "procedural" rule that "'takes away no

[*] Editor's note: The Court denied certiorari on these petitions on May 26, 2020.

[**] Editor's note: On May 18, 2020, the Court held in an 8-0 decision that plaintiffs in a federal cause of action under the terrorism exception may seek punitive damages for pre-enactment conduct.

substantive right'" or "regulate[s] secondary rather than primary conduct"—then it generally will apply in suits based on pre-enactment conduct. *Landgraf*, 511 U.S. at 274-275 (citation omitted).

Applying that framework, *Landgraf* held that the Civil Rights Act of 1991, 42 U.S.C. 1981a(a), did not authorize courts to award compensatory and punitive damages to a plaintiff for sexual harassment that pre-dated the Act, where "no relief" would have been available before the Act's enactment. 511 U.S. at 283; see id.at 280-285. The Court first determined that a provision directing that the Act "'shall take effect upon enactment,'" combined with "negative inferences drawn from two [different] provisions of quite limited effect," were insufficient to show that Congress intended the new law to apply to an employer's pre-enactment conduct. *Id.* at 257-259 (citation omitted). Next, the Court concluded that awarding damages under the new law would "impose on employers found liable a new disability in respect to past events." *Id.* at 283 (citation and internal quotation marks omitted). The Court accordingly applied the presumption against retroactivity, holding that the new damages provision did not apply to pre-enactment conduct. *Id.* at 280-285.

In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), this Court considered whether Landgraf applied to an action under the FSIA. *Altmann* was decided before Congress enacted the federal cause of action in Section 1605A(c); at the time, the FSIA did "not create or modify any causes of action." *Id.* at 695 n.15. Instead, the FSIA "'codifie[d], as a matter of federal law, the restrictive theory of sovereign immunity'" that the State Department had previously adopted in the "'Tate Letter,'" and "transfer[red] primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Id.* at 690-691 (quoting *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-488 (1983)).

This Court held that *Landgraf*'s "default rule" did not "control" the question whether the FSIA applied to conduct that predated both the Tate Letter in 1952 and the FSIA's enactment in 1976. *Altmann*, 541 U.S. at 692. The Court explained that the FSIA " defie[d] * * * categorization" as either "affect[ing] substantive rights" or "address[ing] only matters of procedure." *Id.* at 694. Although the plaintiff in *Langdraf* would not have been entitled to any relief prior to enactment of the Civil Rights Act of 1991, the Court acknowledged that "in some cases," prior law would have permitted the recovery of backpay. 511 U.S. at 283. As to those cases, the Court stated that the creation of new damages remedies also would have retroactive effect. *Ibid.* While the statute "merely open[ed] United States courts to plaintiffs with pre-existing claims against foreign states," rather than creating its own cause of action, it also codified "'the standards governing foreign sovereign immunity as an aspect of substantive federal law.'" *Id.* at 695 (quoting *Verlinden*, 461 U.S. at 497). The Court further found that the nature of foreign sovereign immunity was not amenable to the *Landgraf* test. While the "aim" of the presumption against retroactivity "is to avoid unnecessary post hoc changes to legal rules on which parties relied in shaping their primary conduct," "the principal purpose of foreign sovereign immunity has never been to permit foreign states * * * to shape their conduct in reliance on the promise of future immunity from suit in United States courts." *Id.* at 696. Instead, foreign sovereign immunity is "'a gesture of comity'" that "reflects current political realities and relationships." *Ibid.* (citation omitted).

"In this *sui generis* context," the Court declined to apply *Landgraf*, instead asking whether "anything in the FSIA or the circumstances surrounding its enactment suggests" that it "should not apply" to a foreign sovereign's pre-enactment conduct. *Altmann*, 541 U.S.at 696-697. The Court answered that question in the negative. *Id.* at 697-699. The Court explained that the statute's statement that "[c]laims of foreign states to immunity should henceforth be decided"

under the FSIA, 28 U.S.C. 1602, along with the statute's "structure" and "purposes," sufficed to demonstrate that Congress "intended courts to resolve all such claims" under the FSIA, "regardless of when the underlying conduct occurred." *Altmann*, 541 U.S. at 698.

b. The court of appeals correctly determined that *Landgraf*, rather than *Altmann*, applies to the federal cause of action in Section 1605A(c). Pet. App. 123a-126a. As this Court has recognized, the creation of a new cause of action is the paradigmatic circumstance implicating the *Landgraf* framework. See, *e.g.*, *Landgraf*, 511 U.S. at 283 (observing that where a statute "can be seen as creating a new cause of action, * * * its impact on parties' rights is especially pronounced"); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997) (concluding that the *Landgraf* analysis applied to a provision that "change[d] the substance of the existing cause of action"). Indeed, *Altmann* itself explained that where a statute "create[s] or modif[ies] a cause of action," it is properly analyzed under *Landgraf*. 541 U.S. at 695 n.15. Because, at the time of *Altmann*, the FSIA did not create or modify any cause of action, it is not determinative that the Court there declined to address *Landgraf*'s applicability to the FSIA on a provision-by-provision basis. See Pet. Br. 36-37.

2. Although the court of appeals correctly held that *Landgraf* applies to the federal cause of action, it erred in concluding that Section 1605A(c) does not clearly authorize punitive damages for pre-enactment conduct. See Pet. App. 125a-128a.

a. As the court of appeals recognized, and respondents have not disputed, the 2008 amendments clearly permit plaintiffs to invoke the express federal cause of action and recover "economic damages, solatium, [and] pain and suffering * * * damages," 28 U.S.C. 1605A(c), for conduct predating the 2008 NDAA. Pet. App. 122a. That is because the amendments direct that certain then-pending " prior actions" under 28 U.S.C. 1605(a)(7)(2006) "shall * * * be given effect as if [they] had originally been filed under section 1605A(c)." NDAA § 1083(c)(2), 122 Stat. 342-343 (capitalization altered). And they allow plaintiffs to file new actions directly "under section 1605A" if those actions are "related" to actions that were "timely commenced" under 28 U.S.C.1605(a)(7) (2006). NDAA § 1083(c)(3), 122 Stat. 343 (capitalization altered). As the court of appeals acknowledged, the actions permitted by the prior- and related-action provisions "necessarily are based upon the sovereign defendant's conduct before enactment of § 1605A." Pet. App. 122a. Those same statutory provisions demonstrate that punitive damages are available under Section 1605A(c) for pre-enactment conduct. Neither Section 1605A(c), nor the prior- and related-action provisions, distinguish among different types of relief. Instead, the prior- and related-action provisions channel certain claims based on prior events through Section 1605A(c) as a whole. Section 1605A(c), in turn, states that "[i]n any such action"—*i.e.*, in any action governed by subsection (c)—"damages may include economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. 1605A(c). If there were any doubt, the 2008 amendments further provide that, "in general," "[t]he amendments made by this section" as a whole "shall apply to any claim arising under section 1605A of title 28." NDAA § 1083(c)(1), 122 Stat. 342 (capitalization altered). Thus, once one accepts that the federal cause of action applies to pre-enactment conduct, and that it makes economic, solatium, and pain and suffering damages available for such conduct, there is no textual basis for reaching a different conclusion with respect to punitive damages.

Indeed, the FSIA's provisions governing prior- and related cases resemble a provision in an earlier civil rights bill that Landgraf reasoned would have "unambiguous[ly]" applied to pre-enactment conduct. 511 U.S. at 263. That provision stated that the new damages provision in the bill "shall apply to all proceedings pending on or commenced after" enactment, *id.* at 255 n.8

(quoting S. 2104, 101st Cong., 2d Sess. § 15(a)(4) (1990)), without singling out pending proceedings seeking punitive damages. Here, Congress similarly provided that "[t]he [2008] amendments * * * shall apply to any claim arising under section 1605A"; authorized plaintiffs with qualifying claims "before the courts in any form" to request that "that action, and any judgment in the action * * * , be given effect as if the action had originally been filed under section 1605A(c)"; and authorized plaintiffs to file "under section 1605A" new actions "[r]elated" to existing actions under the prior terrorism exception. NDAA § 1083(c)(1)-(3), 122 Stat. 342-343.

b. The history of the 2008 amendments confirms that Congress and the Executive understood that Section 1605A would authorize punitive damages for pre-enactment conduct. After the fall of Saddam Hussein's regime in Iraq, President George W. Bush vetoed an earlier version of the 2008 amendments that contained language materially identical to the text of Section 1605A. See H.R. 1585, 110th Cong., 1st Sess. § 1083(a) (2007). Iraq was designated as a state sponsor of terrorism until 2004, 69 Fed. Reg. 58,793 (Sept. 24, 2004), and the proposed legislation would have allowed plaintiffs to recover punitive damages from Iraq for conduct of the former regime. See H.R. 1585 § 1083(a)(1) (requiring courts to hear claims under proposed Section 1605A if the foreign state was designated as a state sponsor of terrorism when "the original action or the related action" was filed); 28 U.S.C. 1605A(a)(2)(A)(i)(II)(same). In vetoing the legislation, the President expressed concern that "creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed" would undermine U.S. foreign policy and burden efforts to rebuild Iraq. Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008," 43 Weekly Comp. Pres. Doc. 1641 (Dec. 28, 2007). As ultimately enacted, the 2008 NDAA authorized the President to waive the amendments' application to Iraq, NDAA § 1083(d)(1), 122 Stat. 343, and the President did so, 73 Fed. Reg. 6571 (Feb. 5, 2008); see *Republic of Iraq v. Beaty*, 556 U.S. 848, 853-854 (2009). The author of the terrorism-exception amendment believed that this compromise would address the President's concerns regarding Iraq while preserving other plaintiffs' ability to recover for prior acts of terrorism. See 154 Cong. Rec. at 501 (Sen. Lautenberg) ("By insisting on being given the power to waive application of this new law to Iraq, the President seeks to prevent victims of past Iraqi terrorism—for acts committed by Saddam Hussein—from achieving the same justice as victims of other countries. Fortunately, the President will not have authority to waive the provision's application to terrorist acts committed by Iran and Libya, among others.").

c. Historical context also indicates that Congress intended to make punitive damages available for conduct predating the 2008 NDAA. The prior Section 1605(a)(7) applied to conduct predating its enactment in April 1996, see AEDPA § 221(c), 110 Stat. 1243, and the broader statutory framework prior to the 2008 amendments makes clear that Congress was aware that courts had awarded punitive damages against foreign states for pre-enactment conduct under that provision. In 2000, Congress directed the Secretary of Treasury to pay to certain plaintiffs with judgments under the terrorism exception 110% of their compensatory damages awards, if they relinquished their rights to punitive damages (or 100% of their compensatory damages awards, if they agreed not to seek to attach certain foreign state assets). Aimee's Law, Pub. L. No. 106-386, Div. C, § 2002(a)(1)-(2), 114 Stat. 1541-1542. At least three of the covered judgments included punitive damages awards against foreign states as such for conduct committed before Section 1605(a)(7)'s enactment in 1996—apparently under the Flatow Amendment, see p. 23 n.5, *infra*—even though Section 1606 barred punitive damages against foreign states at the time. See

Jenco v. Islamic Republic of Iran, 154 F. Supp. 2d 27, 40 (D.D.C. 2001); *Eisenfeld v. The Islamic Republic of Iran*, 172 F. Supp. 2d 1, 9 (D.D.C. 2000); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 27 (D.D.C. 1998).

3. The court of appeals' contrary decision, and respondents' defense of it, are unconvincing.

a. Respondents first contend (Br. in Opp. 24-25; Supp. Br. 4) that Section 1605A(c) does not authorize punitive damages for pre-enactment conduct because it uses "plainly equivocal language—'damages may include … punitive damages.'" Supp. Br. 4 (quoting 28 U.S.C. 1605A(c)). But the word "may" simply confirms that a court has discretion in determining damages awards. …

b. Like the court of appeals, see Pet. App. 128a, respondents would require a clearer statement that punitive damages are available for pre-enactment conduct than for other forms of relief. But respondents offer no sound basis for adopting an extra-clear-statement rule.

i. *Landgraf* does not impose a higher bar for giving punitive damages retroactive effect. As discussed above, there, this Court considered whether a provision permitting plaintiffs to recover "compensatory and punitive damages" should apply to cases involving pre-enactment conduct. 511 U.S. at 249. Although the Court acknowledged particular concerns associated with punitive damages, *id*. at 281, it did not establish a higher standard for evaluating Congress's intent with respect to their retroactive application. Instead, the Court considered whether the statute at issue "explicitly authorized punitive damages" for pre-enactment conduct, *ibid*., just as it determined that the compensatory damages remedy would "not apply" to such conduct "in the absence of clear congressional intent," *id*. at 283. The Court concluded that it "found no clear evidence of congressional intent that [the section]" as a whole "should apply to cases arising before its enactment." *Id*. at 286. The cases that respondents have cited (Br. in Opp. 22) to suggest that Section 1605A(c) lacks the requisite clear statement confirm that no heightened standard applies to punitive damages. In *Ditullio v. Boehm*, 662 F.3d 1091 (2011), the Ninth Circuit considered whether the cause of action in the Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, Div. A, 114 Stat. 1466 (22 U.S.C. 7101 et seq.); see 18 U.S.C. 1595 (2012 & Supp. V 2017), which the court held provided for both compensatory and punitive damages, applied to pre-enactment conduct. 662 F.3d at 1096-1098. In considering retroactivity, the court found no clear statement with respect to the cause of action as a whole; it did not separately assess the authorization of punitive damages, or hold it to a higher standard. *Id.* at 1098-1102. The same was true in *Gross v. Weber*, 186 F.3d 1089, 1091-1092 (8th Cir. 1999), where the court held that neither the Violence Against Women Act of 2000 (VAWA), Pub. L. No. 106-386, Div. B, 114 Stat. 1491, nor Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (20 U.S.C. 1681), applied to pre-enactment conduct. …

ii. Contrary to respondents' suggestion (Supp. Br. 5), the state of the law before 2008 also did not require Congress to specifically "discuss the damages available for § 1605A(c) claims" in the prior- and related-action provisions. As respondents observe (*ibid*.), before the 2008 NDAA, Section 1606 prohibited United States courts from awarding punitive damages against foreign states, though they could award other forms of damages under state and foreign causes of action. But Congress clearly intended to change that default rule when it created a federal cause of action for which "damages may include economic damages, solatium, pain and suffering, and punitive damages," 28 U.S.C. 1605A(c), as well as highly reticulated prior- and related-action provisions that permitted plaintiffs to rely on Section 1605A(c) with respect to certain pre-enactment conduct.

c. Finally, respondents contend (Supp. Br. 6) that the prior- and related-action provisions "focus" not on making punitive damages available for pre-enactment conduct, but instead on overturning the D.C. Circuit's holding in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (2004), that the FSIA included no federal cause of against foreign state sponsors of terrorism. But Congress's solicitude for plaintiffs disadvantaged by *Cicippio-Puleo* does not show that it intended to limit the remedies available to such plaintiffs. Had Congress intended only to reverse Cicippio-Puleo, it could have made a federal cause of action available against designated state sponsors of terrorism without providing for punitive damages. Instead, Congress created a federal cause of action that expressly authorizes the award of punitive damages; made Section 1606's prohibition on the award of such damages against foreign states inapplicable to both the cause of action and the terrorism exception to immunity more generally, see pp. 28-30, *infra*; directed courts to treat certain already-decided claims "as if [they] had originally been filed under section 1605A(c)"; permitted plaintiffs to file new, "[r]elated" claims "under section 1605A"; and stated that "[t]he amendments made by this section" as a whole "shall apply to any claim arising under section 1605A." NDAA § 1083(c)(1)-(3), 122 Stat. 342-343. The plain text of those provisions makes clear that Congress intended for punitive damages to be available to plaintiffs injured by pre-enactment conduct.

* * * *

5. Service of Process: *Sudan v. Harrison*

As discussed in *Digest 2015* at 386-89, *Digest 2016* at 420, *Digest 2017* at 419-20, and *Digest 2018* at 391-98, the United States consistently argued, from the district court to the Supreme Court, that service on a foreign sovereign through delivery of a summons and complaint to the foreign minister, via its embassy in the United States, does not fulfill the requirements of the FSIA. *Sudan v. Harrison*, No. 16-1094. The Supreme Court issued its decision on March 26, 2019, holding that section 1608(a)(3) of the FSIA requires civil service of process by mail to the foreign minister to be completed by mail directly to the foreign minister's office in the foreign state. *Republic of Sudan v. Harrison*, 139 S. Ct. 1048 (2019). Excerpts follow from the Court's opinion.

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* * * *

The question before us concerns the meaning of §1608(a)(3), and in interpreting that provision, "[w]e begin 'where all such inquiries must begin: with the language of the statute itself.' " *Caraco Pharmaceutical Laboratories, Ltd.* v. *Novo Nordisk A/S*, 566 U. S. 399, 412 (2012) (quoting *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989)). As noted, §1608(a)(3) requires that service be sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The most natural reading of this language is that service must be mailed directly to the foreign minister's office in the foreign state. Although this is not, we grant, the only plausible reading of the statutory text, it is the most natural one. See, *e.g., United States* v. *Hohri*, 482 U. S. 64, 69–71 (1987) (choosing the "more natural" reading of a statute); *ICC* v.

Texas, 479 U. S. 450, 456–457 (1987) (same); see also *Florida Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U. S. 33, 41 (2008) (similar).

A key term in §1608(a)(3) is the past participle "addressed." A letter or package is "addressed" to an intended recipient when his or her name and "address" is placed on the outside of the item to be sent. And the noun "address," in the sense relevant here, means "the designation of a place (as a residence or place of business) where a person or organization may be found or communicated with." Webster's Third New International Dictionary 25 (1971) …

We acknowledge that there are circumstances in which a mailing may be "addressed" to the intended recipient at a place other than the individual's residence or usual place of business. … But in the great majority of cases, addressing a mailing to X means placing on the outside of the mailing both X's name and the address of X's residence or customary place of work.

Section 1608(a)(3)'s use of the term "dispatched" points in the same direction. To "dispatch" a communication means "to send [it] off or away (as to a special destination) with promptness or speed often as a matter of official business." Webster's Third 653… . A person who wishes to "dispatch" a letter to X will generally send it directly to X at a place where X is customarily found. The sender will not "dispatch" the letter in a roundabout way, such as by directing it to a third party who, it is hoped, will then send it on to the intended recipient.

A few examples illustrate this point. Suppose that a person is instructed to "address" a letter to the Attorney General of the United States and "dispatch" the letter (*i.e.*, to "send [it] off post-haste") to the Attorney General. The person giving these instructions would likely be disappointed and probably annoyed to learn that the letter had been sent to, let us say, the office of the United States Attorney for the District of Idaho. And this would be so even though a U.S. Attorney's office is part of the Department headed by the Attorney General and even though such an office would very probably forward the letter to the Attorney General's office in Washington. …

A similar understanding underlies the venerable "mail-box rule." As first-year law students learn in their course on contracts, there is a presumption that a mailed acceptance of an offer is deemed operative when "dispatched" if it is "properly addressed." Restatement (Second) of Contracts § 66, p. 161 (1979) (Restatement); *Rosenthal* v. *Walker*, 111 U. S. 185, 193 (1884). But no acceptance would be deemed properly addressed and dispatched if it lacked, and thus was not sent to, the offeror's address (or an address that the offeror held out as the place for receipt of an acceptance). See Restatement § 66, Comment *b*.

It is also significant that service under §1608(a)(3) requires a signed returned receipt, a standard method for ensuring delivery to the addressee. Cf. Black's Law Dictionary 1096 (10th ed. 2014) (defining "certified mail" as "[m]ail for which the sender requests proof of delivery in the form of a receipt signed by the addressee"). We assume that certified mail sent to a foreign minister will generally be signed for by a subordinate, but the person who signs for the minister's certified mail in the foreign ministry itself presumably has authority to receive mail on the minister's behalf and has been instructed on how that mail is to be handled. The same is much less likely to be true for an employee in the mailroom of an embassy.

For all these reasons, we think that the most natural reading of §1608(a)(3) is that the service packet must bear the foreign minister's name and customary address and that it be sent to the minister in a direct and expeditious way. And the minister's customary office is the place where he or she generally works, not a farflung outpost that the minister may at most occasionally visit.

Several related provisions in §1608 support this reading. …

One such provision is §1608(b)(3)(B). Section 1608(b) governs service on "an agency or instrumentality of a foreign state." And like §1608(a)(3), §1608(b)(3)(B) requires delivery of a service packet to the intended recipient "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court." But §1608(b)(3)(B), unlike §1608(a)(3), contains prefatory language saying that service by this method is permissible "if reasonably calculated to give actual notice."

Respondents read §1608(a)(3) as embodying a similar requirement. …

This argument runs up against two well-settled principles of statutory interpretation. First, "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Department of Homeland Security* v. *MacLean*, 574 U. S. ___, ___ (2015) (slip op., at 7). Because Congress included the "reasonably calculated to give actual notice" language only in §1608(b), and not in §1608(a), we resist the suggestion to read that language into §1608(a). Second, "we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837 (1988). Here, respondents encounter a superfluity problem when they argue that the "addressed and dispatched" clause in §1608(a)(3) gives effect to the *Mullane* due process standard. They fail to account for the fact that §1608(b)(3)(B) contains *both* the "addressed and dispatched" and "reasonably calculated to give actual notice" requirements. If respondents were correct that "addressed and dispatched" means "reasonably calculated to give notice," then the phrase "reasonably calculated to give actual notice" in §1608(b)(3) would be superfluous. Thus, as the dissent agrees, §1608(a)(3) "does not deem a foreign state properly served solely because the service method is reasonably calculated to provide actual notice." *Post,* at 2 (opinion of THOMAS, J.).

Section 1608(b)(2) similarly supports our interpretation of §1608(a)(3). Section 1608(b)(2) provides for delivery of a service packet to an officer or a managing or general agent of the agency or instrumentality of a foreign state or "to any other agent authorized by appointment or by law to receive service of process in the United States."

This language is significant for three reasons. First, it expressly allows service on an agent. Second, it specifies the particular individuals who are permitted to be served as agents of the recipient. Third, it makes clear that service on the agent may occur *in the United States* if an agent here falls within the provision's terms. If Congress had contemplated anything similar under §1608(a)(3), there is no apparent reason why it would not have included in that provision terms similar to those in §1608(b)(2). Respondents would have us believe that Congress was content to have the courts read such terms into §1608(a)(3). In view of §1608(b)(2), this seems unlikely. …

Section 1608(c) further buttresses our reading of §1608(a)(3). Section 1608(c) sets out the rules for determining when service "shall be deemed to have been made." For the first three methods of service under §1608(a), service is deemed to have occurred on the date indicated on "the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed." §1608(c)(2). The sole exception is service under §1608(a)(4), which requires the Secretary of State to transmit a service packet to the foreign state through diplomatic channels. Under this method, once the Secretary has transmitted the packet, the Secretary must send to the clerk of the court "a certified copy of the diplomatic note indicating when the papers were transmitted." §1608(a)(4). And when service is effected in this way, service is regarded as having occurred on the transmittal date shown on the certified copy of the diplomatic note. §1608(c)(1).

Under all these methods, service is deemed to have occurred only when there is a strong basis for concluding that the service packet will very shortly thereafter come into the hands of a foreign official who will know what needs to be done. Under §1608(a)(4), where service is transmitted by the Secretary of State through diplomatic channels, there is presumably good reason to believe that the service packet will quickly come to the attention of a high-level foreign official, and thus service is regarded as having been completed on the date of transmittal. And under §§1608(a)(1), (2), and (3), where service is deemed to have occurred on the date shown on a document signed by the person who received it from the carrier, Congress presumably thought that the individuals who signed for the service packet could be trusted to ensure that the service packet is handled properly and expeditiously.

It is easy to see why Congress could take that view with respect to a person designated for the receipt of process in a "special arrangement for service between the plaintiff and the foreign state or political subdivision," §1608(a)(1), and a person so designated under "an applicable international convention," §1608(a)(2). But what about §1608(a)(3), the provision now before us? Who is more comparable to those who sign for mail under §§1608(a)(1) and (2)? A person who works in the office of the foreign minister in the minister's home country and is authorized to receive and process the minister's mail? Or a mailroom employee in a foreign embassy? We think the answer is obvious, and therefore interpreting §1608(a)(3) to require that a service packet be sent to a foreign minister's own office better harmonizes the rules for determining when service is deemed to have been made.

Respondents seek to soften the blow of an untimely delivery to the minister by noting that the foreign state can try to vacate a default judgment under Federal Rule of Civil Procedure 55(c). Brief for Respondents 27. But that is a poor substitute for sure and timely receipt of service, since a foreign state would have to show "good cause" to vacate the judgment under that Rule. Here, as with the previously mentioned provisions in §1608, giving §1608(a)(3) its ordinary meaning better harmonizes the various provisions in §1608 and avoids the oddities that respondents' interpretation would create.

The ordinary meaning of the "addressed and dispatched" requirement in §1608(a)(3) also has the virtue of avoiding potential tension with the Federal Rules of Civil Procedure and the Vienna Convention on Diplomatic Relations.

Take the Federal Rules of Civil Procedure first. At the time of the FSIA's enactment, Rule 4(i), entitled "Alternative provisions for service in a foreign-country," set out certain permissible methods of service on "part[ies] in a foreign country." Fed. Rule Civ. Proc. 4(i)(1) (1976). One such method was "by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court *to the party to be served*." Rule 4(i)(1)(D) (emphasis added). Rule 4(i)(2) further provided that "proof of service" pursuant to that method "shall include a receipt *signed by the addressee* or other evidence of *delivery to the addressee* satisfactory to the court." (Emphasis added.) The current version of Rule 4 is similar. See Rules 4(f)(2)(C)(ii), 4(*l*)(2)(B).

The virtually identical methods of service outlined in Rule 4 and §1608(a)(3) pose a problem for respondents' position: If mailing a service packet to a foreign state's embassy in the United States were sufficient for purposes of §1608(a)(3), then it would appear to be easier to serve the foreign state than to serve a person in that foreign state. This is so because a receipt signed by an embassy employee would not necessarily satisfy Rule 4 since such a receipt would not bear the signature of the foreign minister and might not constitute evidence that is sufficient to show that the service packet had actually been delivered to the minister. It would be an odd

state of affairs for a foreign state's inhabitants to enjoy more protections in federal courts than the foreign state itself, particularly given that the foreign state's immunity from suit is at stake. The natural reading of §1608(a)(3) avoids that oddity.

Our interpretation of §1608(a)(3) avoids concerns regarding the United States' obligations under the Vienna Convention on Diplomatic Relations. We have previously noted that the State Department "helped to draft the FSIA's language," and we therefore pay "special attention" to the Department's views on sovereign immunity. *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U. S. ___, ___ (2017) (slip op., at 9). It is also "well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott* v. *Abbott*, 560 U. S. 1, 15 (2010) (quoting *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 185 (1982)).

Article 22(1) of the Vienna Convention provides: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U. S. T. 3237, T. I. A. S. No. 7502. Since at least 1974, the State Department has taken the position that Article 22(1)'s principle of inviolability precludes serving a foreign state by mailing process to the foreign state's embassy in the United States. See Service of Legal Process by Mail on Foreign Governments in the United States, 71 Dept. State Bull. 458–459 (1974). In this case, the State Department has reiterated this view in *amicus curiae* briefs filed in this Court and in the Second Circuit. The Government also informs us that United States embassies do not accept service of process when the United States is sued in a foreign court, and the Government expresses concern that accepting respondents' interpretation of §1608 might imperil this practice. Brief for United States as *Amicus Curiae* 25–26.

Contending that the State Department held a different view of Article 22(1) before 1974, respondents argue that the Department's interpretation of the Vienna Convention is wrong, but we need not decide this question. By giving §1608(a)(3) its most natural reading, we avoid the potential international implications of a contrary interpretation.

* * * *

6. Execution of Judgments against Foreign States and Other Post-Judgment Actions

a. Bank Markazi v. Peterson

On December 9, 2019, the United States filed an amicus brief recommending the Supreme Court deny certiorari in two cases consolidated for review, *Clearstream Banking v. Peterson*, No. 17-1529, and *Bank Markazi v. Peterson*, No. 17-1534. The U.S. brief does not support the underlying Second Circuit decision concerning execution of a foreign state's assets located outside of the United States. However, the brief argues that the court of appeals had identified several issues to be resolved upon remand to the district court, making Supreme Court review inappropriate at the time. Excerpts follow from the U.S. brief.

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* * * *

In this case, the court of appeals concluded that a foreign sovereign's property outside the United States is subject to attachment and execution in U.S. courts. That conclusion likely would warrant this Court's review in an appropriate case at an appropriate time. In the decision below, however, the court of appeals identified several jurisdictional and other issues for the district court to address on remand, including whether principles of international comity would independently foreclose the turnover order sought by respondents. … The resolution of those other issues may bear on the practical significance of the decision below and the need for this Court's review in this particular case. In addition, both Houses of Congress have passed separate bills that, if either becomes law, could substantially affect the proper disposition of this case. Accordingly, the Court should deny the petitions for writs of certiorari at this time.

A. The Court Of Appeals' Interlocutory Decision Is Flawed

1. Before the FSIA, foreign sovereign property had absolute immunity from attachment or execution in U.S. courts. …

When it enacted the FSIA, Congress only "partially lower[ed] the barrier of immunity from execution," House Report 27, by providing for carefully limited exceptions to execution immunity for property *in* the United States. Section 1609 prescribes a general rule of immunity from execution for "the property in the United States of a foreign state." 28 U.S.C. 1609. Section 1610, in turn, provides exceptions to execution immunity for "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States," and "any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States," subject to the additional limitations imposed by Section 1611. 28 U.S.C. 1610(a) and (b).

Those exceptions to execution immunity "are narrower than the exceptions to jurisdictional immunity." *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011), cert. denied, 567 U.S. 944 (2012). For example, the FSIA abrogates jurisdictional immunity for suits "based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(2), but the corresponding execution-immunity exception applies only to property that "is or was used for the commercial activity" in the United States, 28 U.S.C. 1610(a)(2). The statute thus contemplates that some judgment creditors will "have to rely on foreign states to voluntarily comply with U.S. court judgments," *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010), as was true before the FSIA. The narrower scope of the immunity exceptions reflects a judgment that authorizing execution against a sovereign's property is a greater intrusion on state sovereignty than merely exercising jurisdiction. See *Republic of Philippines* v. *Pimental*, 553 U.S. 851, 866 (2008) (discussing the "specific affront that could result" to a state from seizing its property "by the decree of a foreign court").

Accordingly, every court of appeals to have addressed the issue before the decision below had treated the presence of the disputed foreign sovereign property *in the United States* as a prerequisite to attachment or execution in U.S. courts. See *Rubin* v. *Islamic Republic of Iran*, 830 F.3d 470, 475 (7th Cir. 2016) (identifying as one of the "basic criteria" for attachment that the property "must be within the territorial jurisdiction of the district court"), aff 'd, 138 S. Ct. 816 (2018); *Peterson*, 627 F.3d at 1131-1132 (concluding that foreign-state property located in France is "not 'property in the United States' " and is therefore "immune from execution") (quoting 28 U.S.C. 1610(a)(7)); *Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 247 (5th Cir. 2002) (stating that U.S. courts "may execute only against property that meets"

specified criteria, including that the property be " 'in the United States' ") (quoting 28 U.S.C. 1610(a)(1)).

2. The court of appeals concluded that this Court's decision in *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134 (2014), "vitiated" any prior consensus that foreign sovereign property outside the United States is not subject to attachment and execution in U.S. courts. … *NML Capital*, however, presented the "single, narrow question" whether the FSIA limits the scope of post-judgment discovery in aid of execution "when the judgment debtor is a foreign state." 573 U.S. at 140. Argentina had argued that discovery of its assets outside the United States was inappropriate because those assets could not be subject to execution in U.S. courts. … *NML Capital*, *supra* (No. 12-842). This Court concluded that the FSIA does not speak to the scope of discovery and therefore that the usual rules governing discovery apply, rather than a special rule for foreign sovereigns. See *NML Capital*, 573 U.S. at 142.

In finding that the FSIA does not confer immunity from "discovery of information concerning extraterritorial assets," *NML Capital*, 573 U.S. at 145 n.4, the Court did not hold that such assets are subject to execution in U.S. courts. The Court instead appeared to view discovery as a means of uncovering the location of foreign sovereign property abroad in order to determine whether it might be "executable under the relevant jurisdiction's law." *Id.* at 144. That understanding accords with the usual practice for seeking to enforce the judgment of a U.S. court in a foreign jurisdiction. See, *e.g.*, *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 751 (7th Cir. 2007) ("If assets exist in another country, the person seeking to reach them must try to obtain recognition and enforcement of the U.S. judgment in the courts of that country."), cert. denied, 552 U.S. 1231 (2008).

The court of appeals focused on two other passages in *NML Capital*, neither of which compels the result the court reached. … In the first passage, this Court observed that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *NML Capital*, 573 U.S. at 141-142. But that statement was made to explain why the FSIA itself should not be read to confer implicit immunity from discovery, given its express provisions for jurisdictional and execution immunity. See *id.* at 142-143. The Court has previously recognized, in a case involving official immunity, that "[e]ven if a suit is not governed by the [FSIA], it may still be barred by foreign sovereign immunity under the common law." *Samantar* v. *Yousuf*, 560 U.S. 305, 324 (2010).

In the second passage, the Court observed that, "even if " a foreign state's extraterritorial assets were immune from execution under pre-FSIA law, "then it would be obvious that the terms of [Section] 1609 execution immunity are narrower, since the text of that provision immunizes only foreign-state property '*in the United States*.'" *NML Capital*, 573 U.S. at 144. But that statement was made in response to the argument that "§ 1609 execution immunity implies coextensive discovery-in-aid-of-execution immunity." *Ibid.* The Court reasoned that, because the FSIA itself, in Section 1609, does not establish immunity for foreign sovereign assets abroad, then neither does the FSIA itself confer immunity from discovery about those assets. The Court did not say that the FSIA abrogated whatever immunity from actual execution those assets would have enjoyed prior to enactment of the FSIA, nor that the FSIA forecloses whatever immunity from actual execution those assets now would enjoy independent of the FSIA. In context, moreover, a critical assumption of the Court's reasoning was that U.S. courts "generally lack authority * * * to execute against property in other countries." *Ibid.* No party appears to have raised the possibility that a U.S. court might leverage its exercise of personal jurisdiction over a litigant in the United States to require the litigant to bring foreign sovereign

property to the United States for execution. The Court accordingly had no occasion to address that possibility.

3. Other than *NML Capital*, the court of appeals did not identify any basis for its conclusion that U.S. law provides greater immunity when a foreign state's property is located in this country than when the property is located abroad, including in the foreign state's own territory. It is unlikely that Congress, in providing for only limited inroads on execution immunity for certain foreign sovereign property in the United States, see 28 U.S.C. 1609-1611, intended to subject foreign sovereign property *abroad* to the kind of turnover order contemplated here.

B. Further Review Is Not Warranted At This Time

Although the court of appeals' decision is flawed, this Court's review is not warranted at this time for several reasons.

1. a. The court of appeals identified several significant unresolved issues for the district court to address on remand, including threshold jurisdictional questions. …

First, the court of appeals directed the district court to determine whether Clearstream is subject to the district court's personal jurisdiction. …

Second, the court of appeals acknowledged that the FSIA's execution-immunity provisions may apply after foreign sovereign property is brought into the United States. …The court indicated that a "two-step process" should occur on remand, first "recalling the asset at issue" and then "proceeding with a traditional FSIA analysis." … Elsewhere, however, the court appeared to leave open the possibility that the district court can and should address the second step— whether the assets would be entitled to execution immunity in U.S. courts if brought to the United States—before ordering any turnover. See *id.* at 63a (directing the district court to "determine whether any provision of * * * federal law prevents the court from recalling, or the plaintiffs from receiving, the asset[s]").

The two-step process contemplated by the court of appeals creates uncertainty about the import and effect of the decision below. Petitioners argue that, under state law, the property need not necessarily first be brought to the United States but could instead be transferred directly to the judgment creditor abroad. … If such an order were permissible under state law, the second step contemplated by the decision below would be inapplicable, and the FSIA's carefully crafted provisions for and exceptions to execution immunity would never come into play. And even if such an order were not permissible, ordering a foreign state's property to be transferred from abroad into the United States at step one could affect the legal status of the assets at step two; the decision below leaves unclear how the district court should account for that possibility. …Those issues would need to be resolved by the district court on remand.

Third, the court of appeals invited the district court to consider whether principles of international comity should bar the contemplated turnover order. … This Court has described international comity as "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987). Among other things, principles of comity counsel special caution when there may be a "conflict between domestic and foreign law," such that a litigant faces the prospect of conflicting legal obligations. *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 798 (1993) (citation omitted); cf. *Gucci Am., Inc.* v. *Bank of China*, 768 F.3d 122, 139 (2d Cir. 2010) (stating that a "comity analysis" is "appropriate before ordering a nonparty foreign bank to freeze assets abroad in apparent contravention of foreign law to which it is subject"). Here, Clearstream

may face such a prospect because the assets that respondents seek to have turned over are also the subject of litigation in Luxembourg brought by U.S. victims of the 9/11 terrorist attacks and their families, who are also judgment creditors of Iran.

Fourth, the court of appeals directed the district court to consider any potential "state law" barriers to a turnover order under the circumstances, …

b. The question presented would be better addressed, if necessary, after those issues are resolved on remand. …

2. This dispute is also the subject of pending legislation that may bear on the proper disposition of the case. Cf. *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1317 (2016). On June 27, 2019, the Senate passed the National Defense Authorization Act for Fiscal Year 2020, S. 1790, 116th Cong., 1st Sess. (June 27, 2019). See 165 Cong. Rec. S4604 (daily ed. June 27, 2019). Section 6206(b) of that bill would amend 22 U.S.C. 8772—the provision at issue in *Bank Markazi*, see 136 S. Ct. at 1318-1319—to state that, notwithstanding any other provision of law, certain financial assets that would be blocked under U.S. sanctions if they "were located in the United States" shall be subject to "an order directing that the asset[s] be brought to the State in which the court is located * * * without regard to concerns relating to international comity." S. 1790, § 6206(b)(1). The bill would further direct that the financial assets subject to those amendments include the assets that are the subject of this case. S. 1790, § 6206(b)(2)(C). The House of Representatives has passed an identical proposal in a separate bill. See Damon Paul Nelson and Mathew Young Pollard Intelligence Authorization Act for Fiscal Years 2018, 2019, and 2020, H.R. 3494, 116th Cong., 1st Sess., § 721(b) (July 17, 2019).

3. Finally, the decision below implicates important foreign-policy interests of the United States. The court of appeals determined that foreign sovereign property is unprotected by execution immunity in U.S. courts as long as the property is located outside the United States. If, after the resolution of the unresolved procedural and jurisdictional questions described above, the district court were to issue an order restraining foreign sovereign property located abroad, such an order could in turn put U.S. property at risk. "[S]ome foreign states base their sovereign immunity decisions on reciprocity." *Persinger* v. *Islamic Republic of Iran*, 729 F.3d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984). In view of the full range of U.S. foreign-policy interests, the considered view of the United States is that this Court's review is, nevertheless, not warranted at this time.

* * * *

As referenced in the December 9 brief excerpted above, Congress was considering legislation in 2019 that would bear on the issue in the *Peterson* cases. On December 20, 2019, subsequent to the enactment of the relevant law (Section 1226 of the National Defense Authorization Act for Fiscal Year 2020 ("2020 NDAA"), Pub. L. No. 116-92), the United States filed a supplemental amicus brief, recommending that the Court grant the petitions, vacate the decision, and remand for further proceedings in light of the 2020 NDAA. Section 1226 of the NDAA amends Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012 such that, "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law," a specified "financial asset" that meets certain criteria "shall be subject to execution or attachment in aid of execution, or to an order directing that the asset be brought to the State in which the court is located

and subsequently to execution or attachment in aid of execution, * * * without regard to concerns relating to international comity," in order to satisfy a terrorism-related judgment for compensatory damages against Iran. The amended statute specifies that the assets at issue in the *Peterson* cases are within the scope of this provision.*

b. Chabad v. Russia

For background on *Chabad v.* Russia, No. 05-cv-01548 (D.D.C.) and discussion of previous U.S. statements of interest in the case, see *Digest 2016* at 439-49; *Digest 2015* at 419; *Digest 2014* at 410-13; *Digest 2012* at 319-23; and *Digest 2011* at 445-47. The case concerns Chabad's efforts to secure the transfer of certain books and manuscripts ("the Collection") from the Russian Federation. The Collection consists of materials that were seized at the time of the Bolshevik Revolution and are now held by the Russian State Library, and materials seized by Nazi Germany and later taken by Soviet forces and now held at the Russian State Military Archive. In 2010, the district court entered a default judgment in Chabad's favor directing transfer of the Collection. In 2013, the court imposed monetary contempt sanctions for Russia's failure to make the transfer.

On November 26, 2019, the United States filed a supplemental statement of interest in the district court clarifying that the United States had not changed its position with respect to enforcement of civil contempt sanctions imposed upon Russia and related discovery. On December 20, 2019, the district court issued a number of orders pertaining to the case, including an order denying a motion to quash a subpoena issued to Tenex-USA. Excerpts follow (with record citations and footnotes omitted) from the 2019 U.S. statement of interest. The full text is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

Since the United States filed its last Statement of Interest in this case, Plaintiff has asserted in several filings that the United States no longer opposes contempt sanctions or Plaintiff's discovery efforts. This assertion is incorrect.

First, Plaintiff argues that the United States has changed its position because it has not (until now) filed a Statement of Interest addressing Plaintiff's Motion for Additional Interim Judgment of Accrued Sanctions, and Motion for Increased Sanctions. Of course, as a nonparty, the United States is under no obligation to file a response to motions in this matter. Rather, the United States has discretion under 28 U.S.C. § 517 "to attend to the interests of the United States in a suit pending in a court of the United States." Although the United States carefully considered the Court's request to "update" the Statements of Interest, the United States did not file a response to Plaintiff's Motion for Additional Interim Judgment of Accrued Sanctions and Motion for Increased Sanctions because there were no material developments to bring to the

* Editor's note: On January 13, 2020, the Supreme Court granted the petition, vacated the judgment, and remanded the case for further consideration in light of the National Defense Authorization Act for Fiscal Year 2020, as recommended in the December 20, 2019 supplemental brief.

Court's attention. There is, accordingly, nothing to infer from the United States' decision not to file a response.

Second, Plaintiff argues that the United States has changed its position because it argued in another matter before the Supreme Court that a district court could impose monetary contempt sanctions against a foreign state owned enterprise that failed to comply with a federal grand jury subpoena. This assertion is incorrect, however. In that matter, *In re Grand Jury Subpoena*, No. 18-948 (U.S.), the United States argued that the FSIA does not apply in criminal cases, including when a court issues contempt sanctions in a criminal case. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983) (observing that the FSIA "contains a comprehensive set of legal standards governing claims of immunity in every *civil* action against a foreign state or its political subdivisions, agencies or instrumentalities" (emphasis added)). Accordingly, the United States argued that the Supreme Court should not review the Court of Appeals' judgment to permit monetary contempt sanctions against a foreign state owned enterprise that failed to comply with a federal grand jury subpoena. At the same time, the United States made clear that its position was consistent with its opposition in civil cases to the "imposition of contempt sanctions for failure to comply with a discovery or injunctive order in part *because the sanctions would be unenforceable under the FSIA*." (emphasis added). The United States pointed to the FSIA's limitation to civil proceedings and general principles of equity and comity: although "principles of equity and comity" guard "against the imposition of unenforceable contempt sanctions in civil litigation brought by a private party against a foreign state," such principles do not exist when "the government is a party to [the] case and itself sought the contempt sanction in a criminal proceeding against a state-owned commercial enterprise." Further, as this Court has previously noted in this case, there is a distinction between imposition of contempt sanctions and subsequent enforcement of such sanctions. Likewise, as the Government noted in its brief, the court of appeals in *In re Grand Jury Subpoena* explicitly declined to reach the issue of whether enforcement of contempt sanctions would be permitted. By contrast, the subpoenas at issue before this Court directly pertain to the enforcement of a monetary sanction judgment. Therefore, the United States' position in *In re Grand Jury Subpoena* is entirely consistent with its previous Statements of Interest in this case.

* * * *

B. HEAD OF STATE AND OTHER FOREIGN OFFICIAL IMMUNITY

1. *Miango v. Democratic Republic of the Congo*

On May 1, 2019, at the invitation of the court, the United States filed a statement of interest in *Miango v. Democratic Republic of the Congo*, No. 15-cv-01265 (D.D.C.). The U.S. statement explains relevant principles the State Department applies in foreign official immunity cases, and notes that the court should engage in fact-finding to determine whether the individuals named in the suit are immune under the articulated principles. Excerpts follow (with most footnotes omitted) from the U.S. statement of interest, which is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/. The letter from Jennifer Newstead, referred to as Exhibit A in the statement of interest, is excerpted *infra* and also available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

Plaintiffs allege that on August 6, 2014, they staged a peaceful protest in front of the Capella Hotel, where Joseph Kabila, the President of the Democratic Republic of the Congo, was staying during his visit to Washington, D.C., for the "U.S.-Africa Leaders' Summit." Second Am. Compl. ¶ 24. Plaintiffs' protest was aimed at alleged "human rights abuses and violations" in the Democratic Republic of the Congo. *Id.* ¶ 26. Plaintiffs allege that the individual DRC defendants began "belittling, threatening, intimidating, and disrupting" Plaintiffs' protest. *Id.* ¶ 28. Plaintiffs further allege that their protest remained peaceful and continued as President Kabila approached and entered the Capella Hotel. *Id.* ¶ 29, 31. Shortly after President Kabila entered the hotel, Plaintiffs allege that a group of "apparent security enforcers" "rushed out" of the hotel to join the individual DRC defendants and "physically attack[ed]" Plaintiff Jacques Dieudonne Itonga Miango and a "student protester." *Id.* ¶ 32. Plaintiff Miango was allegedly "knocked down to the ground, beaten, kicked, choked, and stomped on by … Kabila's security enforcers … including Defendant Kassamba and Defendant Sam Mpengo Mbey." *Id.* After the attack, Plaintiffs allege that "some of" the individual DRC defendants (unidentified by name) raided Plaintiff Miango's car and confiscated his possessions, including "protest materials, a computer, [an] iPod, a camera, and other items." *Id.* ¶ 34.

Plaintiffs brought suit against a variety of defendants under the Alien Tort Statute, 28 U.S.C. § 1350, the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1330 *et seq.*, the Federal Tort Claims Act, 28 U.S.C. § 1346 *et seq.*, and the statutory and common law of the District of Columbia. *Id.* ¶ 1, 39–156, 173–82. …

* * * *

ARGUMENT

The Department of State has determined that the Diplomatic Relations Act does not provide diplomatic immunity to the individual DRC defendants. *See* Letter from Jennifer G. Newstead to Joseph H. Hunt at 1 (copy attached as Exhibit A). The State Department also has considered whether the individual DRC defendants are immune from suit based on claims concerning acts taken in an official capacity (i.e., conduct-based immunity), under the principles accepted by the Executive Branch. *See id.*…The State Department does not have sufficient factual information at this time concerning the involvement of the individual DRC defendants in this attack to determine whether the individual DRC defendants would enjoy conduct-based immunity. *See* Exh. A at 1–3. Because the State Department lacks sufficient factual information in this case to make an immunity determination at this time, the State Department respectfully requests that the Court undertake limited fact-finding about the nature of the attack and, in particular, the involvement of the individual DRC defendants. *Id.* at 3. After the Court makes its factual findings, if the Court does not find facts that align with the guidance provided below by the State Department, it would be appropriate for the Court to invite the State Department's views concerning the application of the immunity principles recognized by the Executive Branch to the facts found by the Court. *See id.*

I. The Individual DRC Defendants Are Not Immune From This Suit Under The Diplomatic Relations Act.

The individual DRC defendants argue that they enjoy diplomatic immunity because they were members of a "diplomatic mission" to the United States under the Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 808 (22 U.S.C. § 254a *et seq.*) (DRA). … But, for the reasons set forth below, the State Department has concluded that the Diplomatic Relations Act does not provide diplomatic immunity to the individual DRC defendants.

The DRA gives effect to the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, 500 U.N.T.S. 95 (VCDR), which entered into force for the United States in 1972. The DRA provides that "[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the [VCDR] … or under any other laws extending diplomatic privileges and immunities, shall be dismissed." 22 U.S.C. § 254d. "[T]he purpose of such immunit[y] is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." VCDR, preamble, clause 4. Although the VCDR does not expressly define the term "mission," the DRA defines the term "mission" as including "missions within the meaning of the [VCDR] and any missions representing foreign governments, individually or collectively, which are extended the same privileges and immunities, pursuant to law, as are enjoyed by missions under the Vienna Convention." 22 U.S.C. § 254a(3). Applying this definition, the United States has long interpreted the DRA to apply to diplomats assigned to missions in the United States, and has never interpreted it to apply to visiting foreign officials who are no longer in the United States. *See, e.g.*, *United States v. Sissoko*, 995 F. Supp. 1469, 1470 (S.D. Fla. 1997) …

The State Department determines who is entitled to diplomatic immunity. *See Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 192 (D.D.C. 2007) …. The State Department's Office of Foreign Missions conducted a records check and reported that none of the individual DRC defendants had been notified to the State Department as members of the DRC's diplomatic mission in the United States. Exh. A at 1. Because the individual DRC defendants are not members of a diplomatic mission as those terms are understood under the DRA and the VCDR, they do not benefit from diplomatic immunity.

To support their argument that they are immune from suit, the individual DRC defendants point to internal State Department communications (released pursuant to a Freedom of Information Act request) in which the State Department assessed that the members of President Kabila's traveling party involved in the attack enjoyed "diplomatic immunity." … But that assessment was focused on a different inquiry not governed by the DRA and VCDR: whether the individual DRC defendants were immune from suit *while in the United States as part of the DRC head of state's traveling party*. Once the head of state's visit concluded, immunity associated with that visit ceased.

In sum, the State Department has concluded that Diplomatic Relations Act does not provide diplomatic immunity to the individual DRC defendants.

II. Additional Factual Development Is Necessary To Determine Whether The Individual DRC Defendants Are Immune From Suit Under Principles Of Conduct-Based Immunity Accepted By The Executive Branch.

After concluding that the individual DRC defendants are not immune from suit under the Diplomatic Relations Act, the State Department considered whether the individual DRC defendants are entitled to conduct-based immunity for official acts. For the foregoing reasons, it is the State Department's position that the factual record is insufficient for the State Department

to determine at this time whether the individual DRC defendants were involved in the incident underlying the Second Amended Complaint and thus whether or not they are immune from suit.

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq.*, governs the immunity of foreign states from civil suit in courts in the United States. Before Congress enacted the FSIA, foreign state immunity was determined by a "two-step procedure." *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). If the State Department suggested the immunity of a foreign state, the court dismissed the suit. *Id.* If the State Department did not provide its views, "a district court had authority to decide for itself whether all the requisites for such immunity existed" applying "the established policy of the [State Department]." *Id.* at 312 (quotation marks omitted; alteration in original). In *Samantar,* the Supreme Court held that the FSIA codified principles of foreign state immunity and so supplanted the Executive Branch's determination of the governing principles. *Id*. at 325. But the Court found "nothing in the [FSIA's] origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity." *Id.*; *see id*. at 323 … Accordingly, the two-step procedure continues to apply in suits against foreign officials, and the principles accepted by Executive Branch govern. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945)…[6]

As a general matter, under principles of customary international law accepted by the Executive Branch, a foreign official enjoys immunity from suit based upon acts taken in an official capacity. The State Department does not have sufficient factual information at this time concerning the individual DRC defendants' involvement in the attack. *See* Exh. A at 1–3. The resolution of th[ese] factual questions is necessary to determine whether the individual DRC defendants enjoy immunity from suit under the conduct-based immunity principles accepted by the Executive Branch.

Foreign official immunity, like foreign state immunity, is a threshold question. In the context of foreign state immunity, the Supreme Court has explained that when the question of immunity "turn[s] upon further factual development, the trial judge may take evidence and resolve relevant factual disputes." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316 (2017). The Court further explained that immunity determinations must be made as early in the litigation as possible. *See id.* at 1317 (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493–94 (1983)). Therefore, if there are factual questions that need to be resolved to make the foreign state immunity determination, the Court must undertake the needed factual inquiry as early in the litigation as possible. The same principle applies to factual questions controlling a foreign official's immunity from suit under the principles accepted by the Executive Branch.

Accordingly, the United States respectfully requests that the Court undertake limited fact-finding about the nature of the attack and, in particular, the involvement of the individual DRC defendants. As a general matter, if the Court finds that Plaintiffs' allegations could be substantiated against the individual DRC defendants named in the Second Amended Complaint, and concludes that this attack was an entirely unprovoked attack on peaceful protesters

[6] In a recent case in which a defendant claimed foreign official immunity and in which the State Department did not participate, the D.C. Circuit evaluated the foreign official's immunity by applying principles identified by the Restatement (Second) of Foreign Relations Law. *See Lewis v. Mutond*, 918 F.3d 142, 145 (D.C. Cir. 2019). The Court relied on the Restatement because both parties "assume[d]" that the Restatement "captures the contours of common-law official immunity." *Id.* at 146. But the Court "proceed[ed] on that understanding without deciding the issue." *Id.* As explained above, in suits in which the State Department does not participate, courts are to apply the immunity principles accepted by the Executive Branch. And if those principles are not discernable, the proper course is for the court to invite the United States' views, as the Court did in this case.

exercising their First Amendment rights, it would not constitute an official act for which conduct-based immunity would be available. Exh. A at 2–3. On the other hand, if the Court finds that the individual DRC defendants are named in this action due to their official positions, and that they were not responsible for an entirely unprovoked attack against peaceful protesters exercising their First Amendment rights, the State Department would recognize their immunity from this suit. *Id.* at 3. After the Court makes its findings of fact, if the Court does not find facts that align with the guidance provided above by the State Department, it would be appropriate for the Court to invite the State Department's views concerning the application of the immunity principles recognized by the Executive Branch to the facts found by the Court. *See id.*

* * * *

The letter from Jennifer Newstead, attached as Exhibit A to the statement of interest, is excerpted below and also available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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* * * *

It is the view of the Department of State that the Diplomatic Relations Act (DRA) does not provide diplomatic immunity to the individual DRC defendants. The United States generally interprets the DRA to apply to diplomats assigned to missions in the United States, and has never interpreted it to apply to visiting foreign officials who are no longer in the United States. The Department's Office of Foreign Missions conducted a records check and reported that none of the individual DRC defendants had been notified to the State Department as current or former members of the DRC's diplomatic mission in the United States. The individual DRC defendants thus do not benefit from diplomatic immunity under the DRA.

In addition, the Department has considered whether the individual DRC defendants would be entitled to conduct-based immunity for official acts. Due to the lack of clear factual information available to the Department regarding the individual DRC defendants' involvement in the incident underlying the complaint, however, the Department is not in a position to reach a conclusion on whether they would benefit from conduct-based immunity. However, the Department believes it would be appropriate to advise the Court of the governing conduct-based immunity principles applicable to the circumstances of this case.

The State Department follows an internal procedure to evaluate requests for conduct-based immunity for foreign officials, taking into account principles of immunity articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs and informed by customary international law, and considering the overall impact of the matter on the foreign policy of the United States. As a general matter, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity for which a determination of immunity is appropriate. *See, e.g.*, Letter from Legal Adviser Brian J. Egan to Principal Deputy Assistant Attorney General Benjamin C. Mizer at 2 (June 10, 2016), filed in *Dogan et al.* v. *Barak*, No. 2:15-cv-8130 (C.D. Cal.) *[hereinafter, "Dogan* Letter"]; Letter from Legal Adviser Harold Hongju Koh to Acting Assistant Attorney General Stuart F.

Delery at 1 (Sept. 7, 2012), filed in *Doe* v. *Zedillo*, No. 3:1 l-cv-01433-AWT (D. Conn.) *[hereinafter, "Zedillo* Letter"] …

Here, Plaintiffs allege that security officials accompanying President Joseph Kabila physically attacked the Plaintiffs and subsequently ransacked their car and removed their possessions. … However, beyond the Plaintiffs' allegations that two of the individual DRC defendants were present during the attack, there appears to be no specific information in the complaint about the actions or involvement of the individual DRC defendants. In addition, information available to the Department indicates that none of the individual DRC defendants were security officials for the DRC: according to information available to the Department, Raymond Tshibanda was the Foreign Minister; Seraphin Ngwej was the Ambassador-at-Large for the Great Lakes Region and Presidential Advisor; Jacques Mukaleng Makal was the Director of Presidential Press; Sam Mpengo Mbey was the Chief Executive Officer of the publication "Grands Lacs," a publication devoted to the activities of the Head of State; and Jean Marie Kassamba was the Chief Executive Officer and Journalist at "Tele50." Finally, law enforcement reports available to the Department indicate that different individuals were responsible for the attack on the Plaintiffs.

As a general matter, if the Court finds that the Plaintiffs' allegations could be substantiated against the individual DRC defendants named in the Second Amended Complaint, and concludes that this attack was an entirely unprovoked attack on peaceful protesters exercising their First Amendment rights, it would not constitute an official act for which conduct-based immunity would be available. In particular, the allegations as described by the Plaintiffs here, including the fact that the alleged attack was entirely unprovoked and occurred after President Kabila was inside the hotel, suggest that any physical contact with the Plaintiffs was not reasonably connected to carrying out the functions of ensuring the President's security. It is also unclear how the alleged theft of the Plaintiffs' personal items, as pled, could relate to actions taken while exercising the powers of their office. Finally, given that none of the individual DRC defendants were security officials for the DRC, it is unclear how the allegations here regarding protection of the President would fall within their official functions.

On the other hand, if the Court finds that the individual DRC defendants are named in this action due to their official positions, and that they were not responsible for an entirely unprovoked attack against peaceful protesters exercising their First Amendment rights, the State Department would recognize their immunity from this suit. *See, e.g., Zedillo* Letter at 2 (asserting immunity where plaintiffs sought to hold former President liable simply because he was serving as President when lower-level officials allegedly committed tortious acts).

* * * *

2. *Doğan v. Barak*

The U.S. Court of Appeals for the Ninth Circuit issued a decision on August 2, 2019, upholding the district court's dismissal of the suit against former Israeli Defense Minister Ehud Barak. *Doğan v. Barak*, 932 F.3d 888 (9th Cir. 2019). The United States submitted a suggestion of immunity in the district court, see *Digest 2016* at 163-64 & 450-52, and an *amicus* brief in the U.S. Court of Appeals for the Ninth Circuit, see *Digest 2017* at 449-54. Plaintiffs sued after their son was killed by Israeli Defense Forces ("IDF"),

alleging that Barak commanded the attack that led to their son's death. The court's opinion is excerpted below, with footnotes omitted.

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* * * *

As both parties recognize, the doctrine of foreign sovereign immunity—including foreign official immunity— developed as a matter of common law. *See Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812); *see also Samantar v. Yousuf*, 560 U.S. 305, 311 (2010) (reaffirming that foreign official immunity is governed by common law). The Supreme Court has noted that a two-step procedure is used to resolve a foreign state's claim of common law immunity. *Id.* at 311-12. At the first step, "the diplomatic representative of the sovereign could request a 'suggestion of immunity' from the State Department." *Id.* at 311. Generally, "[i]f the request [i]s granted, the district court surrender[s] its jurisdiction." *Id.* at 311. However, "in the absence of recognition of the immunity by the Department of State," a court moves to the second step, where it has "authority to decide for itself whether all the requisites for such immunity exist[ ]." *Id.* The court grants immunity at step two if it determines that "the ground of immunity is one which it is the established policy of the [State Department] to recognize." *Id.* at 312 (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945)).

In *Samantar*, the Supreme Court noted that "the same two-step procedure was typically followed when a foreign official asserted immunity." *Id*. But *Samantar* stands principally for the proposition that the Foreign Sovereign Immunities Act of 1976 does not govern sovereign immunity over individual foreign officials. *Samantar,* 560 U.S. at 308. Emphasizing the narrowness of its holding, the Supreme Court remanded for the district court to consider "in the first instance," "[w]hether petitioner may be entitled to immunity under the common law …." *Id.* at 325–26. On remand, the Fourth Circuit held that the State Department's immunity determination "carrie[d] substantial weight" but was not dispositive. *Yousuf v. Samantar*, 699 F.3d 763, 773 (4th Cir. 2012) (hereinafter "*Yousuf*"). In so holding, the court distinguished between conduct-based immunity that arises from a foreign official's duties, and status-based immunity that arises from a foreign official's status as a head-of-state. *Id*. at 772–73. Regarding the latter, the Fourth Circuit held that a determination from the State Department is likely controlling. But in *Yousuf*, the defendant was not a head-of-state, and therefore the Fourth Circuit engaged in an independent analysis (although giving "substantial weight" to the State Department's suggestion of non-immunity) to determine that the defendant was not entitled to immunity. *Id.* at 777–78.

The Doğans urge us to adopt the Fourth Circuit's approach. But we need not decide the level of deference owed to the State Department's suggestion of immunity in this case, because even if the suggestion of immunity is afforded "substantial weight" (as opposed to absolute deference), based on the record before us we conclude that Barak would still be entitled to immunity. Common-law foreign sovereign immunity extends to individual foreign officials for "acts performed in [their] official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state[.]" Restatement (Second) of Foreign Relations Law § 66(f) (1965). According to the Complaint, Barak was "instructed by the Prime Minister to conduct" the operations. The Complaint further alleged that Barak's "power … to plan, order, and control the IDF operation and troops as Minister of Defense is set out in Israel's Basic Law[.]" The

Complaint's claims for relief state—several times—that Barak's actions were done under "actual or apparent authority, or color of law, of the Israeli Ministry of Defense and the Government of the State of Israel." And if the State Department's SOI is not entitled to absolute deference, we would nonetheless give it considerable weight. We conclude that exercising jurisdiction over Barak in this case would be to enforce a rule of law against the sovereign state of Israel, and that Barak would therefore be entitled to common-law foreign sovereign immunity even under the Doğans' preferred standard (i.e., conducting an independent judicial determination of entitlement to immunity).

III

Next, the Doğans argue that even if Barak is entitled to common law immunity, Congress has abrogated common law foreign official immunity via the TVPA. The TVPA provides:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350, note § 2(a). The Doğans contend that the TVPA's plain language unambiguously imposes liability on any foreign official who engages in extrajudicial killings. Thus, the question is whether Barak's common law immunity is abrogated by the text of the TVPA.

The Supreme Court has held that courts should "proceed on the assumption that common-law principles of ... immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." *Filarsky v. Delia*, 566 U.S. 377, 389 (2012) (alteration incorporated) (*quoting Pulliam v. Allen*, 466 U.S. 522, 529 (1984)). Thus, even where "the statute on its face admits of no immunities," the Court will read it "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley v. Briggs*, 475 U.S. 335, 339 (1986) (*quoting Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)). Here, although the TVPA purports to impose liability on any "individual who, under actual or apparent authority, or color of law, of any foreign nation" engages in torture or an extrajudicial killing, the statute itself does not expressly abrogate any common law immunities.

Our statutory analysis is also guided by the examination of "the language of related or similar statutes." *City & Cty. of S.F. v. United States Dep't of Transp.*, 796 F.3d 993, 998 (9th Cir. 2015). Here, the most helpful analogue in determining whether the TVPA abrogates common law immunities is 42 U.S.C. § 1983. The Doğans agree that "Section 1983 jurisprudence is highly relevant to the Court's analysis of the TVPA." Section 1983, much like the TVPA, imposes liability on "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" deprives another of a constitutional right. Even with this all-encompassing language ("[e]very person"), the Supreme Court has held that, in passing § 1983, Congress did not "abolish wholesale all common-law immunities." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Indeed, the Court in *Pierson* held that, even though the word "person" includes legislators and judges, for example, § 1983 did not abrogate common law legislative or judicial immunity. *Id.* at 554–55. It follows that, to the extent this court relies on § 1983

jurisprudence in analyzing the TVPA, the statute's use of the overinclusive term "individual" does not abrogate the immunity given to foreign officials at common law simply because foreign officials fit within the category "individual."

Given that (1) the TVPA is silent as to whether any common law immunities are abrogated and (2) the term "individual" does not imply abrogation of common law immunities for *all* individuals, we "assum[e] that common-law principles of …immunity were incorporated" into the TVPA. *Filarsky*, 566 U.S. at 389.

Other considerations counsel against construing the TVPA to abrogate common law foreign official immunity. As the district court observed, "[i]f immunity did not extend to officials whose governments acknowledge that their acts were officially authorized, it would open a Pandora's box of liability for foreign military officials." Indeed, "any military operation that results in injury or death could be characterized at the pleading stage as torture or an extra-judicial killing." And the TVPA allows suits not only by U.S. citizens but by "any person." Because the whole point of immunity is to enjoy "an immunity from *suit* rather than a mere defense to *liability*," the Doğans' reading of the TVPA would effectively extinguish the common law doctrine of foreign official immunity. *Compania Mexicana de Aviacion, S.A. v. U.S. Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam) (emphasis added). Under the Doğans' reading, the TVPA would allow foreign officials to be haled into U.S. courts by "any person" with a family member who had been killed abroad in the course of a military operation conducted by a foreign power. The Judiciary, as a result, would be faced with resolving any number of sensitive foreign policy questions which might arise in the context of such lawsuits. It simply cannot be that Congress intended the TVPA to open the door to that sort of litigation.

Nor does Barak's reading of the TVPA render the statute a nullity, as the Doğans contend. The parties agree that Congress expected foreign states would generally disavow conduct that violates the TVPA because no state officially condones such actions. Thus, in the great majority of cases, an official sued under the TVPA would never receive common-law immunity in the first place, thereby making abrogation unnecessary. Barak points to two examples of this, which adequately prove the point. First, in *Hilao v. Marcos*, 25 F.3d 1467 (9th Cir. 1994), plaintiffs brought claims against the estate of former Filipino dictator Ferdinand Marcos, based on allegations of torture and extrajudicial killings. The Filipino government expressly denied that Marcos's conduct had been performed in an official capacity and urged that the lawsuits be allowed to proceed. *Id.* at 1472. Likewise, in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), plaintiffs brought an action against a former Paraguayan police official based on allegations that he was responsible for the death of their son. In discussing the act of state doctrine, the Second Circuit noted that the defendant's conduct had been "wholly unratified by [the Paraguayan] government." In cases like *Hilao* and *Filartiga*, the TVPA would operate to impose liability on foreign officials who engaged in torture or extrajudicial killings. Thus, our holding today does not render the TVPA a nullity.

For the foregoing reasons, we hold that the TVPA does not abrogate foreign official immunity.

IV

The Doğans next urge this court to hold that foreign officials are not immune from suit for violations of *jus cogens* norms. Under the circumstances of this case, we decline to recognize this exception to foreign official immunity.

At least three circuits have considered whether to create an exception to foreign official immunity for *jus cogens* violations. The Doğans urge this court to follow the approach taken by

the Fourth Circuit in *Yousuf* (post-remand from the Supreme Court). 699 F.3d at 777. After the Supreme Court denied Samantar immunity under the FSIA and remanded for consideration of foreign official immunity at common law, the Fourth Circuit held that "officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." *Id.* at 777. The court explained that *jus cogens* violations should be excepted from the doctrine of foreign official immunity because they are, "by definition, acts that are not officially authorized by the Sovereign." *Id.* at 776.

In examining this same question below, the district court found the Second Circuit's opinion in *Matar v. Dichter* more persuasive. 563 F.3d 9 (2d Cir. 2009). In *Matar*, plaintiffs sued the former head of the Israeli Security Agency for his role in an Israel-sanctioned bombing which killed the leader of a terrorist group, but which also incidentally killed the plaintiffs' family members. *Id.* at 10–11. The Israeli official, Avraham Dichter, argued that he enjoyed foreign official immunity. Because *Matar* was decided pre-*Samantar*, the Second Circuit analyzed immunity alternatively under both the FSIA and the common law. The court reiterated that "there is no general *jus cogens* exception to FSIA immunity." *Id.* at 14. And, relying on the State Department's statement of interest in favor of immunity, the court held that Dichter was entitled to common law foreign official immunity. *Id.* at 15 ("The Executive Branch's determination that a foreign [head-of-state] should be immune from suit even where the [head-of-state] is accused of acts that violate *jus cogens* norms is established by a suggestion of immunity.") (*quoting Ye v. Zemin*, 383 F.3d 620, 627 (7th Cir. 2004)).

The Doğans frame their argument as a request that this court adopt the Fourth Circuit's view. But they actually ask this court to go one step further than the Fourth Circuit went in *Yousuf*. In *Yousuf*, the State Department had filed a "suggestion of non-immunity," highlighting the facts that (1) the defendant was "a former official of a state with no currently recognized government to request immunity on his behalf" and (2) he was a U.S. legal permanent resident, enjoying "the protections of U.S. law," and thus "should be subject to the jurisdiction of the courts." *Yousuf*, 699 F.3d at 777. Although the court ultimately held that foreign officials are not immune for *jus cogens* violations, it did not have occasion to consider whether that should be the case where the foreign sovereign has ratified the defendant's conduct and the State Department files a Suggestion of Immunity on his behalf. *Id.* at 776 ("However, as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign.") (*citing Siderman*, 965 F.2d at 718). Thus, the court in *Yousuf* had no occasion to consider whether *jus cogens* violations should be an *exception* to foreign official immunity because, as in the *Marcos* cases, the defendant was never given immunity in the first place. As far as we can tell, no court has ever carved out an exception to foreign official immunity under the circumstances presented here. We also decline to do so.

* * * *

3. *France.com v. The French Republic*

On December 4, 2019 the United States filed a suggestion of immunity on behalf of French Foreign Minister Jean-Yves Le Drian. *France.com v. The French Republic, et al.*, No. 18-cv-00460 (E.D. Va.). The district court issued an order on December 6, deferring to the U.S. suggestion of immunity and dismissing the claims as to Le Drian. The suggestion of immunity is excerpted below. The suggestion of immunity, letter from

Marik A. String ("Exhibit 1"), and the court's order are available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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* * * *

The Office of the Legal Adviser of the Department of State has informed the Department of Justice that the Embassy of France has formally requested the Government of the United States to inform the Court that Foreign Minister Le Drian is immune from this lawsuit. The Office of the Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of Foreign Minister Le Drian as a sitting foreign minister from the jurisdiction of the United States District Court in this suit." Letter from Marik String to Joseph H. Hunt (copy attached as Exhibit 1).

3. The immunity of foreign states and foreign officials from suit in our courts has different sources. For many years, such immunity was determined exclusively by the Executive Branch, and courts deferred completely to the Executive's foreign sovereign immunity determinations. …

4. As the Supreme Court has explained, however, Congress has not similarly codified standards governing the immunity of foreign officials from suit in our courts. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) … Instead, when it codified the principles governing the immunity of foreign states, Congress left in place the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. *See id.* at 323 …Thus, the Executive Branch retains its historic authority to determine a foreign official's immunity from suit, including the immunity of foreign heads of state, heads of government, and foreign ministers. *See id.* at 311 & n.6 (noting the Executive Branch's role in determining head of state immunity).

5. The doctrine of head of state immunity is well established in customary international law "pursuant to which an incumbent 'head of state is immune from the jurisdiction of a foreign state's courts.'" *Yousuf v. Samantar*, 699 F.3d 763, 769 (4th Cir. 2012) (quoting *In re Grand Jury Proceedings*, 817 F.2d 1108, 1110 (4th Cir. 1987)); *see also* SATOW'S DIPLOMATIC PRACTICE 9 (Lord Gore-Booth ed., 5th ed. 1979). Although the doctrine is referred to as "head of state immunity," it applies to heads of government and foreign ministers as well. *See Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) (noting that *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), "generally viewed as the source of our foreign sovereign immunity jurisprudence," found that "members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign"); *accord* Restatement (Second) of Foreign Relations Law §§ 65, 66 (1965) (noting that the immunity of a foreign state is enjoyed by heads of state, heads of government, and foreign ministers). Thus, U.S. courts, beginning with the Supreme Court in *Schooner Exchange*, have specifically recognized the immunity of sitting foreign ministers based on their status. *See, e.g.*, *Force v. Sein*, No. 15-cv-7772-LGS, 2016 WL 1261139, *1 (S.D.N.Y. Mar. 20, 2016) (recognizing application of head of state immunity to Myanmar's foreign minister); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 296–97 (S.D.N.Y. 2001) (recognizing application of head of state immunity to Zimbabwe's foreign minister), *rev'd in part on other grounds*, *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

6. In the United States, head-of-state immunity determinations are made by the Department of State, exercising the President's authority in the field of foreign affairs. The Supreme Court has held that the courts of the United States are bound by Suggestions of Immunity submitted by the Executive Branch. *See Hoffman*, 324 U.S. at 35–36; *Ex parte Republic of Peru*, 318 U.S. 578, 588–89 (1943). In *Ex parte Republic of Peru*, the Supreme Court decided, in the context of pre-FSIA foreign state immunity, that "[u]pon recognition and allowance of the [immunity] claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the [matter] and remit the libelant to the relief obtainable through diplomatic negotiations." 318 U.S. at 588; *see also id.* at 589 ("The certification and the request [of immunity] …must be accepted by the courts as a conclusive determination by the political arm of the Government."). Such deference to the Executive Branch's determinations of foreign state immunity is compelled by the separation of powers. *See, e.g.*, *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." (citation omitted)).

7. For the same reason, courts have also routinely deferred to the Executive Branch's immunity determinations concerning sitting heads of state, heads of government, and foreign ministers. *See, e.g.*, *Samantar*, 699 F.3d at 772 ("[C]onsistent with the Executive's constitutionally delegated powers and the historical practice of the courts, we conclude that the State Department's pronouncement as to head-of-state immunity is entitled to absolute deference."); *Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) ("We must accept the United States' suggestion that a foreign head of state is immune from suit—even for acts committed prior to assuming office—as a conclusive determination by the political arm of the Government that the continued [exercise of jurisdiction] interferes with the proper conduct of our foreign relations." (internal quotations marks omitted)); *Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) ("The obligation of the Judicial Branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff."); *Miango v. Democratic Republic of Congo*, No. 15-1265-ABJ, 2019 WL 2191806, *2 (D.D.C. Jan. 19, 2019) ("Courts are bound by Suggestions of Immunity submitted by the Executive Branch." (citations omitted)).

8. When the Executive Branch makes a determination that a sitting head of state, head of government, or foreign minister is immune from suit, judicial deference to that determination is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution. *See Ye*, 383 F.3d at 626. Judicial deference to the Executive Branch in these matters, the Seventh Circuit noted, is "motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved." *Id.*; *see also Ex parte Peru*, 318 U.S. at 588; *Spacil*, 489 F.2d at 619). As noted above, in no case has a court subjected a sitting head of state, head of government, or foreign minister to suit after the Executive Branch has determined that the head of state, head of government, or foreign minister is immune.

9. Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a foreign minister's status as the current holder of that office. In this case, because the Executive Branch has determined that Foreign Minister Le Drian, as the sitting Minister of Foreign Affairs of the French Republic, enjoys head of state immunity from

the jurisdiction of U.S. courts in light of his current status, Foreign Minister Le Drian is entitled to immunity from the jurisdiction of this Court over this suit.

* * * *

C. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Determinations under the Foreign Missions Act

a. Requirement for certain PRC military personnel in the United States to provide advance notice of domestic travel

On October 21, 2019, the State Department published a determination pursuant to the Foreign Missions Act, 22 U.S.C. § 4301, *et seq.*, regarding travel by military personnel assigned to the Embassy of the People's Republic of China ("PRC") or its consular posts in the United States. 84 Fed. Reg. 56,280 (Oct. 21, 2019). The Director of the Office of Foreign Missions determined it was necessary

> to require all Chinese military personnel assigned to the Embassy of the People's Republic of China or its consular posts in the United States, including PRC military personnel temporarily working in the United States, to provide prior notification of their plans to travel for either official or personal purposes beyond a 25 miles radius of their post of assignment or destination city if present in the United States on a short-term assignment, regardless of their mode of transportation or destination.

Id.

b. Requirement of advance notice for certain meetings with and travel by PRC personnel in the United States

Also on October 21, 2019, the State Department published a designation and determination pursuant to the Foreign Missions Act regarding official meetings planned with representatives of state, local, and municipal governments in the United States and its territories involving members of the PRC's foreign missions in the United States, as well as official travel by PRC foreign mission members to educational and research institutions. 84 Fed. Reg. 56,281 (Oct. 21, 2019). The Director of the Office of Foreign Missions determined that the official meetings described above constitute a "benefit under the Act," and that it was necessary

> to require all Chinese members of the People's Republic of China's foreign missions in the United States, including its representatives temporarily working in the United States, and accompanying Chinese dependents and members of their households to submit prior notification to the Office of Foreign Missions of:

1. All official meetings with representatives of state, local, and municipal governments in the United States and its territories;

2. All official visits to educational institutions (public or private) in the United States and its territories; and

3. All official visits to research institutions (public or private), including national laboratories, in the United States and its territories.

Id.

On October 16, 2019, the State Department held a briefing explaining the action being taken toward Chinese diplomats with respect to their meetings within the United States. The briefing is excerpted below and available at https://www.state.gov/briefing-with-senior-state-department-officials-on-reciprocal-action-regarding-chinese-diplomats-in-the-united-states/.

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* * * *

[S]tarting from today, the State Department is going to be requiring that all of the PRC foreign missions—their embassy and their various consulates around the United States—will have to notify the Department of State in advance of official meetings with state officials, official meetings with local and municipal officials, official visits to educational institutions, and official visits to research institutions.

Now, I want to be very, very clear on this point. We absolutely value educational and cultural exchange. We absolutely encourage state and local officials, as well as educational and research institutions, to meet with and host foreign officials as they deem appropriate. We are not requiring that any Chinese official get permission from the State Department to have any of these sorts of meetings. We're merely asking that they notify us in advance of such meetings—which, again, that's different from what happens many times in China, where our diplomats are forced to seek permission and are often denied such permission.

… State, local, educational officials—none of them have to take any actions whatsoever. The full onus will fall on the Chinese consulates and embassy to notify us in advance of meetings with these stakeholders.

…[T]his action is a response to what the PRC government does to limit the interactions our diplomats can have in China with Chinese stakeholders. Our goal is to get the Chinese authorities to allow our diplomats in China to engage with provincial and local leaders, Chinese universities, and other educational and research institutes freely, the same way that the Chinese diplomats are able to do here.

* * * *

2. Enhanced Consular Immunities

As discussed in *Digest 2016* at 463, Section 501 of the Department of State Authorities Act, Fiscal Year 2017, Pub. L. No. 114-323 (codified at 22 U.S.C. § 254(c)), amended the Diplomatic Relations Act to include permanent authority for the Secretary of State to

extend enhanced privileges and immunities to consular posts and their personnel on the basis of reciprocity. See also *Digest 2015* at 436-37.

The "Agreement Between the United States of America and the Government of the Republic of Kazakhstan Regarding Consular Privileges and Immunities," was signed on May 3, 2019. Under that agreement the United States and Kazakhstan reciprocally extend enhanced protections for consular posts, consular officers and consular employees and their family members. The full text of the Agreement is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

3. Attempts to Effect Service by Mail to Mexican Embassy

On November 22, 2019, the United States submitted a statement of interest regarding multiple cases in family court in Delaware in which legal documents were mailed to the Mexican Embassy in Washington, D.C. to attempt to effect service upon private Mexican nationals or residents. The United States previously advised Delaware courts in 2016 of the impropriety of this form of service under the Vienna Convention on Diplomatic Relations ("VCDR"). See *Digest 2016* at 420-23. The 2019 statement urges the Delaware courts to recognize the impropriety of service via the embassy and require that service be effected in an alternate manner. Excerpts follow from the U.S. statement of interest, which is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

The Mexican embassy is inviolable and, as such, may not serve as an agent for service of process. First, the VCDR provides, in relevant part, that "the premises of [a] mission shall be inviolable." 23 U.S.T. 3227, 500 U.N.T.S. 95, art. 22. Although the treaty does not define "inviolable," courts have held that this principle must be construed broadly, and is violated by service of process—whether on the inviolable entity for itself or as an agent for the foreign government or a private, non-immune party. *See Tachiona v. United States,* 386 F.3d 205, 222, 224 (2d Cir. 2004) (holding that the VCDR precludes service of process on inviolable persons entitled to diplomatic immunity where such persons are served on behalf of a non-immune, private entity); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) ("[S]ervice through an embassy is expressly banned both by an international treaty to which he United States is a party and by U.S. statutory law."); *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 979-81 (D.C. Cir. 1965) (holding that the inviolability principle precludes service of process on a diplomat as agent of a foreign government); *767 Third Ave. Assocs. v. Permanent Mission of Republic of Zaire to UN*, 988 F.2d 295, 301 (2d Cir. 1993) (approvingly citing the view that "process servers may not even serve papers without entering at the door of a mission because that would 'constitute an infringement of the respect due to the mission'"); James R. Crawford, *Brownlie's Principles of Public Int'l Law* 403 (8th ed.2012) ("[W]rits may not be served, even by post, within the premises of a mission ...").

Courts in the United States have held that this principle prevents service on the embassy as an agent for a private, non-immune party. For example, the United States Court of Appeals for

the Second Circuit rejected an attempt to serve process on the President of Zimbabwe and the Zimbabwean Foreign Minister as agents of a private political party while they visited New York City as delegates to the United Nations Millennium Summit. *Tachiona,* 386 F.3d at 209. …

In these cases, just as in *Tachiona,* service on a private party has been attempted by way of an entity protected by inviolability pursuant to the VCDR. The inviolability of the embassy should be as broadly construed here, as it was in *Tachiona,* and the Court should recognize that the VDCR prohibits service of process in this manner.

Second, the legislative history of the Foreign Sovereign Immunities Act (the "FSIA"**),** which governs suits against foreign governments, demonstrates that Congress explicitly recognizes that service via an embassy would be at odds with the VCDR. The House Report for the FSIA states that a "second means [of service], of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 [of the FSIA) precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations .... Service on an embassy by mail would be precluded under this bill." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.C.C.A.N. 6604, 6625. The House Report also approvingly references cases in which courts recognized the impropriety of service on inviolable diplomatic representatives. *See id.* at 6620 ("It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd. v. Moore,* 345 F.2d 978 (D.C. Cir. I965), or upon consular representatives, *Oster v. Dominion of Canada,* 144 F. Supp. 746 (N.D.N.Y. 1956), *aff'd* 238 F.2d 400 (2d Cir. 1956).").

Third, the United States has strong reciprocity interests at stake. Permitting courts in the United States to treat foreign embassies as a forwarding agent for purposes of litigation that does not involve the foreign government itself would result in the diversion of embassy resources, such as the time and effort needed to determine the significance of a transmission from the court and to assess whether or how to respond. Indeed, the Mexican Embassy has been served in almost half-a-dozen cases from Delaware state courts alone in less than six months, demonstrating the significant impact that allowing such service would have. Consequently, the United States has long maintained that its embassies abroad are not agents for service of process. When a foreign court or litigant purports to serve a U.S. resident or national through an embassy, the embassy sends a diplomatic note to the foreign government indicating that the embassy is not an agent for service of process and therefore that service on the individual has not been effected, just as the Mexican Embassy has done in these cases. If the VCDR were interpreted to permit courts in the United States to serve papers through an embassy, it could make United States embassies abroad vulnerable to similar treatment in foreign courts, contrary to the United States' consistently asserted view of the law. *See, e.g., Medellin v. Texas,* 552 U.S. 491, 524 (2008) (noting that the United States' interests, including its interests in "ensuring the reciprocal observance of the Vienna Convention [on Consular Relations]," are "plainly compelling").

* * * *

4. Vienna Convention on Diplomatic Relations ("VCDR")

a. Broidy v. Benomar

On October 9, 2019, the United States filed an amicus brief at the invitation of the U.S. Court of Appeals for the Second Circuit in *Broidy Capital Management LLC & Elliott Broidy v. Jamal Benomar*, No. 19-236 (2d. Cir.). Plaintiffs alleged that Jamal Benomar—a member of Morocco's Mission to the UN—schemed with the State of Qatar to disseminate documents, allegedly obtained through hacking into plaintiffs' computer system, in order to discredit plaintiffs in the media. The district court dismissed the claims holding that Benomar was immune. The issue in the case was whether an exception to the comprehensive immunity from civil jurisdiction enjoyed by individuals with diplomatic agent status applied, specifically for "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." Excerpts follow (with record cites and footnotes omitted) from the U.S. brief supporting Benomar's claim of diplomatic immunity under the UN Headquarters Agreement, under which members of permanent missions to the United Nations with a diplomatic title are accorded the same immunities as apply to diplomatic agents under the VCDR. The brief is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

I. The defendant is entitled to diplomatic immunity

A. The Vienna Convention's commercial-activities exception does not apply to conduct before the diplomat obtained status-based immunity

To interpret a treaty such as the Vienna Convention, a court "begin[s] with the text of the treaty and the context in which the written words are used." *Tachiona v. United States*, 386 F.3d 205, 216 (2d Cir. 2004). But treaties "are construed more liberally than private agreements, and to ascertain their meaning [a court] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Id.*

1. The Vienna Convention provides that a diplomat "shall * * * enjoy immunity from its civil and administrative jurisdiction," subject to limited exceptions. 23 U.S.T. at 3240 (Art. 31(1)); see id. at 3245 ("Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed." (Art. 39(1)). As the text of that provision makes clear, diplomatic immunity under the Vienna Convention is status-based. Unless an exception to immunity applies, the diplomat "shall" enjoy immunity from a receiving State's "civil and administrative jurisdiction." An individual with diplomatic status shall enjoy immunity not only with respect to actions based on conduct that occurred during the period in which the accredited diplomat serves in a diplomatic role, but also with respect to suits based on conduct that occurred before the individual became a diplomat. As a result, "diplomatic immunity flowing from that status serves as a defense to suits already commenced" for conduct preceding the diplomat's service. *Abdulaziz*, 741 F.2d at 1329-30; see *United States v.*

Khobragade, 15 F. Supp. 3d 383, 387 (S.D.N.Y. 2014) ("[D]iplomatic immunity acquired during the pendency of proceedings destroys jurisdiction even if the suit was validly commenced before immunity applied."); *Fun v. Pulgar*, 993 F. Supp. 2d 470, 474 (D.N.J. 2014) (similar); *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 799 (N.D. Cal. 1987) (similar). As one leading commentator has explained, "if the defendant becomes entitled to immunity he may raise it as a bar to proceedings relating to prior events or to proceedings already instituted against him, and the courts must discontinue any such proceedings if they accept his entitlement." Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 257 (4th ed. 2016).

Conversely, "diplomats lose much of their immunity following the termination of their diplomatic status." *Swarna*, 622 F.3d at 133. Under Article 39(2) of the Vienna Convention, "[w]hen the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so." 23 U.S.T. at 3245. And "once a diplomat becomes a 'former' diplomat, he or she is not immune from suit for prior acts unless those acts were performed 'in the exercise of [the former diplomat's] functions as a member of the mission.'" *Swarna*, 622 F.3d at 134 (quoting Art. 39(2)).

Unlike status-based immunity that applies to conduct preceding the diplomat's tenure, the Vienna Convention's commercial-activities exception is more circumscribed in its application, which depends on when the alleged conduct occurred. That exception applies narrowly to "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." 23 U.S.T. at 3241 (Art. 31(1)(c)) (emphasis added). Before obtaining diplomatic status, an individual is not a "diplomatic agent" with "official functions." The plain text of that provision thus demonstrates that it applies only to conduct undertaken during the diplomat's service. Unlike immunity, the exception does not apply for acts that predate a diplomat's accreditation. And unless another exception applies, the diplomat "shall" enjoy immunity from a receiving State's "civil and administrative jurisdiction."

This Court has previously resisted arguments to interpret Article 31(1)'s exceptions broadly. In *Tachiona*, the Court held that any professional or commercial activities that occurred outside "the receiving State" did not satisfy the commercial-activities exception even if the defendant engaged in other conduct in the receiving State. 386 F.3d at 220. A contrary ruling would have ignored the circumscribed textual scope of the exception. See also *Baoanan v. Baja*, 627 F. Supp. 2d 155, 161 (S.D.N.Y. 2009) (describing Article 31(1)'s exceptions as "narrow"). Although not directly on point, Tachiona is instructive because it demonstrates that the Court will not construe Article 31(1)'s commercial-activities exception broadly to ignore its plain text and diminish the diplomatic protections provided by the Vienna Convention.

2. The context of the Vienna Convention confirms that its commercial-activities exception does not apply where the alleged conduct occurred before the defendant obtained diplomatic status. The only other provision in the Vienna Convention that refers to "professional or commercial activity" is Article 42, which provides that "[a] diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity." 23 U.S.T. at 3247. That reference clearly applies only to conduct by the diplomatic agent during his tenure as such.

Article 42 and Article 31(1)(c) thus work in tandem. Article 42 sets forth the prohibition against diplomats engaging in professional or commercial activities while Article 31(1) lifts immunity for violations of that prohibition. As the United States has previously explained,

"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." Statement of Interest of the United States at 5, *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007) (Dkt. No. 23); see B.S. Murty, The International Law of Diplomacy: The Diplomatic Instrument and World Public Order 356 (1989) ("'Professional or commercial' should be interpreted alike in Art. 31(1) and Art. 42"); Jonathan Brown, Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations, 37 Int'l & Comp. L. Q. 53, 76 (1988) ("Diplomatic agents have a duty under Article 42 not to engage in any such activities but, in the event that they do, they could be sued in respect of them."). In other words, "Article 31(1)(c) was intended to reach those rare instances where a diplomatic agent ignores the restraints of his office and, contrary to Article 42, engages in such activity in the receiving State." *Tabion v. Mufti*, 877 F. Supp. 285, 291 (E.D. Va. 1995), aff'd, 73 F.3d 535 (4th Cir. 1996).

Article 42's prohibition against diplomats engaging in professional or commercial activity for personal profit reaffirms that the commercial-activities exception in Article 31(1) likewise refers only to actions taken while the individual is a diplomatic agent. If the two provisions did not work in tandem, a diplomat could be subject to litigation concerning conduct that predates the diplomat's service. But that litigation would harm the sending State by interfering with the diplomat's service even though he is in full compliance with Article 42.

3. The Vienna Convention's negotiating and drafting history removes any doubt that the commercial-activities exception may be triggered only by conduct the diplomat engages in while he serves in that capacity. During that negotiating history, the scope and necessity of an exception to immunity for commercial activity performed concurrently with a diplomat's assignment was extensively debated. The discussion of the exception had nothing to do with conduct predating the diplomat's service.

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 draft for the Codification of the Law relating to Diplomatic Intercourse and Immunities proposed by the ILC's Special Rapporteur in 1955 contained no commercial-activities exception. During a 1957 ILC meeting, however, leading international law scholar and practitioner Alfred Verdross proposed an amendment providing an exception to immunity for an "act relating to a professional activity outside [the diplomatic agent's] official duties." 1957 U.N.Y.B. Int'l L. Comm'n 97. Verdross based the amendment on two sources: a 1929 resolution of the Institute of International Law, which provided that "[i]mmunity from jurisdiction may not be invoked by a diplomatic agent for acts relating to a professional activity outside his official duties," and the 1932 Harvard Draft Convention on Diplomatic Privileges and Immunities, which stated that "[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 connection with that other business or profession." *Id*. Neither Verdross's amendment nor its source material contemplated extending the exception beyond a diplomat whose activities fall outside official duties as a diplomat.

Discussion of Verdross's proposal focused on the actions of diplomats taken while in service. One ILC member "opposed the amendment as unnecessary" because "[d]iplomatic agents practically never engaged in any professional activity outside their official duties." 1957 U.N.Y.B. Int'l L. Comm'n 97 (comment of François). "If they did, and the receiving State objected, it could easily put an end to such activities by declaring the agent persona non grata."

Id. A supporter of the amendment contended that "[t]he dignity itself of a diplomatic agent required that he should not engage in activities outside his official duties." *Id*. at 98 (comment of El-Erian). And the Special Rapporteur expressed his view that, "[t]o engage in a professional activity outside [the diplomat's] official duties would impair the dignity not merely of the diplomatic agent himself but of the whole mission." *Id*. (comment of Sandström). Indeed, the Special Rapporteur considered "the whole idea of a diplomatic agent engaging in any professional activity outside his official duties as repugnant." *Id*. (emphasis added). The discussion did not address prior commercial activities undertaken before a diplomat begins service, and instead centered on diplomats who act in derogation of their diplomatic status.

When the United States commented that the proposed commercial-activities exception went beyond existing international law, the Special Rapporteur responded by describing the exception in terms of activity that was inconsistent with diplomatic status: "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." Diplomatic Intercourse and Immunities: Summary of Observations Received from Governments and Conclusions of the Special Rapporteur, U.N. Doc. A/CN.4/116, at 55-56 (emphasis added). No mention was made of the exception applying to abrogate immunity based on conduct that occurred before any diplomatic status should have "imposed" any "restraints" on the individual.

The ILC's final draft addressing "[i]mmunity from jurisdiction" provided an exception for "[a]n action relating to a professional or commercial activity exercised by the diplomatic agent in the receiving State, and outside his official functions." 1958 U.N.Y.B. Int'l L. Comm'n 98. The Commentary to the provision reinforced that the exception is limited to acts inconsistent with the diplomatic agent's official functions. The Commentary explained that the exception "arises in the case of proceedings relating to a professional or commercial activity exercised by the diplomatic agent outside his official functions." *Id*. It also noted that, although "activities of these kinds are normally wholly inconsistent with the position of a diplomatic agent, and that one possible consequence of his engaging in them might be that he would be declared persona non grata," the exception was necessary because "such cases may occur and should be provided for, and if they do occur the persons with whom the diplomatic agent has had commercial or professional relations cannot be deprived of their ordinary remedies." *Id*.

The ILC's draft convention was considered at the United Nations Conference on Diplomatic Intercourse and Immunities in 1961. The Department of State's instructions to the United States delegation at that Conference expressed the following understanding of the exception:

> Although states have generally accorded complete immunity to diplomatic agents from criminal jurisdiction, there has been a reluctance in some countries to accord complete immunity from civil jurisdiction particularly where diplomats engage in commercial or professional activities which are unrelated to their official functions. *While American diplomatic officers are forbidden to engage in such activities in the country of their assignment, other states have not all been so inclined to restrict the activities of their diplomatic agents.* Subparagraph (c) of paragraph 1 would enable persons in the receiving State who have professional and business dealings of a non-diplomatic character with a diplomatic agent to have the same recourse against him in the courts as they would have against a non-diplomatic person engaging in similar activities.

Exemption From Judicial Process, 7 Dig. of Int'l L. 406 (1970) (emphasis added). The United States' contemporaneous view thus interpreted the commercial-activities exception to focus on the kind of for-profit activity in which diplomats should not be engaging while serving as a diplomatic agent of the sending State.

During the debate at the Diplomatic Conference, the delegate from Colombia proposed what would become Article 42 of the Vienna Convention, which as noted above provides that "[a] diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity." 23 U.S.T. at 3247; see 1 U.N. Conference on Diplomatic Intercourse and Immunities: Official Records 211-13 (1962), U.N. Doc. A. CONF.20/14. The Conference delegates saw Article 31(1)(c)'s commercial-activities exception and Article 42's ban on commercial activities as closely intertwined. The delegates from Colombia and Italy even proposed deleting the commercial-activities exception in Article 31(1)(c) as unnecessary in view of the prohibition in Article 42. The Conference voted, however, to retain the exception because, among other reasons, there could be no assurance that diplomatic agents would not engage in prohibited activities. See *id*. at 19-21.

Because Articles 42 and 31(1)(c) are so closely tethered to each other, U.S. government officials "have consistently interpreted the [commercial-activities exception] narrowly, advising Congress during its consideration of the Vienna Convention in 1965 and passage of the Diplomatic Relations Act in 1978 that the 'commercial activity' exception was 'minor' and 'probably meaningless' because it merely exposed diplomats to litigation based upon activity expressly prohibited in Article 42." *Tabion v. Mufti*, 73 F.3d 535, 538 n.6 (4th Cir. 1996) (emphasis added); see Diplomatic Immunity: Hearings on S. 476, S. 477, S. 478, S. 1256, S. 1257 and H.R. 7819 Before the Subcomm. on Citizens and S'holders Rights and Remedies of the S. Comm. on the Judiciary, 95th Cong. 32 (1978) (statement of Bruno Ristau, Chief, Foreign Litigation Unit, U.S. Dep't of Justice) ("The [commercial-activities] exception * * * is probably meaningless, because another provision of the convention, article 42, prohibits them from carrying on any commercial activity for personal profit while they are diplomatic agents."). Here again, as with every stage of the negotiating and drafting history, the discussion of the commercial-activities exception involved the specific question of a diplomat who engages in professional or commercial activities for profit while serving as a diplomat. This Court should not adopt an interpretation of the commercial-activities exception that is "contrary to the drafting history." *Swarna*, 622 F.3d at 137 (examining the drafting history to interpret Vienna Convention Article 39).

4. As described above, the primary purpose of diplomatic immunity under the Vienna Convention "is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions." 23 U.S.T. at 3230 (pmbl.). That purpose dovetails with the purpose of Article 31(1)(c), which lifts immunity against a diplomat whose conduct does not comply with Article 42 in violation of his duty to serve as an agent of the sending State rather than as an individual pursuing personal profit. The efficient performance of a diplomatic mission's functions could be undermined if a diplomat who has acted consistently with Article 42 nonetheless may be sued for conduct that predates the individual's status as a diplomatic agent. The purpose of diplomatic immunity thus supports what the text, context, and history of the Vienna Convention make clear: The commercial-activities exception does not allow suit against a diplomat based on alleged conduct predating the individual obtaining diplomatic status.

B. Benomar's alleged conduct occurred before he obtained status-based immunity

According to the record in this case, the Moroccan Permanent Mission to the United Nations notified the U.S. Mission to the United Nations on September 21, 2018 that Benomar enjoys the title of Minister Plenipotentiary entitled to the privileges and immunities of diplomats under Article 31(1) of the Vienna Convention. … The State Department thereafter recognized his diplomatic status and issued him appropriate credentials. And the State Department's certification of an individual as a diplomat "is conclusive evidence as to the diplomatic status of [the] individual." *United States v. Al-Hamdi*, 356 F.3d 564, 573 (4th Cir. 2004); *e.g.*, *Abdulaziz*, 741 F.2d at 1329, 1331 (noting that "courts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status," and that "once the United States Department of State has regularly certified a visitor to this country as having diplomatic status, the courts are bound to accept that determination"); *In re Baiz*, 135 U.S. 403, 421 (1890) (noting that "the certificate of the secretary of state * * * is the best evidence to prove the diplomatic character of a person"). Benomar is therefore entitled under Article 31 of the Vienna Convention to status-based immunity from the civil jurisdiction of U.S. courts, unless an exception applies.

The commercial-activities exception to immunity does not apply because none of the alleged conduct in the operative complaint (or the proposed amended complaint) occurred after September 21, 2018—the earliest date on which Benomar could have received status-based immunity. The complaint asserts in passing that Benomar's activities "continu[ed]" to the present. But such conclusory allegations plainly fail to demonstrate with specificity that this action relates to any outside professional or commercial activity Benomar engaged in after September 21. *E.g.*, *Gomes v. ANGOP, Angl. Press Agency*, No. 11-0580, 2012 WL 3637453, at *9 (E.D.N.Y. Aug. 22, 2012) (rejecting "wholly conclusory" allegation that a diplomat engaged in money laundering sufficient to trigger Article 31(1)'s commercial-activities exception); *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002) ("bald assertions" insufficient to defeat a motion to dismiss against a foreign sovereign based on immunity).

Moreover, it does not matter that Benomar claimed to be immune because of his purported diplomatic status during the time period in which, according to the complaint, he allegedly engaged in wrongdoing. And although Benomar was recognized by the United Nations and the State Department in August 2018 as a "Special Advisor" at the Moroccan Permanent Mission to the United Nations that entitled him to some privileges and immunities apart from the Vienna Convention, he did not have status as a diplomatic agent. As plaintiffs stressed throughout this litigation, U.S. recognition is conclusive, but the United States did not recognize Benomar's diplomatic-agent status until September 21, 2018 at the earliest. No person or government may "unilaterally assert diplomatic immunity." *United States v. Lumumba*, 741 F.2d 12, 15 (2d Cir. 1984); see *United States v. Kuznetsov*, 442 F. Supp. 2d 102, 106 (S.D.N.Y. 2006) (rejecting the defendant's argument that he qualified as a diplomatic agent because the United States did not recognize him as such). Because Benomar did not have recognized diplomatic status during the period when the alleged conduct occurred, the commercial-activities exception cannot apply.

C. Other factors may be relevant to whether the operative complaint alleges conduct sufficient to satisfy the commercial-activities exception

The commercial-activities exception is inapplicable here because the alleged conduct predated Benomar's status as a recognized diplomat. Accordingly, this Court need not address

whether the same conduct would constitute a "commercial activity" if an individual engaged in it while serving as a recognized diplomat. Nonetheless, in light of the Court's invitation, the United States provides the following views on that question.

1. The commercial-activities exception "relates only to trade or business activity engaged in for personal profit." *Tabion*, 73 F.3d at 537. Put differently, "diplomats are engaged in 'professional or commercial' activity within the meaning of the [Vienna] Convention when they engage in a business, trade or profession for profit." U.S. Statement of Interest, supra, at 14…

Plaintiffs do not dispute that conduct must be engaged in for the diplomat's profit to qualify for the commercial-activities exception. But the district court found that plaintiffs offered only "bald allegations that Benomar participated in (and was paid millions of dollars for) participating in the scheme to illegally hack plaintiffs' computers and distribute the results to the press." In the absence of any actual evidence that Qatar paid Benomar, the court found that "plaintiffs have not established by a preponderance of the evidence that Benomar was involved in the activity or did it for money."

Record evidence is consistent with those findings. Benomar stated under penalty of perjury that he "do[es] not engage in any systematic trade or business activity within the United States." He also declared under penalty of perjury that he has "received no remuneration from the state of Qatar for [his] foreign policy advice regarding the resolution of the conflict with its neighbours." Even absent that evidence, however, plaintiffs failed to demonstrate by a preponderance of the evidence that Benomar engaged in any professional or commercial activity for profit. As the district court explained, "[t]he only evidence [plaintiffs] provided was a few lines of a deposition transcript in which Joseph Allaham states he is owed $5- to $10 million by Qatar and was thinking of suing Benomar over it because he could not get a straight answer about it." "[T]his inscrutable excerpt does not show that Benomar was paid anything, let alone that he was paid for participating in the hacking conspiracy, or even that Allaham was; nor does it show that Benomar was paid or agreed to pay anyone." …

2. Had the plaintiffs shown that Benomar was paid for the conduct alleged in the complaint, it is still not clear that the commercial-activities exception would apply to the factual allegations in this case. As explained above, the Court need not address that question here. If it does, the United States respectfully suggests considering the following points.

First, even if a defendant is paid for his conduct, that circumstance does not by itself compel the conclusion that the activity is professional or commercial; for-profit conduct is a necessary but not sufficient element of the commercial-activities exception. A critical factor in this analysis is the nature of the activities and whether those activities are "continuous" and involve "a business, trade or profession for profit." U.S. Statement of Interest, supra, at 9, 14, 20 (emphasis added).

Second, there are circumstances, particularly at a country's mission to international organizations, in which members of different missions collaborate closely to advance a shared objective. A member of one mission might, as part of his official functions, advise another State on how to advance that State's objectives, including by providing technical or other assistance. The United States would have significant concerns if a foreign State permitted a civil case against a U.S. diplomat serving at a U.S. Embassy to proceed for acts taken on behalf of the United States merely because another State benefited from or was involved in those acts. And that would be true irrespective of whether the foreign State agreed with the appropriateness of the conduct. The presence or absence of diplomatic immunity does not turn on "the propriety of

[a sovereign's] political conduct, with the attendant risks of embarrassment at the highest diplomatic levels." *Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971).

Assuming, contrary to this record, that Benomar had been a diplomatic agent since 2017, Benomar has indicated that any actions he took on behalf of a different State were done with, at a minimum, Morocco's acquiescence. Although Morocco has not provided a statement as to whether Benomar's alleged actions were performed in the course of his official functions, Benomar has indicated that his conduct fell within his diplomatic responsibilities. Benomar declared that he provided "foreign policy advice to a number of regional actors, including Qatar, regarding how best to achieve a peaceful resolution to these conflicts and the steps [he] believed were necessary not only to resolve the blockade and bring an end to the war in Yemen, but, more generally, how to reconcile differences among the states so that the region might enjoy a greater measure of stability and harmony." Benomar also stated that he "maintained contact with all the main Yemeni political actors and advised a number of regional and international actors, at their request, and in close consultation and cooperation with the government of Morocco." *Id.* (emphasis added). And he declared that his "communications to and with representatives of Qatar are consistent with [his] diplomatic responsibilities to Morocco," and "are intended to further the interests of Morocco."

Third, even seemingly commercial activity may be diplomatic when it is done at the behest of the sending State. There are circumstances in which "there may sometimes be difficulties in determining the limits of diplomatic functions and the boundaries between diplomatic and commercial" functions. *Denza*, supra, at 254. But "[a] diplomat who is instructed to undertake an activity, such as export promotion or assistance to businessmen, which could be argued to be commercial, * * * is acting within his official functions and should be entitled without question to personal diplomatic immunity." *Id.*

The United States offers this discussion so that the Court has a more complete picture of the narrow scope of the commercial-activities exception even though applying these general principles to an individual who was not recognized by the United States as a diplomat is difficult because the principles all contemplate that the alleged tortfeasor engaged in the acts as a diplomat. If the Court were to address these issues, it should make clear that, regardless of how it rules in this particular case, "professional or commercial activity" under Article 31(1)(c) should be interpreted narrowly and "official functions" should be interpreted broadly so that even arguably professional or commercial activity does not subject a defendant to suit where the defendant engaged in the conduct at the instruction of the sending State.

II. This Court need not address the appropriate allocation of the burden of proof for asserting an exception to diplomatic immunity, but if it does address the issue it should rule that the plaintiff carries the burden

This Court also need not address who bears the burden to prove jurisdiction in a case involving diplomatic immunity from suit. The commercial-activities exception has no bearing where, as here, the conduct occurred before the diplomat obtained immunity. Alternatively, plaintiffs' threadbare allegations about Benomar engaging in any activity for profit could not satisfy any burden to establish an exception based on commercial activities. Against that backdrop, regardless of who carries the burden of production and persuasion, Benomar is entitled to immunity.

If this Court were to address the issue, however, it should hold that once a diplomat's status is demonstrated, a plaintiff in a suit against a diplomat carries the burden to establish subject-matter jurisdiction by establishing, through a preponderance of the evidence, that an

exception to immunity applies. *E.g.*, *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001) (adopting a similar standard on a motion to dismiss for lack of subject-matter jurisdiction on the basis of sovereign immunity); see also S. Rep. No. 95-958, at 5 (1978) (noting that a prior version of the bill that would be enacted as the Diplomatic Relations Act of 1978 had been revised because that version "might be read to impose on the courts a new special motion procedure in immunity cases"). Under the ordinary standard for subject-matter jurisdiction, "when the question to be considered is one involving the jurisdiction of a federal court, jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998).

Plaintiffs have urged this Court to adopt a burden-shifting framework borrowed from cases interpreting and applying the FSIA, which governs the jurisdiction of courts in suits brought against foreign states and their agencies and instrumentalities. Several courts have held that, "[o]nce the defendant presents a prima facie case that it is a foreign sovereign, the plaintiff has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with the alleged foreign sovereign." *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (emphasis added; citation omitted); *e.g.*, *Virtual Countries*, 300 F.3d at 241; *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000); *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 n.6 (5th Cir. 1989) (per curiam). That view about the burden of persuasion appears to have been derived from the FSIA's legislative history, which mistakenly described sovereign immunity as an affirmative defense that must be established by the defendant. See H.R. Rep. No. 94-1487, at 17 (1976) (noting that, because "sovereign immunity is an affirmative defense which must be specially pleaded," "the burden will remain on the foreign state to produce evidence in support of its claim of immunity); *id.* ("Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.").

That snippet of legislative history is inconsistent with the text of the FSIA. "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Because "subject-matter jurisdiction turns on the existence of an exception to foreign sovereign immunity," even if "the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 n.20 (1983); see also *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 799 n.15 (7th Cir. 2011) ("the House Report got this point wrong"); *Frolova v. U.S.S.R.*, 761 F.2d 370, 373 (7th Cir. 1985) (per curiam) (characterizing the legislative history's description of sovereign immunity as an affirmative defense as "not entirely accurate"); cf. *Walters v. Industrial & Commercial Bank of China, Ltd.*, 651 F.3d 280, 293 (2d Cir. 2011) (acknowledging that whether "sovereign immunity is an affirmative defense * * * is debatable"). And if foreign sovereign immunity is not an affirmative defense, there is no reason to "rest" the "ultimate burden of proving immunity" with the "foreign state."

This Court need not address the issue of burden of proof in this case. Regardless of which standard the Court applies, Benomar is entitled to immunity because the commercial-activities exception does not apply to conduct that predates service as a diplomat or, alternatively, plaintiffs' "bald assertions" of remuneration are "not sufficient to defeat the motion to dismiss"

even under the FSIA standard. *Virtual Countries*, 300 F.3d at 241. If the Court were to address which party carries the burden to establish immunity, however, the United States respectfully requests that the Court should not transplant the errant statement in some FSIA cases concluding that the foreign state carries the ultimate burden of proving immunity into this context; instead, the Court should hold that once the defendant has established that he is presumptively entitled to diplomatic immunity, the plaintiff has the burden to establish by a preponderance of the evidence that an exception to immunity applies. The diplomat does not have any ultimate burden of persuasion.

III. This Court's precedents addressing sovereign immunity provide useful guidance as to the preliminary showing required for allowing jurisdictional discovery

The United States takes no position on whether the district court abused its discretion when it denied plaintiffs jurisdictional discovery to establish an exception to immunity. We briefly note, however, that concerns that have led this Court to take a circumspect approach to allowing jurisdictional discovery in cases addressing foreign sovereign immunity apply with even greater force to cases involving diplomatic immunity.

In *Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193 (2d Cir. 2016), the Court upheld the district court's denial of jurisdictional discovery in an FSIA case involving a lawsuit against two of Ecuador's instrumentalities. The Court explained that sovereign immunity is immunity from "the expense, intrusiveness, and hassle of litigation." *Id*. at 206; *e.g., Phoenix Consulting*, 216 F.3d at 40 ("In order to avoid burdening a sovereign that proves to be immune from suit * * * jurisdictional discovery should be carefully controlled and limited."); *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 146 n.6 (2014) (noting "comity interests and the burden that the discovery might cause to the foreign state" as factors for a court to consider when addressing discovery requests against a foreign sovereign). In light of the need for immunity to protect against the burdens of litigation, "a district court may deny jurisdictional discovery demands made on a foreign sovereign if the party seeking discovery cannot articulate a 'reasonable basis' for the court first to assume jurisdiction." *Arch Trading*, 839 F.3d at 206-07.

This Court has also recognized in the context of litigation brought under the FSIA that plaintiffs should be able to "specify * * * what discovery they might seek," and jurisdictional discovery must extend no further than to "verify allegations of specific facts crucial to an immunity determination." *Arch Trading*, 839 F.3d at 207. A plaintiff who offers only "conclusory" allegations cannot obtain jurisdictional discovery, because "[t]he FSIA protects defendants from a fishing expedition." *Id*. That principle also applies when conduct involves allegations among defendants and others, precluding speculative requests to "examine the details of the relationships" between defendants and others identified in a complaint. *Id*.; see *id*. at 207-08 (noting "the distinction between activities of defendants and of the entities alleged to be conducting commercial activity in the United States").

Like a foreign state under the FSIA, diplomatic agents are "presumptively entitled to immunity" under the Vienna Convention and "to dismissal" under the Diplomatic Relations Act and should be shielded against the expense, intrusiveness, and hassle of litigation. *Devi v. Silva*, 861 F. Supp. 2d 135, 141 (S.D.N.Y. 2012). To guard against the dilution of that principle, this Court has recognized in the FSIA context that district courts must "be 'circumspect' in allowing discovery before the plaintiff has established that the court has jurisdiction." *Arch Trading*, 839 F.3d at 206. Indeed, those concerns carry even greater force in cases against diplomatic agents, where the exceptions to immunity are even narrower than the exceptions to foreign sovereign

immunity in the FSIA and where litigation has the potential to implicate principles of diplomatic inviolability and other protections afforded to diplomats under the Vienna Convention.

IV. A district court should be allowed to consider immunity from suit as a factor when deciding whether to grant leave to amend

The district court stated that plaintiffs "have not claimed to have any evidence not already available to them," and "plaintiffs have not suggested that they are in possession of facts that would cure the deficiencies" the court identified. Based on those circumstances, the court ruled that allowing plaintiffs to file an amended complaint would be futile because "the problem here is not a pleading deficiency that plaintiffs can fix," but rather "an absence of evidence."

The United States takes no position addressing whether the district court abused its "broad discretion" when it denied plaintiffs' leave to amend. *Gurary v. Winehouse*, 235 F.3d 792, 801 (2d Cir. 2000). But the United States respectfully states that, even if it is not absolutely clear that "amendment would be futile," *Tocker v. Philip Morris Cos.*, 470 F.3d 481, 491 (2d Cir. 2006), a diplomat's potential immunity from suit may properly inform a district court's analysis of whether leave to amend should be granted based on potential prejudice to the defendant, see *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007) (noting "undue prejudice to the opposing party" as a proper basis to deny leave to amend). Allowing leave despite likely futility could threaten the diplomat's immunity from suit by imposing on the diplomat the burden of defending against a suit that has already been found to be deficient.

* * * *

On December 6, 2019, the Court of Appeals for the Second Circuit issued its decision in *Broidy*, finding Benomar immune from the suit. *Broidy Capital Management LLC & Elliott Broidy v. Jamal Benomar*, 944 F.3d 436 (2d Cir. 2019). The decision is excerpted below.

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* * * *

…[W]here a defendant has demonstrated diplomatic status, we hold that plaintiffs bear the burden of proving by a preponderance of the evidence that an exception to diplomatic immunity applies and that jurisdiction therefore exists.

* * * *

D. The commercial activity exception to diplomatic immunity does not apply to plaintiffs' claims

We next turn to the question of whether plaintiffs met their burden of establishing that an exception to diplomatic immunity applies. Plaintiffs claim that their suit can proceed pursuant to the commercial activity exception to diplomatic immunity, which permits a diplomat to be sued in "[a]n action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." VCDR art. 31(1)(c). While the precise contours of the phrase "professional or commercial activity," which is not defined in the VCDR, are unsettled, it is broadly understood to refer to trade or business activity engaged in for personal profit. *See Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996). Plaintiffs contend that

Benomar engaged in commercial activity because of his alleged for-profit work on the hack and smear campaign in late 2017 and early 2018. The United States argues as amicus that the complaint fails even to allege application of the commercial activity exception because it alleges only conduct occurring before Benomar obtained status-based immunity, and, in the United States' view, the commercial activity exception does not apply to conduct before the diplomat obtained status-based immunity. However, we need not reach the question of when activity must occur to qualify for the commercial activity exception or what type of activity qualifies because it is clear from the record that plaintiffs failed to meet their burden of proving by a preponderance of the evidence that Benomar at any time engaged in the alleged smear campaign.

* * * *

Reviewing this evidence, the district court rightly concluded that plaintiffs had failed to meet their burden of proving by a preponderance of the evidence that Benomar had engaged in commercial or professional activity. Plaintiffs submitted no evidence whatsoever that Benomar was engaged in the activity or received the payments alleged, only a snippet of a deposition transcript that, viewed in the context of the additional transcript pages submitted by Benomar, is both unpersuasive and misleadingly out of context. As plaintiffs failed to establish that the commercial activity exception to diplomatic immunity applied, we find that Benomar is entitled to diplomatic immunity under the terms of the Vienna Convention, and plaintiffs' claims against him were properly dismissed for lack of subject matter jurisdiction.

II. The district court did not abuse its discretion in denying jurisdictional discovery

Plaintiffs also argue that the district court erred in denying their request for jurisdictional discovery. …

Plaintiffs' arguments ignore the fact that the district court offered plaintiffs an opportunity to make specific jurisdictional discovery requests, and plaintiffs failed to do so. …

Further, contrary to plaintiffs' contentions otherwise, it was appropriate for the district court to balance the need for jurisdictional discovery with the risk of imposing discovery obligations on a diplomat who in fact possesses immunity from the court's jurisdiction—and, moreover, who generally "is not obliged to give evidence as a witness" under the VCDR. VCDR art. 31(2). Like sovereign immunity, diplomatic immunity protects the diplomatic mission "from the expense, intrusiveness, and hassle of litigation." *Arch Trading*, 839 F.3d at 206. Achieving this goal requires that "a court must be circumspect in allowing discovery before the plaintiff has established that the court has jurisdiction." *Id.*

In the FSIA context, this Court has described discovery as "warranted only to verify allegations of specific facts crucial to an immunity determination" and inappropriate where "plaintiffs do not yet know what they expect to find from discovery" and advance only broad demands for discovery of the kind plaintiffs advanced in their opposition to the motion to dismiss. *Id.* at 207 (affirming denial of jurisdictional discovery where "plaintiffs did not specify … what discovery they might seek").

Accordingly, the district court did not abuse its discretion in denying plaintiffs jurisdictional discovery.

III. The district court did not abuse its discretion in denying leave to amend the complaint

Finally, plaintiffs argue that the district court abused its discretion in denying leave to amend their complaint. …

Here, permitting plaintiffs to amend their complaint as requested would have been futile. …Therefore, as the proposed amendments would not enable plaintiffs to establish jurisdiction and would not affect the proper dismissal of the complaint, the district court did not abuse its discretion in denying plaintiffs leave to amend.

* * * *

b. Muthana v. Pompeo

On April 26, 2019, the United States filed its brief in support of its motion to dismiss or, in the alternative, for summary judgment in the civil action brought by the father of Hoda Muthana. *Muthana v. Pompeo*, No. 19-cv-00445 (D.D.C.). Hoda Muthana was born in the United States while her father, a former Yemeni diplomat to the UN, had diplomatic-agent-level immunity under the Vienna Convention on Diplomatic Relations ("VCDR"), because the United States was not notified that Plaintiff's diplomatic status had been terminated until more than three months after Muthana's birth. Muthana was granted a passport in error. Muthana traveled to Syria to join ISIS in November 2014. The United States revoked Muthana's passport in January 2016.

Her father's suit seeks injunctive relief barring the United States from rescinding Muthana's (or her minor child's) purported U.S. citizenship; a declaratory judgment that the United States violated Muthana's due process rights; a writ of mandamus requiring the United States to aid in the return of Muthana and her minor child to the United States; and a declaratory judgment that Plaintiff would not violate 18 U.S.C. § 2339B—which makes it a crime to provide material support or resources to designated foreign terrorist organizations—if he were to provide financial assistance to Muthana (Count 9).

On May 17, 2019, the United States filed a reply brief in support of dismissal or summary judgment. On December 9, 2019, the court granted summary judgment on counts one through eight and dismissal of count nine. Excerpts follow from the opening brief of the United States. The opening brief, reply brief, and court opinion are available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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* * * *

Plaintiff's next-friend claims, Counts 1 through 8, all rest on a fundamental and dispositive error—the assertion that Muthana is a U.S. citizen. She is not and never was a U.S. citizen. Muthana's parents enjoyed diplomatic-agent-level immunity at that time of her birth, meaning that she was born not subject to the jurisdiction of the United States and thus could not and did not acquire U.S. citizenship at birth. And because A.M.'s only claim to citizenship rests on his mother (Muthana) being a U.S. citizen, the claims related to A.M. must also be dismissed.

In particular, and as explained below, the Court should dismiss Counts 1 through 8 for failure to state a claim because the allegations in the complaint and the exhibits to the complaint, if taken as true, fail to establish that Muthana is a U.S. citizen. If the Court believes that it cannot conclude that Muthana is not a U.S. citizen solely on the basis of the complaint and exhibits, and believes that it cannot rely on the relevant government records on a motion to dismiss, Defendants move in the alternative for summary judgment on these claims based on the

undisputed facts and the attached Department of State certification and contemporaneous underlying official records.

a) The Allegations in the Complaint and Exhibits to the Complaint Fail to Establish that Muthana Is a U.S. Citizen—So All of Plaintiff's Next-Friend Claims Fail

The Fourteenth Amendment to the U.S. Constitution confers citizenship on persons "born or naturalized in the United States, *and subject to the jurisdiction thereof*." U.S. Const. amend. XIV, § 1 (emphasis added); *see also* 8 U.S.C. § 1401(a). The Supreme Court has long held that the phrase "subject to the jurisdiction thereof" excludes from the coverage of the Fourteenth Amendment's citizenship clause children born in the United States to foreign ministers or diplomatic officers representing foreign nations. *Wong Kim Ark*, 169 U.S. at 693 ("The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory … with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers …."); *Nikoi v. Attorney Gen.*, 939 F.2d 1065, 1066 (D.C. Cir. 1991) ("Because one parent was a foreign official with diplomatic immunity when each child was born, the birth did not confer United States citizenship.").

It is critical to Plaintiff's next-friend claims that Plaintiff enjoyed diplomatic-agent-level immunity when Muthana was born. As explained above, the Vienna Convention governs that issue. Article 10 of the Convention requires a sending State to notify the receiving State of "[t]he appointment of members of the mission [and] their arrival." Vienna Convention, art. 10(1)(a). When someone is appointed to a permanent mission to the United Nations, the individual's sending State must first notify the United Nations Office of Protocol. Declaration of James B. Donovan (Mar. 3, 2019) ¶ 3 (attached hereto as Exhibit A). Once the United Nations Office of Protocol accepts the accreditation of the individual, it notifies USUN and requests that the United States afford the individual the appropriate privileges and immunities. *Id.* ¶ 4. Article 39 of the Convention states that "[e]very person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed." Vienna Convention, art. 39(1). Article 37, in turn, extends the privileges and immunities specified in Articles 29 to 36 to "members of the family of a diplomatic agent forming part of his household." *Id.* art. 37(2).

In like manner, Article 10 of the Vienna Convention requires a sending State to notify the receiving State of the "final departure or the termination of [members'] functions with the mission." Vienna Convention, art. 10(1)(a). When someone serving in a permanent mission to the United Nations is terminated, the individual's sending State must first notify the United Nations Office of Protocol. Donovan Decl. ¶ 9. Once the United Nations Office of Protocol receives a notice of termination of the individual, it notifies USUN. *Id.* Article 43 of the Convention, in turn, specifies that "[t]he function of a diplomatic agent comes to an end … on *notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end*." Vienna Convention, art. 43(a) (emphasis added). Notification from the sending State is the normal method for establishing the date that immunity ends. *See Raya v. Clinton*, 703 F. Supp. 2d 569, 578 (W.D. Va. 2010) ("[T]he Vienna Convention requires sending countries to provide formal notice of a diplomatic agent's appointment and termination, and specifically states that an agent's diplomatic functions come to an end on notification of termination by the sending country."). If the United States receives a timely notification of termination, immunity then subsists for a reasonable period after the termination date as notified by the foreign government so that the foreign mission member has a reasonable time to depart,

unless it is a late notice received more than 30 days after the date of termination. Vienna Convention, art. 39(2) ("When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so … ."). That is, if the United States had been properly notified on August 25, 1994, that Plaintiff's termination date was September 1, 1994, he and his family would have continued to enjoy diplomatic-agent-level privileges and immunities until October 1, 1994. But when the notice of termination is received more than 30 days after the date of termination, the immunities cease on the date of notification. *See id*., art. 9(2) ("If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission."); 43(b) ("[t]he function of a diplomatic agent comes to an end … on notification by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member of the mission.").

Under these principles, Plaintiff's Counts 1 through 8 must be dismissed because the undisputed facts establish that Muthana did not acquire U.S. citizenship at birth. Plaintiff alleges that he was terminated from his diplomatic position with the Yemeni Mission to the United States "no later than September 1, 1994." Compl. ¶ 42. It is undisputed that USUN was not formally notified of his termination, however, until February 6, 1995. *Id*., Ex. D. Thus, under the plain terms of the Vienna Convention, and consistent with the practice of the United States regarding individuals accredited to permanent missions to the United Nations, Plaintiff's diplomatic status ceased on February 6, 1995—the date the receiving State (the United States, through USUN) received notice of his termination. *See* Vienna Convention, art. 43 ("The function of a diplomatic agent comes to an end … on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end"). In the meantime, Muthana was born in New Jersey on [redacted] 1994. Compl. ¶ 20.

Because USUN did not receive timely notification of Plaintiff's termination, the Department of State afforded Plaintiff's family, including Muthana, immunity through the date of notification, February 6, 1995. When Muthana was born in New Jersey on [redacted] 1994, she enjoyed diplomatic-agent-level immunity through her father and, therefore, was born not "subject to the jurisdiction" of the United States and did not acquire U.S. citizenship at birth. *Wong Kim Ark*, 169 U.S. at 693 ("[t]he Fourteenth Amendment affirms the … rule of citizenship by birth within the territory … with the exceptions or qualifications … of children of foreign sovereigns or their ministers"). Because Plaintiff's next-friend claims all rely on Muthana's purported acquisition of U.S. citizenship at birth, they all necessarily fail.

This conclusion makes good sense. Relying on the date of notification of termination, which both accords with the plain language of the Vienna Convention and reflects U.S. practice regarding members of UN permanent missions and foreign missions to the United States, is critical to our foreign relations. The Supreme Court has emphasized the overriding importance of "the concept of reciprocity that governs much of international law" on diplomatic privileges and immunities, as well as other strong reasons "to protect foreign diplomats in this country":

> Doing so ensures that similar protections will be accorded those that we send abroad to represent the United States, and thus serves our national interest in protecting our own citizens. Recent history is replete with attempts, some unfortunately successful, to harass and harm our ambassadors and other diplomatic officials. These underlying purposes

> combine to make our national interest in protecting diplomatic personnel powerful indeed.

Boos v. Barry, 485 U.S. 312, 323–24 (1988). By relying on the date of notification of termination, the United States preserves foreign governments' control over when their emissaries' functions and immunity ends, absent notice from the receiving State that ends such recognition under Article 43(b) (normally for bad acts by a member of a foreign mission resulting in expulsion). This approach—of giving primacy to notice of termination by the sending State—is critical to preserving the United States' own ability to control when the immunities granted to our own diplomats serving overseas end. For example, the United States would not want a foreign State to determine—without formal notification from the United States—that one of our mission members is no longer employed by the Embassy or to commence a criminal prosecution based on the foreign State's own determination of employment (or not) by the United States. *See* Vienna Convention, preamble ("the purpose of such privileges and immunities is … to ensure the efficient performance of the functions of diplomatic missions as representing State"). Relying on the date of notification to determine when diplomatic immunity ends avoids second-guessing and gives the States— through this notice process—control over when diplomatic immunity begins and ends. Under the principles of reciprocity that govern foreign relations, this rule is of paramount importance to the safety and security of U.S. diplomats abroad.

Plaintiff maintains that the date of termination of a diplomatic position—rather than the date of notification of termination—governs diplomatic status. Compl. ¶ 42. As just explained, the law provides otherwise. A foreign diplomat enjoys immunity from the time the receiving State confers such immunity until the time the receiving State terminates it, and, consistent with the Department of State's routine and usual practice, Plaintiff's diplomatic-agent-level immunity was in effect until USUN received formal notice of his termination from the U.N. Office of Protocol on February 6, 1994. None of Plaintiffs' arguments to the contrary has merit.

First, at the March 4, 2019 hearing on Plaintiff's request for expedited consideration of the complaint, Plaintiff argued that a sending State could misuse the process afforded parties to the Vienna Convention, under which diplomatic immunity ends upon notification to the receiving State, and that the Court should therefore accept Plaintiff's position that diplomatic immunity ends upon termination. Mar. 4, 2019 Hearing Transcript at 33:25–34:7 (positing that a sending State "could discharge one of the members of their diplomat part[y] and send that person out to commit acts of espionage and sabotage fully cloaked with the deniability that they're being done on behalf of the country because we discharged them; but with the full knowledge that that person would be able to operate with absolute impunity from the law because they didn't send a notification").

Plaintiff's argument—which is predicated on a signatory purposefully and intentionally violating the Vienna Convention—directly conflicts with the terms of the Vienna Convention and is wildly implausible. The Vienna Convention directs that "[t]he function of a diplomatic agent comes to an end … *on notification by the sending State to the receiving State* that the function of the diplomatic agent has come to an end." Vienna Convention, art. 43 (emphasis added); *see also id*., art. 43(b) (the function of a diplomatic agent may come to an end "[o]n notification by the receiving State to the sending State that … it refuses to recognize the diplomatic agent as a member of the mission."). So Plaintiff's hypothesized scenario would flout the United States' own negotiated agreement with other counties to rely on the notification of

termination. *Logan v. Dupuis*, 990 F. Supp. 26, 29 (D.D.C. 1997) (a "treaty is to be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'") (citing the Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331).

Plaintiff's hypothetical is also incongruent with the reasons a State enters into the Vienna Convention in the first place, *see* Vienna Convention, preamble (that the purpose of the Convention is to "maintain … international peace and security and "promot[e] … friendly relations among nations"), and is contrary to the foundations of international law—comity, mutuality, and reciprocity, *see Hilton v. Guyot*, 159 U.S. 113, 228 (1895) (recognizing the "that international law is founded upon mutuality and reciprocity"); *The Schooner Adeline*, 13 U.S. 244, 285 (recognizing "the principles of international law, comity and reciprocity"). Under the Vienna Convention, a sending State is *required* to provide notice of termination, *see* Vienna Convention, art. 10(1)(a), and a person enjoying privileges and immunities has a duty "to respect the laws and regulations of the receiving State," *id.*, art 41(1). If a signatory is prepared to violate the express terms of the Vienna Convention to abuse a receiving State's grant of diplomatic immunity as posited in Plaintiff's hypothetical, there is no reason to think a sending State would not further violate the Vienna Convention and use *current* members of its diplomatic mission to engage in espionage and other bad acts.

And the gambit that Plaintiff's counsel posits would almost certainly fail. Given that the sending State would be responsible for having failed to provide the notice of termination (in contravention of the Vienna Convention) and that the "former" diplomat's action would presumably be of benefit to the sending State, it seems highly unlikely that anyone would be fooled by the sending State's chicanery. Moreover, if the receiving State was not aware of the termination—because notice had not been provided—it would be even more likely to attribute the actions of the agent to the sending State. So the sending State would likely suffer the political and diplomatic repercussions of its agent's misconduct regardless. On top of all of this, the hypothetical ignores the authority of the receiving State to terminate diplomatic privileges by providing notice to the sending State if concerns arise regarding an individual in a diplomatic mission. *See* Vienna Convention, art. 43(b).

Indeed, because the Convention expressly provides for notice to the sending State or by the receiving State to terminate diplomatic privileges, this hypothetical concern for abuse provides no basis to depart from these express terms of the Convention. Plaintiff asks the Court to depart from the Convention's plain language and thereby create uncertainty between the United States and signatories to the Vienna Convention. The Court should not do so. *See Tabion*, 73 F.3d at 537 ("Treaties are contracts between sovereigns, and as such, should be construed to give effect to the intent of the signatories."). Plaintiff's position will adversely affect U.S. diplomats abroad and U.S. interests. *See Hellenic Lines, Ltd v. Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965) (purpose of diplomatic immunity is "to 'contribute to the development of friendly relations among nations' and to 'ensure the efficient performance of the functions of diplomatic missions'") (citing the Vienna Convention, preamble). As explained above, the Vienna Convention serves to protect the functions of U.S. diplomatic missions and members of U.S. diplomatic missions, and the United States relies on the date of notification of termination to ensure that the diplomatic immunity of U.S. diplomats is not terminated prematurely and without knowledge of the United States in violation of the Vienna Convention.

Second, in support of Plaintiff's argument that diplomatic-agent-level immunity "last[s] only as long as the diplomatic position itself," Plaintiff points to a 2004 letter by Russell F.

Graham, a minister counselor at USUN. *See* Compl., Ex C. Plaintiff alleges that he provided the Department of State with a copy of this letter in support of Muthana's 2005 passport application. Compl. ¶ 21. The letter, however, is not addressed to Plaintiff or to the Department of State, but rather to the Bureau of Citizenship and Immigration Services, *id.*, Ex. C, a component of the Department of Homeland Security that has no role in either passport issuance or the conferral or termination of diplomatic-agent-level immunity. The letter does not state for what purpose it was issued, and it is unclear how Plaintiff obtained the letter.

In any event, the letter notes two dates: Plaintiff's date of appointment, October 15, 1990; and date of termination, September 1, 1994. *Id.* The letter does not purport to state or analyze when the Department of State no longer afforded Plaintiff's diplomatic privileges, nor does it address the question at issue here: namely, what immunities Plaintiff enjoyed between September 1, 1994, and the date USUN was formally notified of Plaintiff's termination, February 6, 1995. The letter does not address Muthana or her birth at all. Rather, the letter states, correctly, that diplomatic privileges and immunities existed during Plaintiff's period of employment and makes no assessment of the period at issue in this suit. The letter, in other words, indicates that Plaintiff enjoyed diplomatic immunity during his period of employment. It does not, however, establish that his immunity ceased prior to the date USUN was notified of his termination.

Third, Plaintiff cites *United States v. Khobragade*, 15 F. Supp. 3d 383 (S.D.N.Y. 2014), and *United States v. Guinand*, 688 F. Supp. 774 (D.D.C. 1988), as support for his claim that the date of termination governs immunity. Compl. ¶ 41. Neither case helps him, however, because neither case addresses the distinction between the date that a person is terminated and the date that the United States is notified of termination. In *Khobragade*, the defendant was a member of the Indian permanent mission to the United Nations with diplomatic-agent-level immunity who, after being criminally indicted, departed the United States. 15 F. Supp. 3d at 386. The case does not address the legal significance of the termination date and does not hold that diplomatic immunity under the Vienna Convention ends upon termination. *Id.*

Nor does *Guinand* address the date of notification of termination or hold that immunity ceases upon termination rather than notification. It simply states, as a general matter, that U.S. criminal jurisdiction may be exercised "over persons whose status as members of the diplomatic mission has been terminated for acts they committed during the period in which they enjoyed privileges and immunities," *Guinand*, 688 F. Supp. at 775.

The entirety of Plaintiff's next-friend claims rests on a flawed legal position about the time period during which the Department of State afforded Plaintiff diplomatic-agency-level immunity. Under settled law, Muthana was born to a father who enjoyed diplomatic-agent-level immunity at the time of her birth and, therefore, was not born "subject to the jurisdiction" of the United States. As a result, she did not acquire U.S. citizenship at birth. Therefore, the Court should dismiss Counts 1 through 8 for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6).

b) The Attached Department of State Certification and Underlying Records Confirm that Muthana Did Not Acquire U.S. Citizenship at Birth

If Court believes that it cannot conclude that Muthana is not a U.S. citizen solely on the basis of the complaint and exhibits, and it determines that it cannot rely on the official government records included herewith in addressing the motion to dismiss, the Court should grant summary judgment to Defendants on the issue based on the undisputed facts and the attached Department of State certification and underlying records.

Although there is some question whether Plaintiff was terminated from his diplomatic position in June or in September 1994, any dispute on that point is irrelevant to any issue in this

case. Plaintiff and Defendants agree that Plaintiff was terminated "no later than September 1, 1994." Compl. ¶ 42. There is also no dispute that Muthana was born in New Jersey on [redacted] 1994. *Id.* ¶ 20. Finally, Plaintiff does not dispute that USUN was not officially notified of Plaintiff's termination until February 6, 1995. *Id.*, Ex. D.

The attached certification and contemporaneous records from the Department of State confirm that Muthana was born not subject to the jurisdiction of the United States and thus did not acquire U.S. citizenship at birth. The Court can and should grant summary judgment on this basis.

First, the attached Department of State certification—which addresses Plaintiff's diplomatic status at the time of Muthana's birth—conclusively establishes that the Department of State still afforded Plaintiff diplomatic-agent-level immunity at the time of Muthana's birth and that Muthana thus did not acquire U.S. citizenship at birth. Certification of James B. Donovan, Minister-Counselor for Host Country Affairs at USUN (Mar. 1, 2019) (attached hereto as Ex. B). This certification shows: that the United States was not formally notified of Plaintiff's termination from his diplomatic post until February 6, 1995; that the Muthana family continued to enjoy diplomatic-agent-level immunity until that date; and that Muthana therefore was not born "subject to the jurisdiction" of the United States and thus did not acquire U.S. citizenship at birth. Donovan Certification.

Under established law that has been consistent for over a century, when the Department of State certifies the diplomatic status of an individual, "the courts are bound to accept that determination." *Abdulaziz*, 741 F.2d at 1339. The "certificate of the secretary of state … is the best evidence to prove the diplomatic character of a person." *In re Baiz*, 135 U.S. 403, 421 (1890); *see also United States v. Al-Hamdi*, 356 F.3d 564, 573 (4th Cir. 2004) ("[W]e hold that the State Department's certification, which is based upon a reasonable interpretation of the Vienna Convention, is conclusive evidence as to the diplomatic status of an individual. Thus, we will not review the State Department's factual determination that, at the time of his arrest, Al-Hamdi fell outside the immunities of the Vienna Convention."). Thus, the attached Department of State certification ends the factual inquiry into Plaintiff's diplomatic status at the time of Muthana's birth. *See Abdulaziz*, 741 F.2d at 1331 ("[O]nce the United States Department of State has regularly certified a visitor to this country as having diplomatic status, the courts are bound to accept that determination.").

Second, although the Department of State's certification of Plaintiff's status is dispositive under the law, it is based upon contemporaneous government records that show conclusively that USUN did not receive formal notification of Plaintiff's termination until February 6, 1995. When an individual comes to work at his or her country's permanent mission to the United Nations, the sending State sends a notification of appointment to the United Nations Office of Protocol. Donovan Decl. ¶ 3. After accepting the accreditation, the United Nations Office of Protocol then notifies USUN of the appointment. *Id.* ¶ 4, 5. The United Nations uses the same process to notify USUN of a termination. *Id.* ¶ 12–14.

Contemporaneous records reflecting these processes establish that the United States was not formally notified of Plaintiff's termination until February 6, 1995. As explained in the attached Department of State declaration, at the time of Plaintiff's service at the United Nations, USUN maintained its privileges-and-immunities records in what was known as the KARDEX system. *Id.* ¶ 7–11. Under this system, each accredited diplomat had a paper card reflecting relevant information, including the diplomat's name and place of birth, information about the diplomat's family members, and dates for the beginning and end of the diplomat's privileges and

immunities. The KARDEX card for Plaintiff, *id.*, Ex. 1, is clearly annotated to record the termination of his diplomatic-agent-level privileges and immunities as February 6, 1995. *Id.*

Plaintiff's card also reflects an annotation recording the birth of Muthana, with her place and date of birth. *Id*. This annotation is significant because it indicates that USUN, at the time that it received notification of Muthana's birth, had not terminated Plaintiff's privileges and immunities. There would have been no reason to annotate the card to reflect the addition of a new child if Plaintiff was not then enjoying such privileges and immunities. *Id.* ¶ 19. The annotation thus reflects the Department of State's view that Muthana, like her family, enjoyed diplomatic immunity and that she was not born subject to the jurisdiction of the United States. The attached Department of State declaration also explains the importance of relying on the date of notification of termination in determining when diplomatic privileges and immunities end: "We rely on the official notification date because anything short of that, such as reliance on hearsay about the status of a diplomat, could erroneously expose an accredited diplomat to the jurisdiction of the United States, when in fact, under applicable international law, he or she would enjoy immunities." *Id.* ¶ 14.

Nothing in Plaintiff's complaint conflicts with the certification or the underlying contemporaneous government records or raises any potential dispute on a material fact. The complaint alleges that Plaintiff—Muthana's father—served as First Secretary from October 15, 1990, until sometime in 1994. Compl. ¶ 18, 25, 42, Ex. D. This is entirely consistent with the attached certification and underlying records. *See* Donovan Certification; Donovan Declaration ¶ 18, Ex. 2, Ex. 3. The complaint also does not dispute that USUN was not officially notified of Plaintiff's termination until February 6, 1995. Compl. ¶ 21, Ex. D. Again, this is consistent with the attached certification and records. *See* Donovan Certification; Donovan Declaration ¶ 18, Ex. 1, Ex. 2, Ex. 3. Accordingly, when Muthana was born on [redacted] 1994, Compl. ¶ 20, her father enjoyed diplomatic-agency-level immunity because the United Nations had not yet notified USUN of his termination and the Department of State continued to update its records system, KARDEX, showing that the United States still afforded him diplomatic-agency-level immunity. *See* Vienna Convention, art. 43 ("The function of a diplomatic agent comes to an end … on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end … ."). This in turn meant that Muthana was born with diplomatic-agent-level immunity because she was a member of her father's household. *See* Vienna Convention, art. 37(2) (extending diplomatic immunity to "members of the family of a diplomatic agent forming part of his household").

Under these principles, it is clear that Muthana is not and never was a U.S. citizen—and that none of the relief Plaintiff seeks on her behalf can be granted. Accordingly, Defendants are entitled to summary judgment on Counts 1 through 8 of the complaint.

* * * *

D. INTERNATIONAL ORGANIZATIONS

International Organizations Immunities Act: *Jam v. IFC*

As discussed in *Digest 2018* at 416-28, the United States filed a brief as amicus curiae in the U.S. Supreme Court in a case involving the International Organizations Immunities Act ("IOIA"). *Jam v. Int'l Fin. Corp.*, No. 17-1011. On February 27, 2019, the Supreme

Court issued its decision, holding that the IOIA grants international organizations the same immunity from suit as foreign governments enjoy under the FSIA. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019). Excerpts follow from the Court's opinion.

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* * * *

The IFC contends that the IOIA grants international organizations the "same immunity" from suit that foreign governments enjoyed in 1945. Petitioners argue that it instead grants international organizations the "same immunity" from suit that foreign governments enjoy today. We think petitioners have the better reading of the statute.

A

The language of the IOIA more naturally lends itself to petitioners' reading. In granting international organizations the "same immunity" from suit "as is enjoyed by foreign governments," the Act seems to continuously link the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity between the two. The statute could otherwise have simply stated that international organizations "shall enjoy absolute immunity from suit," or specified some other fixed level of immunity. Other provisions of the IOIA, such as the one making the property and assets of international organizations "immune from search," use such noncomparative language to define immunities in a static way. 22 U. S. C. §288a(c). Or the statute could have specified that it was incorporating the law of foreign sovereign immunity as it existed on a particular date. See, *e.g.*, Energy Policy Act of 1992, 30 U. S. C. §242(c)(1) (certain land patents "shall provide for surface use to the same extent as is provided under applicable law prior to October 24, 1992"). Because the IOIA does neither of those things, we think the "same as" formulation is best understood to make international organization immunity and foreign sovereign immunity continuously equivalent.

That reading finds support in other statutes that use similar or identical language to place two groups on equal footing. …

The IFC objects that the IOIA is different because the purpose of international organization immunity is entirely distinct from the purpose of foreign sovereign immunity. Foreign sovereign immunity, the IFC argues, is grounded in the mutual respect of sovereigns and serves the ends of international comity and reciprocity. The purpose of international organization immunity, on the other hand, is to allow such organizations to freely pursue the collective goals of member countries without undue interference from the courts of any one member country. The IFC therefore urges that the IOIA should not be read to tether international organization immunity to changing foreign sovereign immunity.

But that gets the inquiry backward. We ordinarily assume, "absent a clearly expressed legislative intention to the contrary," that "the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 68 (1982) (alterations omitted). Whatever the ultimate purpose of international organization immunity may be—the IOIA does not address that question—the immediate purpose of the immunity provision is expressed in language that Congress typically uses to make one thing continuously equivalent to another.

B

The more natural reading of the IOIA is confirmed by a canon of statutory interpretation that was well established when the IOIA was drafted. According to the "reference" canon, when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises. 2 J. Sutherland, Statutory Construction §§5207–5208 (3d ed. 1943). For example, a statute allowing a company to "collect the same tolls and enjoy the same privileges" as other companies incorporates the law governing tolls and privileges as it exists at any given moment. *Snell* v. *Chicago*, 133 Ill. 413, 437–439, 24 N. E. 532, 537 (1890). In contrast, a statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments. See, *e.g.*, *Culver* v. *People ex rel. Kochersperger*, 161 Ill. 89, 95–99, 43 N. E. 812, 814– 815 (1896) (tax-assessment statute referring to specific article of another statute does not adopt subsequent amendments to that article).

Federal courts have often relied on the reference canon, explicitly or implicitly, to harmonize a statute with an external body of law that the statute refers to generally. Thus, for instance, … a general reference to federal discovery rules incorporates those rules "as they are found on any given day, today included," *El Encanto, Inc.* v. *Hatch Chile Co.*, 825 F. 3d 1161, 1164 (CA10 2016), and a general reference to "the crime of piracy as defined by the law of nations" incorporates a definition of piracy "that changes with advancements in the law of nations," *United States* v. *Dire*, 680 F. 3d 446, 451, 467–469 (CA4 2012).

The same logic applies here. The IOIA's reference to the immunity enjoyed by foreign governments is a general rather than specific reference. The reference is to an external body of potentially evolving law—the law of foreign sovereign immunity—not to a specific provision of another statute. The IOIA should therefore be understood to link the law of international organization immunity to the law of foreign sovereign immunity, so that the one develops in tandem with the other.

The IFC contends that the IOIA's reference to the immunity enjoyed by foreign governments is not a general reference to an external body of law, but is instead a specific reference to a common law concept that had a fixed meaning when the IOIA was enacted in 1945. And because we ordinarily presume that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses," *Neder* v. *United States*, 527 U. S. 1, 23 (1999), the IFC argues that we should read the IOIA to incorporate what the IFC maintains was the then-settled meaning of the "immunity enjoyed by foreign governments": virtually absolute immunity.

But in 1945, the "immunity enjoyed by foreign governments" did not *mean* "virtually absolute immunity." The phrase is not a term of art with substantive content, such as "fraud" or "forgery." See *id.*, at 22; *Gilbert* v. *United States*, 370 U. S. 650, 655 (1962). It is rather a concept that can be given scope and content only by reference to the rules governing foreign sovereign immunity. It is true that under the rules applicable in 1945, the *extent* of immunity from suit was virtually absolute, while under the rules applicable today, it is more limited. But in 1945, as today, the IOIA's instruction to grant international organizations the immunity "enjoyed by foreign governments" is an instruction to look up the applicable rules of foreign sovereign immunity, wherever those rules may be found—the common law, the law of nations, or a statute. In other words, it is a general reference to an external body of (potentially evolving) law.

C

In ruling for the IFC, the D.C. Circuit relied upon its prior decision in *Atkinson*, 156 F. 3d 1335. *Atkinson* acknowledged the reference canon, but concluded that the canon's probative force was "outweighed" by a structural inference the court derived from the larger context of the

IOIA. *Id*., at 1341. The *Atkinson* court focused on the provision of the IOIA that gives the President the authority to withhold, withdraw, condition, or limit the otherwise applicable privileges and immunities of an international organization, "in the light of the functions performed by any such international organization." 22 U. S. C. §288. The court understood that provision to "delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances." *Atkinson*, 156 F. 3d, at 1341. That delegation, the court reasoned, "undermine[d]" the view that Congress intended the IOIA to in effect update itself by incorporating changes in the law governing foreign sovereign immunity. *Ibid*. We do not agree. The delegation provision is most naturally read to allow the President to modify, on a case-by-case basis, the immunity rules that would otherwise apply to a particular international organization. The statute authorizes the President to take action with respect to a single organization—"any such organization"— in light of the functions performed by "such organization." 28 U. S. C. §288. The text suggests retail rather than wholesale action, and that is in fact how authority under §288 has been exercised in the past. See, *e.g.*, Exec. Order No. 12425, 3 CFR 193 (1984) (designating INTERPOL as an international organization under the IOIA but withholding certain privileges and immunities); Exec. Order No. 11718, 3 CFR 177 (1974) (same for INTELSAT). In any event, the fact that the President has power to modify otherwise applicable immunity rules is perfectly compatible with the notion that those rules might themselves change over time in light of developments in the law governing foreign sovereign immunity.

The D.C. Circuit in *Atkinson* also gave no consideration to the opinion of the State Department, whose views in this area ordinarily receive "special attention." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l. Drilling Co*., 581 U. S. ___, ___ (2017) (slip op., at 9). Shortly after the FSIA was enacted, the State Department took the position that the immunity rules of the IOIA and the FSIA were now "link[ed]." Letter from Detlev F. Vagts, Office of the Legal Adviser, to Robert M. Carswell, Jr., Senior Legal Advisor, OAS, p. 2 (Mar. 24, 1977). The Department reaffirmed that view during subsequent administrations, and it has reaffirmed it again here.[2] That longstanding view further bolsters our understanding of the IOIA's immunity provision.

D

The IFC argues that interpreting the IOIA's immunity provision to grant anything less than absolute immunity would lead to a number of undesirable results.

The IFC first contends that affording international organizations only restrictive immunity would defeat the purpose of granting them immunity in the first place. Allowing international organizations to be sued in one member country's courts would in effect allow that

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3 See Letter from Roberts B. Owen, Legal Adviser, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980) in Nash, Contemporary Practice of the United States Relating to International Law, 74 Am. J. Int'l. L. 917, 918 (1980) ("By virtue of the FSIA, and unless otherwise specified in their constitutive agreements, international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities, while retaining immunity for their acts of a public character."); Letter from Arnold Kanter, Acting Secretary of State, to President George H. W. Bush (Sept. 12, 1992) in Digest of United States Practice in International Law 1016–1017 (S. Cummins & D. Stewart eds. 2005) (explaining that the Headquarters Agreement of the Organization of American States affords the OAS "full immunity from judicial process, thus going beyond the usual United States practice of affording restrictive immunity," in exchange for assurances that OAS would provide for "appropriate modes of settlement of those disputes for which jurisdiction would exist against a foreign government under the" FSIA); Brief for United States as *Amicus Curiae* 24–29.

member to second-guess the collective decisions of the others. It would also expose international organizations to money damages, which would in turn make it more difficult and expensive for them to fulfill their missions. The IFC argues that this problem is especially acute for international development banks. Because those banks use the tools of commerce to achieve their objectives, they may be subject to suit under the FSIA's commercial activity exception for most or all of their core activities, unlike foreign sovereigns. According to the IFC, allowing such suits would bring a flood of foreign-plaintiff litigation into U. S. courts, raising many of the same foreign-relations concerns that we identified when considering similar litigation under the Alien Tort Statute. See *Jesner* v. *Arab Bank, PLC*, 584 U. S. ___, ___–___ (2018); *Kiobel* v. *Royal Dutch Petroleum Co*., 569 U. S. 108, 116–117 (2013).

The IFC's concerns are inflated. To begin, the privileges and immunities accorded by the IOIA are only default rules. If the work of a given international organization would be impaired by restrictive immunity, the organization's charter can always specify a different level of immunity. The charters of many international organizations do just that. See, *e.g*., Convention on Privileges and Immunities of the United Nations, Art. II, §2, Feb. 13, 1946, 21 U. S. T. 1422, T. I. A. S. No. 6900 ("The United Nations … shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity"); Articles of Agreement of the International Monetary Fund, Art. IX, §3, Dec. 27, 1945, 60 Stat. 1413, T. I. A. S. No. 1501 (IMF enjoys "immunity from every form of judicial process except to the extent that it expressly waives its immunity"). Notably, the IFC's own charter does not state that the IFC is absolutely immune from suit.

Nor is there good reason to think that restrictive immunity would expose international development banks to excessive liability. As an initial matter, it is not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA. To be considered "commercial," an activity must be "the *type*" of activity "by which a private party engages in" trade or commerce. *Republic of Argentina* v. *Weltover, Inc*., 504 U. S. 607, 614 (1992); see 28 U.S.C. §1603(d). As the Government suggested at oral argument, the lending activity of at least some development banks, such as those that make conditional loans to governments, may not qualify as "commercial" under the FSIA. …

And even if an international development bank's lending activity does qualify as commercial, that does not mean the organization is automatically subject to suit. The FSIA includes other requirements that must also be met. For one thing, the commercial activity must have a sufficient nexus to the United States. See 28 U. S. C. §§1603, 1605(a)(2). For another, a lawsuit must be "based upon" either the commercial activity itself or acts performed in connection with the commercial activity. See § 1605(a)(2). Thus, if the "gravamen" of a lawsuit is tortious activity abroad, the suit is not "based upon" commercial activity within the meaning of the FSIA's commercial activity exception. See *OBB Personenverkehr AG* v. *Sachs*, 577 U. S. ___, ___–___ (2015); *Saudi Arabia* v. *Nelson*, 507 U. S. 349, 356–359 (1993). At oral argument in this case, the Government stated that it has "serious doubts" whether petitioners' suit, which largely concerns allegedly tortious conduct in India, would satisfy the "based upon" requirement. … In short, restrictive immunity hardly means unlimited exposure to suit for international organizations.

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The International Organizations Immunities Act grants international organizations the "same immunity" from suit "as is enjoyed by foreign governments" at any given time. Today, that means that the Foreign Sovereign Immunities Act governs the immunity of international

organizations. The International Finance Corporation is therefore not absolutely immune from suit.

The judgment of the United States Court of Appeals for the D. C. Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

* * * *

As directed by the Supreme Court, the case was remanded to the district court, and on September 13, 2019, the United States filed a statement of interest to convey its view that the lawsuit did not fall within the FSIA's commercial activity exception to immunity. *Jam v. Int'l Fin. Corp.*, No. 15-cv-00612 (D.D.C 2019). The lawsuit was filed by farmers, fishermen, a village, and a trade union in India, alleging that the construction of a power plant in Gujarat, India—financed in part by the IFC—socially and environmentally damaged their community. Excerpts follow from the U.S. statement of interest, which is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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I. IFC's Alleged Conduct Does Not Come Within The FSIA's Commercial Activity Exception.

The FSIA governs the circumstances under which international organizations that have been designated by Executive Order are immune from suit in courts in the United States. *Jam*, 139 S. Ct. at 772. The Act establishes that foreign states shall be immune from suit in U.S. courts unless one of the Act's express exceptions to immunity applies. 28 U.S.C. § 1604. One of these exceptions, known as the commercial activity exception, provides that

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case … in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). By requiring that the lawsuit be "based upon" acts in the United States or causing a direct effect in the United States, the commercial activity exception permits suits against foreign sovereigns only where a sufficient nexus exists between the United States and the allegations giving rise to the action. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18 (1976) (referring to § 1605(a)(2) as encompassing "[c]ommercial activities having a nexus with the United States"). Here, plaintiffs rely on the first two prongs of the exception, asserting that their action is "based upon" IFC's commercial activity in the United States and conduct in the United States in connection with commercial activity outside of the United States. Compl. ¶ 195. But as set forth below, their arguments are squarely foreclosed by Supreme Court precedent.

In *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), the Supreme Court explained how to determine whether the action is "based upon" acts in the United States. According to the Court, for purposes of the exception, "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *Id.* at 396. The plaintiff in *Sachs*, a U.S. citizen, had purchased a railway pass in the United States, over the Internet, and then traveled to Austria, where she was injured when she slipped and fell while boarding an Austrian state-owned railway. *Id.* at 393. The plaintiff argued that her causes of action were "based upon" her purchase of the railway pass in the United States because the sale of the pass in the United States was an element of each of her claims. But the Court rejected that argument, and concluded that "the conduct constituting the gravamen" of the complaint "plainly occurred abroad," thus failing § 1605(a)(2)'s territorial-nexus requirement. *Id.* at 396. The Court stressed that all of the plaintiff's claims turned "on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria." *Id.*

The Court's reasoning in *Sachs* relied heavily upon its earlier decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). The plaintiffs in *Nelson*, a married couple, sued Saudi Arabia and its state-owned hospital for torts against the husband, allegedly in retaliation for his reporting of hazards at the hospital where he had worked (in Saudi Arabia) after being recruited and hired (in the United States) by the defendants. *Id.* at 352–54. The Court concluded that, although the husband's recruitment and hiring in the United States to work at the hospital "led to the conduct that eventually injured" him, those actions were "not the basis" for the lawsuit. *Id.* at 358. Rather, it was the husband's jailing and alleged torture in Saudi Arabia that formed the gravamen of the complaint. *Id.* The Court emphasized that "[e]ven taking each of the [plaintiffs'] allegations about [the] recruitment and employment as true, those facts alone entitle the [plaintiffs] to nothing under their theory of the case." *Id.* Further, although there were 16 causes of actions at issue in *Nelson*, the Court "did not undertake an exhaustive claim-by-claim, element-by-element analysis," but instead "zeroed in on the core of their suit: the Saudi sovereign acts that actually injured them." *Sachs*, 136 S. Ct. at 396.

Like in *Sachs* and *Nelson*, the "gravamen" of plaintiffs' lawsuit here is tortious activity that allegedly took place and injured plaintiffs outside of the United States. The conduct alleged to have caused plaintiffs' injuries—the construction and operation of the power plant—occurred in India. It is that conduct that forms the core of the lawsuit, and without it, there would be nothing for which to recover. The complaint alleges that "numerous critical decisions relevant to whether to finance the Tata Mundra Project, and under what conditions," were made in the United States, and that IFC's funding for the project likewise was disbursed in the United States. Compl. ¶ 197– 98. But even taking those allegations as true, "those facts alone entitle the [plaintiffs] to nothing under their theory of the case." *Nelson*, 507 U.S. at 358.

Moreover, although IFC's decision to finance the project and its disbursement of funds is a link in the chain of events that "led" to the harm described in the complaint, the "gravamen" of the lawsuit still is conduct in India. As the Supreme Court explained in *Sachs*, "the essentials of a personal injury narrative will be found at the point of contact." 136 S. Ct. at 397 (citation omitted). Here, the construction and operation of the power plant—not IFC's financing—are what "actually injured" the plaintiffs. *Id.* at 396. Like the sale of the train ticket in *Sachs* or the recruitment and hiring in *Nelson*, IFC's loan to the Indian company CGPL is an antecedent step that alone cannot entitle the plaintiffs to relief. *See Nelson*, 507 U.S. at 358 (explaining that the "torts, and not the arguably commercial activities that preceded their commission, form the basis for the [plaintiffs'] suit").

Plaintiffs attempt to escape the geographical thrust of this action by alleging that "IFC's responses to allegations of harm caused by the Project … were decided, directed and/or approved from the headquarters in Washington, D.C." Compl. ¶ 199. They assert that IFC's internal compliance ombudsman identified many of the environmental and social harms asserted by the plaintiffs, and that IFC in Washington thereafter failed to remedy the injuries. *Id.* ¶ 153–56, 299, 300. But this theory fares no better. The "core" of plaintiffs' suit, *Sachs*, 136 S. Ct. at 396, remains CGPL's construction and operation of the plant—the conduct giving rise to plaintiffs' injuries. That conduct serves as the "foundation for … [plaintiffs'] claims and, therefore, also the gravamen of [their] suit." *Nnaka v. Fed. Republic of Nigeria*, 238 F. Supp. 3d 17, 28 (D.D.C. 2017) (Bates, J.). Even if IFC's response to the harms could have mitigated them in some fashion, it is still the events in India that form the "essentials" of the lawsuit, and without which plaintiffs would suffer no injury. *Sachs*, 136 S. Ct. at 397.

It makes no difference that the plaintiffs plead claims for negligence and negligent supervision, which purport to be based on IFC's alleged failure to take steps in the United States to prevent or mitigate the harm in India. Compl. ¶ 294–306. The Supreme Court rejected similar attempts at "artful pleading" in *Sachs* and *Nelson*. *Sachs*, 136 S. Ct. at 396 (rejecting argument based on strict liability claim for failure to warn, because "however Sachs frames her suit, the incident in [Austria] remains at its foundation"); *Nelson*, 507 U.S. at 363 (similarly rejecting argument based on failure to warn claim as "merely a semantic ploy" and a "feint of language"). The same holds true for the plaintiffs' third-party beneficiary claim for breach of contract. Compl. ¶ 325–332. Indeed, the plaintiff in *Sachs* brought claims for breach of implied warranties of merchantability and fitness, which sounded in contract, but the Court nevertheless deemed the gravamen of the suit to be the "wrongful conduct and dangerous conditions in Austria." *Sachs*, 136 S. Ct. at 396; *cf. Nnaka*, 238 F. Supp. 3d. at 29 ("Although Nnaka's complaint includes a claim for breach of contract, it sounds substantially—maybe even primarily—in tort."). It would be contrary to the Supreme Court's reasoning in *Sachs* and *Nelson* to permit plaintiffs to evade the FSIA's restrictions by recasting actions in India as a negligent failure to act or breach of contract in the United States.

Nor does it matter that plaintiffs have decided to sue only IFC in this action. Plaintiffs insist that the "gravamen" analysis must focus on the actions of the named defendant, and not nonparties (such as CGPL). … But the fact that plaintiffs named only IFC, which did not itself build or operate the plant that allegedly harmed the plaintiffs, cannot shift the gravamen of the lawsuit to IFC's actions in Washington. The lawsuit still is "based upon" conduct which caused harm in India, regardless of whether the plaintiffs choose to sue other defendants. More generally, a plaintiff cannot gerrymander the "gravamen" analysis by declining to name a party that directly caused the harm and instead naming only an entity that is steps removed. Such an approach would make little sense, particularly given the purpose of the "based upon" requirement to allow suits against foreign sovereigns (or international organizations) only where a sufficient nexus exists between the United States and the allegations at the center of the action. *See Nelson*, 507 U.S. at 357 (reading the phrase "based upon" as demanding "something more than a mere connection with, or relation to").

At bottom, the allegations in this case turn on and center around allegedly tortious conduct by a private party that took place in another country and resulted in injuries abroad. IFC's actions in the United States are not the basis or core of plaintiffs' lawsuit. Accordingly, the allegations of this case fall outside the bounds of the commercial activity exception.

Cross References

ILC's work on Immunity of State Officials from Foreign Criminal Jurisdiction, **Ch. 7.C.2.**
Investor-State dispute resolution (including expropriation), **Ch. 11.B.**

CHAPTER 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Air Transport Agreements

Information on U.S. air transport agreements is available at https://www.state.gov/subjects/air-transport-agreements/. In 2019, U.S. air transport agreements with Cameroon and Namibia entered into force. In 2019, the United States negotiated new air transport agreements with The Bahamas and Belarus; and negotiated and signed or initialed amendments to the agreements with Suriname, Argentina, Japan, and Kenya. The United States also concluded an agreement addressing time restrictions on leasing of aircraft with crew with the EU, Norway, and Iceland.

On January 15, 2019, the U.S.-Cameroon air transport agreement, signed at Yaoundé February 6, 2006, entered into force. The agreement with Cameroon is available at https://www.state.gov/19-115.

On March 8, 2019, the Joint Committee established under the U.S.-EU Air Transport Agreement of 2007, as amended, met in Washington, D.C. See March 13, 2019 State Department media note, available at https://www.state.gov/u-s-eu-joint-committee-meeting-strengthens-transatlantic-civil-aviation-ties/. On the margins of this meeting, representatives of the United States, the EU, and the governments of Norway and Iceland initialed an agreement addressing EU time constraints on U.S. air carrier leases of aircraft with crew. See *id*. The agreement removing time constraints on leases was signed on August 27, 2019 by the United States, EU, Iceland, and Norway. See August 27, 2019 State Department media note, available at https://www.state.gov/the-united-states-the-european-union-iceland-and-norway-sign-agreement-to-remove-time-constraints-on-air-carrier-leases-of-aircraft-with-crew/. The agreement is available at https://www.state.gov/agreement-to-remove-time-constraints-on-air-carrier-leases-of-aircraft-with-crew-between-the-u-s-eu-iceland-and-norway/. As described in the media note:

> This agreement ends a longstanding imbalance in our civil aviation relationship and allows U.S. carriers to lease aircraft and crew to their European partners with no time constraints, in a manner consistent with the 2007 Air Transport Agreement between the United States and the European Community and its Member States, as amended. The agreement will be provisionally applied as of today's signature. Conclusion of the agreement demonstrates the close and cooperative relationship between the United States and our European

> partners. Transatlantic flights linking the United States and Europe power growth and job creation, and underpin valuable economic and commercial ties.

On March 25, 2019, the United States signed an agreement amending the 2013 air transport agreement with Suriname. The agreement entered into force upon signing and is available at https://www.state.gov/suriname-19-325.

On June 18, 2019, the U.S.-Namibia air transport agreement, signed at Windhoek March 16, 2000, and the amendment to that agreement signed December 12, 2018, both entered into force. The full text of the Namibia air transport agreement, with amendment and annexes, is available at https://www.state.gov/namibia-19-618.

On June 26, 2019, the governments of the United States and Argentina signed a protocol of amendment to the 1985 air transport agreement between the two countries. See June 26, 2019 media note, available at https://www.state.gov/united-states-and-argentina-sign-protocol-to-modernize-their-1985-air-transport-services-agreement/. The media note states that the conclusion of the amendment follows a year of negotiations by the U.S. Departments of State, Transportation, and Commerce with their counterparts from Argentina. The protocol of amendment entered into force upon signature. The full text of the June 26, 2019 protocol is available at https://www.state.gov/argentina-19-626.

On August 21, 2019, the U.S. and Japanese government delegations signed a record of discussions ("ROD") recommending that their respective governments adopt an amendment to the U.S.-Japan Air Transport Agreement of 1952, as amended. See August 21, 2019 State Department media note, available at https://www.state.gov/united-states-and-japan-to-expand-daytime-service-at-haneda-airport/. As explained in the media note:

> The proposed amendment would expand daytime passenger service between Tokyo's Haneda Airport and U.S. destinations. It would provide for 12 additional slot pairs (12 arrivals and 12 departures daily) during daytime hours for U.S. air carriers and the same for Japanese carriers.

The ROD is available at https://www.state.gov/u-s-japan-record-of-discussions-of-august-21-2019/.

In a December 9, 2019 media note, the State Department announced that U.S. delegates had negotiated new air transport agreements with The Bahamas, Belarus, and Kenya during the twelfth ICAO Air Services Negotiation Event ("ICAN 2019"). The media note, available at https://www.state.gov/strengthening-u-s-open-skies-civil-aviation-partnerships/, is excerpted below.

* * * *

ICAN 2019, which took place in Aqaba, Jordan, on December 2-6, was the year's largest gathering of civil aviation negotiators. The event, organized by the International Civil Aviation Organization (ICAO), drew attendees from more than 60 nations. …

The agreements with the Commonwealth of The Bahamas and the Republic of Belarus, initialed on December 3, are the first bilateral air transport agreements negotiated with these countries. Both agreements are now being applied on the basis of comity and reciprocity, creating new opportunities for travelers and businesses.

The agreement with Kenya, initialed on December 4, adds seventh-freedom traffic rights for all-cargo operations. Such rights facilitate the movement of goods throughout the world by giving carriers greater flexibility to meet their cargo and express delivery customers' needs more efficiently.

The U.S. delegation also met with counterparts from host country Jordan and 20 other nations to ensure fair competition for U.S. carriers, to explore possibilities for new Open Skies agreements, and to further modernize existing agreements with civil aviation partners. …

* * * *

2. The Downing of Malaysia Airlines Flight MH17 in Ukraine

As discussed in *Digest 2018* at 439-40, and *Digest 2017* at 485, the State Department expressed support for, and confidence in, the Joint Investigative Team ("JIT") investigating the downing of Malaysian Airlines flight MH17 in Ukraine. On June 19, 2019, the Department issued a statement by Secretary of State Michael R. Pompeo welcoming the indictments of four individuals for their role in the downing of flight MH17. The statement is available at https://www.state.gov/prosecution-of-four-suspects-in-mh17-case/ and includes the following:

> This is an important milestone in the search for the truth, and we remain confident in the professionalism and ability of the Dutch criminal justice system to prosecute those responsible in a manner that is fair and just. We fully support the work of the Dutch authorities and the Joint Investigation Team (JIT), an independent criminal investigation led by the Netherlands, Australia, Belgium, Malaysia, and Ukraine.
>
> …
>
> We recall the UN Security Council's demand that "those responsible … be held to account and that all States cooperate fully with efforts to establish accountability." All of those indicted today were members of Russia-led forces in eastern Ukraine. We call upon Russia to respect and adhere to UN Security Council Resolution 2166 (2014) and ensure that any indicted individuals currently in Russia face justice.

3. Restrictions on Air Service to Cuba

On October 25, 2019, the State Department announced in a media note, available at https://www.state.gov/united-states-restricts-scheduled-air-service-to-cuban-airports/, that the U.S. Department of Transportation had suspended scheduled commercial air service between the United States and Cuban international airports, other than Havana's Jose Marti International Airport. The restriction aims to curb Cuban regime profits from U.S. air travel. The media note further states:

> U.S. air carriers will have 45 days to discontinue all scheduled air service between the United States and all airports in Cuba, except for Jose Marti International Airport.

> In line with the President's foreign policy toward Cuba, this action prevents revenue from reaching the Cuban regime that has been used to finance its ongoing repression of the Cuban people and its support for Nicolas Maduro in Venezuela. In suspending flights to a total of nine airports, the United States impedes the Cuban regime from gaining access to hard currency from U.S. travelers staying in its state-controlled resorts, visiting state-owned attractions, and otherwise contributing to the Cuban regime's coffers near these airports.

B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS

1. Non-Disputing Party Submissions under Chapter 11 of the North American Free Trade Agreement:

Article 1128 of NAFTA allows NAFTA Parties who are not parties to a particular dispute to make submissions to a Tribunal hearing that dispute on questions of interpretation of NAFTA.

a. Tennant Energy LLC v. Canada

On November 27, 2019, the United States filed an 1128 submission in the dispute between Tennant Energy LLC, a California corporation, and the Government of Canada arising out of certain renewable energy initiatives undertaken by Ontario. Tennant Energy claims that Canada has violated Article 1105 (Minimum Standard of Treatment). The U.S. submission is excerpted below and available at https://www.state.gov/tennant-energy-llc-v-government-of-canada/.

* * * *

2. NAFTA Article 1134 provides as follows:

> A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

3. The Article's first sentence permits the Tribunal to order, *inter alia*, measures "to preserve the rights of a disputing party." One example of such a measure, as noted later in the same sentence, is "an order to preserve evidence in the possession or control of a disputing party." This type of order preserves the other party's potential future right to have that evidence disclosed. The right to disclosure of evidence is contingent: it depends on the tribunal's authority under the applicable arbitration rules to order the disclosure and the tribunal's determination that it is appropriate under the circumstances to exercise such authority.

4. A measure requiring one party to post security for the other party's costs may also preserve rights, namely a disputing party's potential future right to recover its costs. Again, this

right would be contingent but, as with orders to preserve evidence, it would be within the scope of Article 1134's first sentence.

5. Article 1134 makes no distinction between interim measures that protect contingent rights and measures that protect existing rights. Indeed, the phrase "rights of a disputing party" is not qualified in any way. The only types of interim measures that the Article expressly bars a tribunal from ordering are the two types specified in the Article's second sentence: "[a] Tribunal may not order attachment," nor may it "enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117." An order directing a party to post security for costs does not fall into either proscribed category.

6. The United States is not aware of any tribunals that have ruled on requests for security for costs under NAFTA Article 1134, but a number of tribunals have done so under Article 47 of the ICSID Convention, which, similar to Article 1134, permits a tribunal to grant provisional measures that "preserve the respective rights of either party." The United States agrees with the tribunals that have concluded that this language allows for provisional measures that preserve contingent rights, including orders granting a party security for its costs. For example, in *RSM Production Corp. v. Government of Grenada*, the tribunal explained:

> As to what rights of a party may be preserved [under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules], it seems obvious that, in the context of a dispute, the parties' contested substantive rights have yet to be determined. For example, a party seeking damages for contractual or a treaty breach has no "established" or "determined" right to damages. Similarly, a party who seeks an ultimate award for costs has only a potential right to costs… .
>
> To construe the rights that are to be protected or preserved under Article 47 and Rule 39 as being limited to "established" rights makes no sense whatever in the context of a provisional measure for their protection. Any such measure must, by definition, precede a determination of their substantive validity.[2]

7. In sum, an order directing one party to post security for another party's costs may constitute "an interim measure of protection to preserve the rights of a disputing party." Moreover, such an order is not barred by the second sentence of Article 1134. Accordingly, a tribunal may issue such an order in appropriate circumstances and if so authorized by the applicable arbitration rules.

* * * *

b. Vento Motorcycles, Inc. v. Mexico

On August 23, 2019, the United States filed an 1128 submission in the dispute between Vento Motorcycles, Inc., a Texas company, and Mexico, in which Vento claims that Mexico wrongly applied certain tariffs to its products. The claimant alleges violations of Article 1102 (National Treatment), Article 1103 (Most-Favored-Nation Treatment),

[2] *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Cost ¶¶ 5.6, 5.8 (Oct. 14, 2010). *See also BSG Resources Ltd. v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 3, ¶ 75 (Nov. 25, 2015) …; *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs ¶ 72 (Aug. 13, 2014) …

Article 1104 (Standard of Treatment), and Article 1105 (Minimum Standard of Treatment). The U.S. submission is excerpted below (with footnotes omitted) and available in full at https://www.state.gov/vento-motorcycles-inc-v-united-mexican-states/.

* * * *

16. As discussed below, the concepts of legitimate expectations, good faith, non-discrimination and transparency are not component elements of "fair and equitable treatment" under customary international law that give rise to independent host State obligations.

Legitimate Expectations

17. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

Good Faith

18. The principle that "every treaty in force is binding on the parties to it and must be performed by them in good faith" is established in customary international law, not in Section A of NAFTA Chapter Eleven. As such, claims alleging breach of the good faith principle in a party's performance of its NAFTA obligations do not fall within the limited jurisdictional grant afforded in Section B.

19. Furthermore, it is well established in international law that good faith is "one of the basic principles governing the creation and performance of legal obligations," but "it is not in itself a source of obligation where none would otherwise exist." As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability. Accordingly, a claimant "may not justifiably rely upon the principle of good faith" to support a claim, absent a specific treaty obligation, and the NAFTA contains no such obligation.

Non-Discrimination

20. Similarly, the customary international law minimum standard of treatment set forth in Article 1105 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination. As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently. To the extent that the customary international law minimum standard of treatment incorporated in Article 1105 prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings, access to judicial remedies or treatment by the courts, or the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife.

Transparency

21. The concept of "transparency" also has not crystallized as a component of "fair and equitable treatment" under customary international law giving rise to an independent host-State obligation. The United States is aware of no general and consistent State practice and *opinio*

juris establishing an obligation of host-State transparency under the minimum standard of treatment.

* * *

22. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law. The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 1105 in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum standard of treatment. Thus, arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 1105(1). Likewise, decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State practice" for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice. A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 1105(1).

23. Thus, the NAFTA Parties expressly intended Article 1105(1) to afford the minimum standard of treatment to covered investments, as that standard has crystallized into customary international law through general and consistent State practice and *opinio juris*. A claimant must demonstrate that alleged standards that are not specified in the treaty have crystallized into an obligation under customary international law.

24. As all three NAFTA Parties agree, the burden is on the claimant and the claimant alone to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*. "The party which relies on a custom … must prove that this custom is established in such a manner that it has become binding on the other Party." Tribunals applying the minimum standard of treatment obligation in Article 1105 have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. …

25. Once a rule of customary international law has been established, the claimant must then show that the State has engaged in conduct that violates that rule. An alleged breach of the minimum standard of treatment must be assessed "in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders." Chapter Eleven tribunals do not have an open-ended mandate to "second-guess government decision-making."

Article 1116(1) (Continuous Nationality)

26. Article 1116(1) provides, in pertinent part, that "[a]n *investor of a Party* may submit to arbitration under this Section a claim that *another Party* has breached an obligation under" Chapter Eleven, Section A.

27. An investor must be a national of a Party other than the respondent NAFTA Party continuously at three critical dates and at all times between them: the time of the purported breach, the submission of a claim to arbitration, and the resolution of the claim.

* * * *

33. The conclusions above are consistent with the well-established principle of international law that an individual or entity cannot maintain an international claim against its own State. As the United States has long maintained with respect to the rule of "continuous nationality," and as the tribunal in *Loewen v. United States of America* explained: "In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*." In the absence of continuous nationality of the claimant as set forth above, a tribunal lacks jurisdiction over the relevant claim.

Article 1116(2) (Limitations Period)

34. All claims under Article 1116(1) must be submitted to arbitration within the three-year limitations period set out in Article 1116(2). The claims limitation period is "clear and rigid" and not subject to any "suspension," "prolongation," or "other qualification." Specifically, Article 1116(2) requires a claimant to submit a claim to arbitration within three years of the "date on which the" investor "first acquired, or *should have first acquired*, knowledge" of (i) the alleged breach, and (ii) loss or damage incurred by the investor.

35. For purposes of assessing what a claimant should have known, the United States agrees with the reasoning of the *Grand River* Tribunal: "a fact is imputed to [*sic*] person if by exercise of reasonable care or diligence, the person would have known of that fact." As that Tribunal further explained, it is appropriate to "consider in this connection what a reasonably prudent investor should have done in connection with extensive investments and efforts such as those described to the Tribunal." Similarly, as the *Berkowitz* Tribunal held, endorsing the reasoning in *Grand River* with respect to the identically worded limitations provision in the CAFTA-DR, "the 'should have first acquired knowledge' test … is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known."

Article 1139 (Definition of "Investment")

36. Article 1139 provides an exhaustive, not illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven.

37. Article 1139(h) includes within the definition of "investment" "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise[.]"

38. To qualify as investment under Article 1139(h), more than the mere commitment of funds is required. An investor must also have a cognizable "interest" that arises from the commitment of those resources. Specifically, Article 1139(h)(i) states that such interests might arise from, for example, turnkey or construction contracts or concessions. Similar interests might arise, according to Article 1139(h)(ii), from "contracts where remuneration depends substantially on the production, revenues or profits of an enterprise."

39. Not every economic interest that comes into existence as a result of a contract, however, constitutes an "interest" as defined in Article 1139(h). Article 1139(i) specifically excludes from the definition of "investment" "claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d)." Article 1139(j) likewise excludes "any other claims to money, that do not

involve the kinds of interests set out in subparagraphs (a) through (h) [of the definition of 'investment' in Article 1139]."

Limitations on Loss or Damage

40. Article 1116(1) allows an investor to recover "loss or damage by reason of, or arising out of" a breach of Chapter Eleven, Section A. In this connection, an investor may recover such damages only to the extent that damages are established on the basis of satisfactory evidence that is not inherently speculative.

41. Moreover, an investor may only recover for loss or damage that the investor incurred in its capacity as an *investor of a Party*. "Investor of a Party" is defined in Article 1139 …

42. Thus, reading Articles 1101, 1116 and 1139 together, it is clear that an investor may only recover for damages it incurred in its capacity as an investor seeking to make, making, or having made, an investment *in the territory of the other Party*.

43. Finally, the definition of "investment" in Article 1139 also limits the scope of damages available to a NAFTA Chapter Eleven claimant. …

44. Moreover, Article 1139(h)(ii), … does not treat "revenues or profits" as "investments" in themselves. Instead, "revenues or profits" are elements of the type of contract that may (as an example) give rise to "interests that arise from the commitment of capital or other resources in the territory" of the respondent State—with the "interests," not the "revenues or profits," constituting the "investment" under NAFTA Article 1139. Indeed, without these limitations, any income arising from a claimant's exports to entities located in the respondent State might improperly be characterized as an "investment" under Article 1139, and under such characterization, all exporters would be free to bring "investment" claims under Chapter Eleven regardless of whether they are making, have made, or seek to make an investment in the territory of the respondent Party. Such claims are not, for the reasons herein provided, covered under Chapter Eleven.

* * * *

c. Lion Mexico Consolidated LP v. Mexico

On June 21, 2019, the United States filed an 1128 submission in the dispute between Lion Mexico Consolidated LP ("LMC"), a Canadian enterprise, and Mexico, in which LMC alleges that the cancellation by Mexican courts of mortgages that guaranteed LMC's loan-based investment in Mexico violated NAFTA Chapter Eleven Articles 1110 (Expropriation and Compensation) and 1105 (Minimum Standard of Treatment). Excerpts follow from the U.S. submission (with footnotes omitted), which is available in full at https://www.state.gov/lion-mexico-consolidated-lp-v-united-mexican-states/.

* * * *

Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 1105(1), concerns the obligation to provide "fair and equitable treatment." The "fair and equitable treatment" obligation includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Other such areas concern the obligation to provide "full protection and security," which is also expressly addressed in Article 1105(1), and the obligation not to expropriate covered investments, except under the conditions specified in

Article 1110. The customary international law obligations not to deny justice and to provide full protection and security are further elaborated immediately below, whereas the obligation concerning expropriation is discussed under the Article 1110 heading.

Claims for Judicial Measures

6. Denial of justice in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process." Aliens have no cause for complaint at international law about a domestic system of law provided that it conforms to "a reasonable standard of civilized justice" and is fairly administered. "Civilized justice" has been described as requiring "[f]air courts, readily open to aliens, administering justice honestly, impartially, [and] without bias or political control[.]"

7. A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a "notoriously unjust" or "egregious" administration of justice "which offends a sense of judicial propriety." …

8. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts. Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.

9. In this connection, it is well-established that international tribunals such as NAFTA Chapter Eleven tribunals are not empowered to be supranational courts of appeal on a court's application of domestic law. Thus, an investor's claim challenging judicial measures under Article 1105(1) is limited to a claim for denial of justice under the customary international law minimum standard of treatment. *A fortiori*, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law.

Treatment Must Be Accorded to the Investment

10. As noted above, Article 1105(1) requires each Party to "accord to investments of investors of another Party *treatment* in accordance with international law, including fair and equitable treatment and full protection and security." (Emphasis added). Article 1105(1) differs from other substantive obligations, such as those in Articles 1102, 1103 and the second paragraph of Article 1105, in that it obligates a Party to accord treatment only to an "*investment.*" In the context of a claim for denial of justice under Article 1105(1), a claimant (*i.e.*, an investor) must therefore establish that the treatment accorded to its investment rose to the level of a denial of justice under customary international law.

Requirement of Judicial Finality

11. It is well-established that the international responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective.

12. In this connection, while it is not controversial that acts of State organs, including acts of State judiciaries, are attributable to the State, there will be a breach of Article 1105(1) based on judicial acts (*e.g.*, a denial of justice) only if the justice system *as a whole* (*i.e.*, until there has been a decision of the court of last resort available) produces a denial of justice. …

13. As such, non-final judicial acts cannot be the basis for claims under Chapter Eleven of the NAFTA, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. Rather, an act of a domestic court that remains subject to appeal has not ripened into the type of final act that is sufficiently definite to implicate state responsibility, unless such recourse is obviously futile or manifestly ineffective.

14. International tribunals have found that further remedies were obviously futile where there "was no justice to exhaust." It is not enough for a claimant to allege the "absence of a reasonable prospect of success or the improbability of success, which are both less strict tests."

…

Full Protection and Security

* * * *

17. The United States has consistently maintained, moreover, that the Article 1105(1) obligation to provide "full protection and security" does not, for example, require States to prevent economic injury inflicted by third parties, nor does it require States to guarantee that aliens or their investments are not harmed under any circumstances. Such interpretations would impermissibly extend the duty to provide "full protection and security" beyond the minimum standard under customary international law.

Article 1110 (Expropriation and Compensation)

* * * *

19. Judicial measures may give rise to a claim for denial of justice under the circumstances described above with respect to Article 1105(1). As previously explained, a denial of justice may exist where there is, for example, an obstruction of access to courts, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. Additional instances of denial of justice have included corruption in judicial proceedings and executive or legislative interference with the freedom of impartiality of the judicial process.

20. Decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants, however, do not give rise to a claim for expropriation under Article 1110(1). Moreover, the United States has not recognized the concept of "judicial takings" as a matter of domestic law.

21. Of course, where a judiciary is not separate from other organs of the State and those organs (executive or legislative) direct or otherwise interfere with a domestic court decision so as to cause an effective expropriation, these executive or legislative acts may form the basis of a separate claim under Article 1110, depending on the circumstances. Were it otherwise, States might seek to evade international responsibility for wrongful acts by using the courts as the conduit of executive or legislative action.

Articles 1116(2) and 1117(2) (Limitations Period)

* * * *

24. In the context of a claim of denial of justice, … the three-year limitations period set out in Articles 1116(2) and 1117(2) will not begin to run until the date on which the investor or enterprise first acquired, or should have acquired, knowledge that either the breach has occurred – *i.e.*, when all available domestic remedies have been exhausted, unless obviously futile or

manifestly ineffective – or the claimant or enterprise has incurred loss or damage, whichever is later.

Article 1121(1)(b) and (2)(b) (Waiver)

25. Article 1121(1)(b) and (2)(b) requires a waiver of an investor's (or an investor's and enterprise's) "right to initiate or continue … any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in" Articles 1116 or 1117. The purpose of the waiver provision is to avoid the need for a respondent Party to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)."

26. Article 1121(1)(b) and (2)(b) includes an exception to the waiver requirement for "proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party." The purpose of this exception is to allow a claimant to initiate or continue certain proceedings to preserve its rights during the pendency of the arbitration, in a manner consistent with the broader purposes of the waiver requirement.

27. It is well-established that the responsibility of a State may not be invoked if "the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted." As discussed above, denial of justice is a claim to which a rule requiring judicial finality, unless obviously futile or manifestly ineffective, does apply, as a substantive element of the claim. Nothing in Article 1121 departs from this rule.

* * * *

2. Non-Disputing Party Submissions under other Trade Agreements

a. U.S.-Korea FTA: Seo v. Republic of Korea

Chapter Eleven of the United States-Korea Free Trade Agreement ("KORUS") contains provisions designed to protect foreign investors and their investments and to facilitate the settlement of investment disputes. Article 11.20.4 of the KORUS, like Article 1128 of NAFTA, allows for non-disputing Party submissions. On June 19, 2019, the United States made an Article 11.20.4 submission in the dispute brought by Mrs. Seo, a U.S. citizen, alleging that conduct by the Republic of Korea breached Korea's obligations to accord fair and equitable treatment under KORUS Article 11.5 and expropriated her property in violation of KORUS Article 11.6. Excerpts follow from the U.S. submission, which is available in full at https://www.state.gov/u-s-korea-fta-investor-state-arbitrations/.

* * * *

Expedited Review Mechanisms in U.S. International Investment Agreements

2. In August 2002, an arbitral tribunal constituted under NAFTA Chapter Eleven concluded that it lacked authority to rule on the United States' preliminary objection that, even accepting all of the claimant's allegations of fact, the claims should be dismissed for "lack of legal merit." The tribunal ultimately dismissed all of claimant's claims for lack of jurisdiction, but only after three more years of pleading on jurisdiction and merits and millions of dollars of additional expense.

3. In all of its subsequent investment agreements concluded to date, the United States has negotiated expedited review mechanisms that permit a respondent State to assert preliminary objections in an efficient manner.

4. The KORUS contains such expedited review mechanisms in Article 11.20, at subparagraphs 6 and 7…

5. Paragraphs 6 and 7 establish complementary mechanisms for a respondent State to seek to efficiently and cost-effectively dispose of claims that cannot prevail as a matter of law, potentially together with any preliminary objections to the tribunal's competence. Additionally, the provisions leave in place any mechanism that may be provided by the relevant arbitral rules to address other objections as a preliminary question. As such, the Agreement, like other agreements incorporating this language, "draws a clear distinction between three different categories of procedures for dealing with preliminary objections."

6. Paragraph 6 authorizes a respondent to make "any objection" that, "as a matter of law," a claim submitted is not one for which the tribunal may issue an award in favor of the claimant under Article 11.26. Paragraph 6 clarifies that its provisions operate "[w]ithout prejudice to a tribunal's authority to address other objections as a preliminary question." Paragraph 6 thus provides a further ground for dismissal, in addition to "other objections," including those with respect to a tribunal's competence.

7. Subparagraph (a) requires that a respondent submit any such objection "as soon as possible after the tribunal is constituted," and generally no later than the date for the submission of the counter-memorial. This contrasts with the expedited procedures contained in paragraph 7, which authorize a respondent, "within 45 days after the tribunal is constituted," to make an objection under paragraph 6 and any objection that the dispute is not within the tribunal's competence.

8. Subparagraph (c) states that, for any objection under paragraph 6, a tribunal "shall assume to be true" the factual allegations supporting a claimant's claims. The tribunal "may also consider any relevant facts not in dispute." This evidentiary standard facilitates an efficient and expeditious process for eliminating claims that lack legal merit. Subparagraph (c) does not address, and does not govern, other objections, such as an objection to competence, which the tribunal may already have authority to consider.

9. Paragraph 7 provides an expedited procedure for deciding preliminary objections, whether permitted by paragraph 6 or the applicable arbitral rules. If the respondent makes a request within 45 days of the date of the tribunal's constitution, "the tribunal shall decide on an expedited basis an objection under paragraph 6 and any objection that the dispute is not within the tribunal's competence." Paragraph 7 thus modifies the applicable arbitration rules by requiring a tribunal to decide on an expedited basis any paragraph 6 objection as well as any objection to competence, provided that the respondent makes the request within 45 days of the date of the tribunal's constitution.

* * * *

12. As such, when a respondent invokes paragraph 7 to address objections to competence, there is no requirement that a tribunal "assume to be true claimant's factual allegations." To the contrary, there is nothing in paragraph 7 that removes a tribunal's authority to hear evidence and resolve disputed facts. …

13. Finally, nothing in the text of paragraph 7 alters the normal rules of burden of proof. In the context of an objection to competence, the burden is on a claimant to prove the necessary

and relevant facts to establish that a tribunal is competent to hear a claim. It is well-established that where "jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage." A tribunal may not assume facts in order to establish its jurisdiction when those facts are in dispute.

* * * *

b. U.S.-Panama TPA: Bridgestone v. Panama

Chapter Ten of the United States-Panama Trade Promotion Agreement ("U.S.-Panama TPA") contains provisions designed to protect foreign investors and their investments and to facilitate the settlement of investment disputes. Article 10.20.2 of the U.S.-Panama TPA, like Article 1128 of NAFTA, allows for non-disputing Party submissions.

As discussed in *Digest 2018* at 453-56, and *Digest 2017* at 500-04, the United States has made three non-disputing Party submissions in *Bridgestone v. Panama*. On July 29 2019, the United States made a fourth submission orally at the hearing in the dispute. Excerpts follow from the fourth (oral) non-disputing Party submission of the United States. A transcript of the U.S. oral submission and the previous written submissions are available at https://www.state.gov/bridgestone-licensing-services-inc-and-bridgestone-americas-inc-v-the-republic-of-panama/.

* * * *

[T]he United States offers interpretations on three issues: The fair-and-equitable-treatment obligation, including the obligation not to deny Justice; the burden of proof for such a claim; and damages. …

The first issue I will address is the minimum-standard-of-treatment obligation, which includes fair and equitable treatment, as provided in Paragraph 1 of Article 10.5. That obligation is circumscribed by the customary international law minimum standard of treatment of aliens and does not require treatment in addition to or beyond that standard.

Two provisions of the TPA address this explicitly:

First, Paragraph 2 of Article 10.5 explicitly prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. That paragraph additionally provides that the concept of "fair and equitable treatment" does not require treatment in addition to or beyond that which is required by that standard, and does not create additional substantive rights.

Additionally, Annex 10-A of the TPA, entitled "customary international law," explains that the Parties view the customary international law obligations referenced in Article 10.5 as resulting from the general and consistent practice of States that they follow from a sense of legal obligation. Thus, the fair-and-equitable-treatment obligation in the TPA is the customary international law obligation.

Turning to denial of justice, as noted by Paragraph 2(a) of the Article 10.5, the obligation not to deny justice is included as part of the concept of fair and equitable treatment. Because the obligation not to deny justice is subsumed within fair and equitable treatment, it is also therefore a customary international law obligation. And this is made clear by Annex 10-A, which, as I just noted, refers to the customary international law obligations in Article 10.5.

The obligations in Paragraph 1 of Article 10.5 apply to covered investments rather than to investors. That is in contrast with other obligations of Section A of Chapter 10, the Investment chapter of the TPA. For example, the obligation to accord national treatment found in Article 10.3 applies to both investors and covered investments, as explicitly provided in Paragraphs 1 and 2 of that Article. Similarly, the obligation to accord most-favored-nation treatment found in Article 10.4 also applies to both investors and covered investments, and likewise the obligation in Article 10.6 Paragraph 1 regarding treatment in case of strife explicitly applies to both investors and covered investments.

So, the Parties to the TPA made deliberate decisions to require that some obligations apply to both investors and covered investments. However, for Article 10.5, the TPA Parties made the decision to extend the obligation only to covered investments. The obligations contained in Paragraph 1 of Article 10.5 including the obligation not to deny justice only apply to treatment accorded to covered investments.

… This means that a denial of justice claim, just like any claim alleging a violation of Paragraph 1 of Article 10.5, may not be arbitrated pursuant to Chapter 10 of the TPA if the Claim is for treatment accorded to an investor rather than a covered investment. …

…In addition, a Claimant must establish that this treatment failed to meet the standards for denial of justice, which the United States discussed in more detail in its Third Submission in this matter, dated December 7th, 2018, in Paragraphs 2 to 4.

The question then, is how a covered investment is accorded treatment in an adjudicatory proceeding for the purposes of a denial of justice claim. For a claim submitted under Article 10.16, Paragraph 1(a), a Claimant, investor, alleging that the treatment accorded to its covered investment amounted to a denial of justice must establish that the Claimant was, or sought to be but was prohibited from becoming, a party to an adjudicatory proceeding in order for that treatment to result in a denial of justice by virtue of that proceeding.

Alternatively, for a claim submitted under Article 10.16 Paragraph 1(b) on behalf of its covered investment that is an enterprise of the Respondent State that the Investor owns or controls directly or indirectly, a Claimant must establish that the enterprise was, or sought to be but was prohibited from becoming, a party to an adjudicatory proceeding in order for the treatment accorded to result in a denial of justice by virtue of those proceedings.

The United States has also explained this in its recent non-disputing party submission under the U.S.-Peru TPA in *Gramercy Funds Management versus Republic of Peru*, …

The second issue I will address briefly is the burden of proof for a claim of denial of justice under Article 10.5 of the TPA and applicable rules of international law. …

General principles of international law concerning the burden of proof in international arbitration provide that a Claimant has the burden of proving its claims, and if a Respondent raises any affirmative defenses, the Respondent must prove such defenses. And the standard of proof is generally a preponderance of the evidence. However, when allegations of corruption are raised, either as part of a claim or part of a defense, the general principles of international law applicable to international arbitration require that the Party asserting that corruption occurred must establish the corruption through "clear and convincing" evidence.

An example of a tribunal that has ruled that the clear and convincing evidence standard is required for findings of corruption is *EDF Services Limited versus Romania* at Paragraph 221 of its Award dated October 8, 2009. And that case is ICSID Case Number ARB/05/13.

The third and last issue I will address is the issue of monetary damages, as that term is used in Paragraph 1(a) of Article 10.26. An investor may recover damages only to the extent that

damages are established on the basis of satisfactory evidence that is not inherently speculative. Further, an investor may only recover for loss or damage that the Investor incurred in its capacity as an investor of a party. That means that the Investor may only recover for damages it incurred in its capacity as an investor-seeking to make, making or having made an "investment" in the territory of the other Party. In Article 2.1 of the TPA further defines "covered investment" as an investment within the territory of the other Party. The United States has made a comparable submission on this issue in the context of the NAFTA as an intervenor in Mexico's action to partially set aside a NAFTA Award in the Court of Appeals for Ontario. That was the case of *Cargill versus Mexico*.

* * * *

c. U.S.-Peru TPA: Gramercy v. Peru

Chapter Ten of the U.S.-Peru Trade Promotion Agreement ("TPA") contains provisions similar to those in other trade agreements, to protect investors and facilitate dispute settlement. Article 10.20.2 of the U.S.-Peru TPA, like Article 1128 of NAFTA, allows for non-disputing Party submissions. On June 21, 2019, the United States filed an Article 10.20.2 submission in the dispute *Gramercy v. Peru*. Claimants Gramercy Funds Management LLC and Gramercy Peru Holdings LLC, incorporated in Delaware, filed a claim against the Government of Peru relating to measures allegedly taken by the government and its courts to diminish the value of agrarian reform bonds that the claimants purchased from Peruvian bondholders between 2006 and 2009. The claimants allege that Peru has violated Articles 10.3 (National Treatment), 10.4 (Minimum Standard of Treatment) and 10.7 (Expropriation) of the United States-Peru Trade Promotion Agreement. The submission is excerpted below (with footnotes omitted) and available in full at https://www.state.gov/gramercy-v-peru/.

* * * *

Article 10.7 (Expropriation)

20. Article 10.7 of the U.S.-Peru TPA provides that no Party may expropriate or nationalize property (directly or indirectly) except for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate and effective compensation; and in accordance with due process of law. …

21. If an expropriation does not conform to each of the specific conditions set forth in Article 10.7.1, paragraphs (a) through (d), it constitutes a breach of Article 10.7. …

22. Under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory. This principle is not an exception that applies after an expropriation has been found, but rather is a recognition that certain actions, by their nature, do not engage State responsibility.

23. U.S.-Peru TPA Annex 10-B, paragraph 3, provides specific guidance as to whether an action constitutes an indirect expropriation. As explained in paragraph 3(a) of Annex 10-B, determining whether an indirect expropriation has occurred "requires a case-by-case, fact-based inquiry" that considers, among other factors: (i) the economic impact of the government action; (ii) the extent to which that action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.

24. With respect to the first factor, an adverse economic impact "standing alone, does not establish that an indirect expropriation has occurred." It is a fundamental principle of international law that, for an expropriation claim to succeed a claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner." Moreover, to constitute an expropriation, a deprivation must be more than merely "ephemeral."

25. In determining the economic impact of a government action on an investment under paragraph 3(a)(i) of Annex 10-B, the first point of comparison is the economic value of the investment immediately before the expropriation took place, based on the facts and circumstances known to exist at that time. Where a series of measures is alleged to have resulted in the expropriation, the first point of comparison is the economic value of the investment immediately before the first in the alleged series of measures. The second point of comparison is the economic value immediately after the alleged expropriatory measure(s) have been implemented, but must exclude any adverse economic impact caused by acts, events or circumstances not attributable to the alleged breach. With respect to both points of comparison, the economic value of an investment must be reasonably ascertainable, and not speculative, indeterminate, or contingent on unforeseen or uncertain future events.

26. The second factor—the extent to which that action interferes with distinct, reasonable investment-backed expectations—requires an objective inquiry of the reasonableness of the claimant's expectations, which may depend on the regulatory climate existing at the time the property was acquired in the particular sector in which the investment was made. For example, where a sector is already highly regulated, reasonable extensions of those regulations are foreseeable.

27. The third factor considers the nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature (*i.e.*, whether "it arises from some public program adjusting the benefits and burdens of economic life to promote the common good")….

28. Judicial measures applying domestic law may give rise to a claim for denial of justice under Article 10.5 of the Agreement, as described in the next Section of this submission. Decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not, however, give rise to a claim for expropriation under Article 10.7.

29. Where a judiciary is not separate from other organs of the State and those organs (executive or legislative) direct or otherwise interfere with a domestic court decision so as to cause an effective expropriation, these executive or legislative acts may form the basis of a separate claim under Article 10.7, depending on the circumstances. Were it otherwise, States might seek to evade international responsibility for wrongful acts by using the courts as the conduit of executive or legislative action.

Article 10.5 (Minimum Standard of Treatment, including Denial of Justice)

* * * *

32. Annex 10-A to the U.S.-Peru TPA addresses the methodology for interpreting customary international law rules covered by Article 10.5. The Annex expresses the Parties' "shared understanding that 'customary international law' generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation." Thus, in Annex 10-A the Parties confirmed their understanding and

application of this two-element approach—State practice and *opinio juris*—which is "widely endorsed in the literature" and "generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice."

33. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-step approach, that a rule of customary international law exists, most recently in its decision on *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*.…

34. The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*. …

35. Once a rule of customary international law has been established, a claimant must then show that the respondent State has engaged in conduct that violates that rule. …

Concepts that have and have not crystallized into the minimum standard

36. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, expressly addressed in Article 10.5.2(a), concerns the obligation to provide "fair and equitable treatment," which includes "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world." This obligation, which is addressed in further detail below, encompasses the same guarantees as the "effective means of asserting claims and enforcing rights" provisions found in earlier U.S. treaty practice. The United States removed the "effective means" provision from its investment treaties because it deemed that the customary international law principle prohibiting denial of justice rendered a separate treaty obligation unnecessary.

37. Other areas included within the minimum standard of treatment concern the obligation not to expropriate covered investments except under the conditions specified in Article 10.7, and the obligation to provide "full protection and security," which, as stated in Article 10.5.2(b), "requires each Party to provide the level of police protection required under customary international law."

38. The concept of "legitimate expectations" is not a component element of "fair and equitable treatment" under customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

39. In addition, the customary international law minimum standard of treatment set forth in Article 10.5.1 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination. …

40. The concept of "transparency" also has not crystallized as a component of "fair and equitable treatment" under customary international law giving rise to an independent host-State obligation.…

41. Decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State

practice" for purposes of evidencing customary international law, although such decisions may be relevant for determining State practice when they include an examination of such practice.…

Claims Based on Judicial Measures

42. Article 10.5.1 differs from other substantive obligations (*e.g.*, Articles 10.3, 10.4 and 10.6) in that it obligates a Party to accord treatment only to a "covered investment". The minimum standard of treatment under Article 10.5.1 includes the obligation to provide "fair and equitable treatment," which, as explained in Article 10.5.2(a), includes the customary international law obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Therefore, in the context of a claim for denial of justice under Article 10.5.1, a claimant must establish that the treatment accorded to its covered investment rose to the level of a denial of justice under customary international law.

43. In addition, in the context of a claim for denial of justice under Article 10.5.1, a claimant (as an investor of a Party) must establish that it or its covered investment (in the case of an enterprise of the respondent State that the claimant owns or controls directly or indirectly) was, or sought to be but was prohibited from becoming, a party to adjudicatory proceedings in order for the treatment accorded to result in a denial of justice by virtue of those proceedings.

44. Denial of justice in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process." A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a "notoriously unjust" or "egregious" administration of justice "which offends a sense of judicial propriety."

45. More specifically, a denial of justice exists where there is, for example, an "obstruction of access to courts," "failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment." A manifestly unjust judgment is one that amounts to a travesty of justice or is grotesquely unjust. To be manifestly unjust a court decision must "amount[] to an outrage, bad faith, willful neglect of duty, or an insufficiency of governmental action recognizable by every unbiased [person]." Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom or impartiality of the judicial process. However, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law.

46. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts. Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice. In this connection, it is well established that international tribunals, such as U.S.-Peru TPA Chapter Ten tribunals, are not empowered to be supranational courts of appeal on a court's application of domestic law.

47. It is equally well established that the international responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. …

* * * *

C. WORLD TRADE ORGANIZATION

The following discussion of developments in 2019 in select WTO dispute settlement proceedings involving the United States is drawn from Chapter II.D "WTO Dispute Settlement" of the Annual Report of the President of the United States on the Trade Agreements Program ("Annual Report"), released in February 2020 and available at https://ustr.gov/sites/default/files/2020_Trade_Policy_Agenda_and_2019_Annual_Report.pdf. WTO legal texts referred to below are available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

1. Disputes brought by the United States

a. China – Domestic Supports for Agricultural Producers (DS511)

A panel of the WTO concluded in its February 28, 2019 report that China breached Articles 3.2 and 6.3 of the Agriculture Agreement by exceeding, in each year from 2012 to 2015, its *de minimis* level of support for wheat, Indica rice, and Japonica rice. On April 26, 2019, the Dispute Settlement Body ("DSB") adopted the panel's report. The United States and China agreed on March 31, 2020 as the end of a "reasonable period of time" for China to come into compliance with WTO rules. The Annual Report provides background on the dispute at pages 59-60.

b. China – Administration of Tariff-Rate Quotas for Certain Agricultural Products (DS517)

The Annual Report summarizes the background of this dispute at pages 60-61. On April 18, 2019, the panel constituted to hear the dispute circulated its report, finding that China's administration of tariff-rate quotas ("TRQs") for wheat, corn, and rice is inconsistent with its obligations. The DSB adopted the panel report on May 28, 2019. The United States and China agreed that the reasonable period of time for China to come into compliance with WTO rules ends February 29, 2020.

c. European Union – Measures Concerning Meat and Meat Products (Hormones) (DS26, 48)

See *Digest 2008* at 562-67 and *II Cumulative Digest 1991-1999* at 1418-20 for background on this long-running dispute. As explained at pages 62-63 of the Annual Report, the United States and EU successfully negotiated a resolution, the August 2, 2019 "*Agreement on the Allocation to the United States of a Share in the Tariff Rate Quota for High Quality Beef Referred to in the Revised MOU Regarding the Importation of Beef from Animals Not Treated with Certain Growth-promoting Hormones and Increased Duties Applied by the United States to Certain Products of the European Union.*"

Accordingly, the United States will not reinstate action in connection with the EU's measures concerning meat and meat products. 84 Fed. Reg. 68,286 (Dec. 13, 2019).

d. European Union – Measures Affecting Trade in Large Civil Aircraft (DS316)

As discussed in *Digest 2018* at 457, *Digest 2016* at 494-95, and *Digest 2011* at 373-74, both the panel and the Appellate Body agreed with U.S. claims that subsidies provided by the EU, France, Germany, Spain, and the United Kingdom to Airbus were inconsistent with WTO obligations. A compliance panel and the Appellate Body subsequently issued decisions in the dispute. Arbitration proceedings regarding the level of countermeasures resumed in 2018, and on October 2, 2019, determined a commensurate level of countermeasures up to $7.50 billion annually. A second compliance panel established in 2018 issued its report on December 2, 2019, finding that the EU continued to be in breach of Articles 5(c) and 6.3(a), (b), and (c) of the Agreement on Subsidies and Countervailing Measures ("SCM agreement"), and that the EU and certain Member States had accordingly failed to comply with the DSB recommendations under Article 7.8 of the SCM agreement to "take appropriate steps to remove the adverse effects or ... withdraw the subsidy." See Annual Report at 66-67. The EU has notified the DSB of its appeal of the second compliance panel's findings.

e. India – Export Related Measures (DS541)

On October 31, 2019, the panel constituted to hear the dispute brought regarding India's export subsidy program issued its report. The report finds all of the challenged export subsidy programs to be inconsistent with Articles 3.1 (a) and 3.2 of the SCM agreement. India has notified the DSB of its decision to appeal the panel report. See Annual Report at 69-70.

2. Disputes brought against the United States

a. Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (DS436)

As discussed in *Digest 2014* at 474-75, India and the United States both appealed some of the panel's findings in this dispute regarding U.S. countervailing measures on certain hot-rolled carbon steel flat products from India. The Appellate Body upheld the panel's findings in part, also reversing in part. In 2018, India requested the establishment of a compliance panel. The Annual Report summarizes further developments in the dispute in 2019 at pages 82-83:

> …The compliance Panel circulated its panel report on November 15, 2019. The compliance Panel rejected the majority of India's claims that the United States failed to bring its countervailing duty determination and injury determination into compliance. The United States prevailed on eight sets of claims, including with

> respect to [the U.S. Department of Commerce's or] USDOC's determination that the National Mineral Development Corporation is a public body, rejection of in-country benchmarks, use of out-of-country benchmarks, the calculation of benefit under the Steel Development Fund program, the inclusion of new subsidies in a review proceeding, disclosure of essential facts, the "appropriateness" of exceeding a terminated domestic settlement rate in a Section 129 proceeding, and all but one aspect of the injury determination. The compliance Panel found in favor of India on one specificity claim and on one injury issue. The compliance Panel also found that the United States' failure to amend one portion of the cumulation statute (19 USC § 1677(7)(G)(i)(III)) was inconsistent with the DSB recommendation made in the original proceedings of the dispute.
>
> On December 18, 2019, the United States notified the DSB of its decision to appeal issues of law covered in the report of the compliance Panel and legal interpretations developed by the compliance Panel. Because no division of the Appellate Body can be established to hear this appeal, the United States is conferring with India to seek a positive solution to this dispute.

b. Countervailing Duty Measures on Certain Products from China (DS437)

As discussed in *Digest 2018* at 458 and *Digest 2014* at 475, China challenged certain U.S. countervailing duty determinations in which the U.S. Department of Commerce considered Chinese state-owned enterprises to be public bodies under the SCM agreement. After the Appellate Body partially reversed the first panel's report, and the United States implemented DSB recommendations, the compliance panel requested by China issued its report in 2018. Both the United States and China appealed some of the findings in the compliance panel's report. The Annual Report summarizes developments in 2019 at page 85:

> An appellate report was circulated on July 16, 2019. The appellate majority upheld the findings of the compliance Panel. The appellate report includes a lengthy dissent that calls into question the reasoning and interpretative analysis of the appellate majority and prior Appellate Body reports.
>
> The DSB considered the appellate report and the compliance Panel report, as modified by the appellate report, at its meeting on August 15, 2019. The United States noted in its DSB statement that, through the interpretations applied in this proceeding, based primarily on erroneous approaches by the Appellate Body in past reports, the WTO dispute settlement system is weakening the ability of WTO Members to use WTO tools to discipline injurious subsidies. The Subsidies Agreement is not meant to provide cover for, and render untouchable, one Member's policy of providing massive subsidies to its industries through a complex web of laws, regulations, policies, and industrial plans. Finding that the kinds of subsidies at issue in this dispute cannot be addressed using existing WTO remedies, such as countervailing duties, calls into question the usefulness of the WTO to help WTO Members address the most urgent economic problems in today's world economy. The United States noted specific aspects of the findings of the appellate report that are erroneous and undermine the interests of all WTO

> Members in a fair trading system, including erroneous interpretations of "public body" and out-of-country benchmark, diminishing U.S. rights and adding to U.S. obligations, engaging in fact-finding, and treating prior reports as "precedent."
>
> On October 17, 2019, China requested authorization to suspend concessions and other obligations pursuant to Article 22.2 of the DSU. On October 25, 2019, the United States objected to China's request, referring the matter to arbitration pursuant to Article 22.6 of the DSU. On November 15, 2019, the WTO notified the parties that the arbitration would be carried out by the panelists who served during the compliance proceeding: Mr. Hugo Perezcano Diaz, Chair; and Mr. Luis Catibayan and Mr. Thinus Jacobsz, Members.

c. Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea (DS464)

As discussed in *Digest 2016* at 496-97, the United States agreed to implement the recommendation of the DSB after it adopted the Appellate Body and panel reports in this dispute. In 2018, the parties went to arbitration before the original panel after Korea requested authorization to suspend concessions. The Annual Report summarizes developments in 2019 at page 87:

> The arbitrator circulated its decision on February 8, 2019. The arbitrator determined that the level of nullification or impairment to Korea from U.S. noncompliance with respect to the antidumping and countervailing duty measures on washers totaled no more than $84.81 million per year, and the arbitrator further specified a formula for calculating the nullification or impairment for products other than washers.
>
> On May 6, 2019, Commerce published a notice in the U.S. *Federal Register* announcing the revocation of the antidumping and countervailing duty orders on washers (84 Fed. Reg. 19,763 (May 6, 2019)). With this action, the United States has completed implementation of the DSB recommendations concerning those antidumping and countervailing duty orders.

d. Certain Measures Relating to the Renewable Energy Sector (India) (DS510)

India brought this dispute concerning domestic content requirements and subsidy measures in the renewable energy programs of certain U.S. state governments. See Annual Report at 90-91. The June 27, 2019 panel report found that some state measures were not within its terms of reference and that other measures were inconsistent with Article III:4 of the GATT 1994. Both the United States and India have notified the DSB of their decisions to appeal.

3. Dispute Settlement Understanding

In 2019, the United States made a series of statements at DSB meetings explaining that, for more than 16 years and across multiple U.S. Administrations, the United States has

been raising serious concerns with the Appellate Body's disregard for the rules set by WTO Members and adding to or diminishing rights or obligations under the WTO Agreement. Many WTO Members share these concerns, whether on the mandatory 90-day deadline for appeals, review of panel fact finding, issuing advisory opinions on issues not necessary to resolve a dispute, the treatment of Appellate Body reports as precedent, or persons serving on appeals after their term has ended. The United States has also explained that when the Appellate Body abused the authority it had been given within the dispute settlement system, it undermined the legitimacy of the system and damaged the interests of all WTO Members who cared about having the agreements respected as they had been negotiated and agreed. If WTO Members support a rules-based trading system, then the Appellate Body must follow the rules to which WTO Members agreed in 1995.

For many years, the United States and other WTO Members have raised repeated concerns about appellate reports going far beyond the text setting out WTO rules in areas as varied as subsidies, antidumping and countervailing duties, standards under the TBT Agreement, and safeguards. Such overreach restricts the ability of the United States to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices.

As a result, the United States was not prepared to agree to launch the process to fill vacancies on the WTO Appellate Body without WTO Members engaging with and addressing these critical issues.

D. INVESTMENT TREATIES, TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Africa Growth and Opportunity Act

As previewed in a November 2, 2018 announcement (see *Digest 2018* at 460), the President determined that the Islamic Republic of Mauritania is not making continual progress in meeting the requirements described in section 506A(a)(1) of the Trade Act and terminated the designation of Mauritania as a beneficiary sub-Saharan African country for purposes of section 506A of the Trade Act, effective January 1, 2019. 84 Fed. Reg. 35 (Jan. 7, 2019).

On October 31, 2019, the President provided notice of intent to terminate Cameroon's designation as a beneficiary sub-Saharan African Country under AGOA, effective January 2020. The President took the action in accordance with section 506A(a)(3)(B) of the Trade Act based on his determination "that the Government of Cameroon currently engages in gross violations of internationally recognized human rights, contravening the eligibility requirements of section 104 of the AGOA." See White House message, available at https://agoa.info/news/article/15683-agoa-eligibility-of-cameroon-message-to-congress-by-the-white-house.html. The White House message states further:

> Cameroon has failed to address concerns regarding persistent human rights violations being committed by Cameroonian security forces. These violations include extrajudicial killings, arbitrary and unlawful detention, and torture.

In a December 26, 2019 proclamation*, the President also determined:

> that the Republic of Niger (Niger), the Central African Republic, and the Republic of The Gambia (The Gambia) have not established effective visa systems and related customs procedures meeting the requirements of section 113 of the AGOA (19 U.S.C. 3722), which are required in order for a beneficiary sub-Saharan African country to receive the preferential treatment provided for under section 112(a) of the AGOA (19 U.S.C. 3721(a)). Therefore, Niger, the Central African Republic, and The Gambia are not eligible for the treatment provided for under section 112(a).
>
> Section 112(c) of the AGOA, as amended in section 6002 of the Africa Investment Incentive Act of 2006 (division D, title VI, Public Law 109-432, 120 Stat. 2922, 3190-93 (19 U.S.C. 3721(c)), provides special rules for certain apparel articles imported from "lesser developed beneficiary sub-Saharan African countries."

2. Generalized System of Preferences

In Proclamation 9902 of May 31, 2019, President Trump modified the list of beneficiary developing countries for purposes of the Generalized System of Preferences ("GSP"), removing India from the list. 84 Fed. Reg. 26,323 (June 5, 2019). The President made the determination to terminate India's designation pursuant to section 502(d)(1) of the Trade Act of 1974, as amended (the "1974 Act") (19 U.S.C. 2462(d)(1)), finding that India has not assured the United States that it will provide "equitable and reasonable access" to its markets. India's designation as a beneficiary developing country terminated effective June 5, 2019, after proper notification to Congress.

In Proclamation 9887 of May 16, 2019, President Trump terminated the designation of Turkey as a beneficiary developing country for purposes of the GSP based on its level of economic development. 84 Fed. Reg. 23,425 (May 21, 2019).

3. NAFTA/U.S.-Mexico-Canada Agreement ("USMCA")

As discussed in *Digest 2018* at 460-61 and *Digest 2017* at 516, the Trump Administration renegotiated the North American Free Trade Agreement ("NAFTA") and the United States, Canada, and Mexico signed the Protocol Replacing NAFTA with the Agreement Between the United States of America, the United Mexican States, and Canada ("USMCA"). On December 10, 2019 the three parties reached a compromise agreement that, Secretary Pompeo said, "will bring the United States, Mexico, and Canada closer to passage of the [USMCA]." See December 11, 2019 State Department press statement, available at https://www.state.gov/on-the-united-states-mexico-canada-agreement/. On December 19, 2019, the U.S. House of Representatives passed the USMCA. See press statement from Secretary Pompeo, available at https://www.state.gov/milestone-marked-

* Editor's note: The December 26, 2019 proclamation is Presidential Proclamation No. 9974, 84 Fed. Reg. 72,187 (Dec. 30, 2019).

by-u-s-house-of-representatives-passage-of-the-united-states-mexico-canada-agreement/.[**]

E. IMPORT ADJUSTMENTS BASED ON U.S. NATIONAL SECURITY

Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862), as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security. The President acted pursuant to Section 232 in 2018 with respect to imports of aluminum, steel, and automobiles. Further adjustments were made in 2019.

1. Aluminum

As discussed in *Digest 2018* at 462-64, the United States took measures in 2018 to address aluminum imports. On May 19, 2019, in Proclamation 9893, the President excluded Canada and Mexico from the tariffs on aluminum imposed in 2018. 84 Fed. Reg. 23,983 (May 23, 2019). Excerpts follow from Proclamation 9893.

* * * *

4. The United States has successfully concluded discussions with Canada and Mexico on satisfactory alternative means to address the threatened impairment of the national security posed by aluminum imports from Canada and Mexico. The United States has agreed on a range of measures with Canada and Mexico to prevent the importation of aluminum that is unfairly subsidized or sold at dumped prices, to prevent the transshipment of aluminum, and to monitor for and avoid import surges. These measures are expected to allow imports of aluminum from Canada and Mexico to remain stable at historical levels without meaningful increases, thus permitting the domestic capacity utilization to remain reasonably commensurate with the target level recommended in the Secretary's report. In my judgment, these measures will provide effective, long-term alternative means to address the contribution of these countries' imports to the threatened impairment of the national security.

5. In light of these agreements, I have determined that, under the framework in the agreements, imports of aluminum from Canada and Mexico will no longer threaten to impair the national security, and thus I have decided to exclude Canada and Mexico from the tariff proclaimed in Proclamation 9704, as amended. The United States will monitor the implementation and effectiveness of these measures in addressing our national security needs, and I may revisit this determination as appropriate.

6. In light of my determination to exclude, on a long-term basis, these countries from the tariff proclaimed in Proclamation 9704, as amended, I have considered whether it is necessary and appropriate in light of our national security interests to make any corresponding adjustments to such tariff as it applies to other countries. I have determined that, in light of the agreed-upon measures with Canada and Mexico, it is necessary and appropriate, at this time, to maintain the current tariff level as it applies to other countries.

[**] Editor's note: The U.S. Senate approved the USMCA on January 16, 2020.

* * * *

2. Steel

As discussed in *Digest 2018* at 464-67, the United States took actions to adjust imports of steel into the United States after an investigation into the effects of such imports on U.S. national security. On May 16, 2019, the President issued Proclamation 9886, reducing the tariff imposed on steel from Turkey from 50 percent to 25 percent. 84 Fed. Reg. 23,421 (May 21, 2019). Excerpts follow from Proclamation 9886.

* * * *

6. The Secretary [of Commerce] has now advised me that, since the implementation of the higher tariff under Proclamation 9772, imports of steel articles have declined by 12 percent in 2018 compared to 2017 and imports of steel articles from Turkey have declined by 48 percent in 2018, with the result that the domestic industry's capacity utilization has improved at this point to approximately the target level recommended in the Secretary's report. This target level, if maintained for an appropriate period, will improve the financial viability of the domestic steel industry over the long term.

7. Given these improvements, I have determined that it is necessary and appropriate to remove the higher tariff on steel imports from Turkey imposed by Proclamation 9772, and to instead impose a 25 percent ad valorem tariff on steel imports from Turkey, commensurate with the tariff imposed on such articles imported from most countries. Maintaining the existing 25 percent ad valorem tariff on most countries is necessary and appropriate at this time to address the threatened impairment of the national security that the Secretary found in the January 2018 report.

* * * *

On May 19, 2019, the President issued Proclamation 9894, excluding Canada and Mexico from the steel tariffs. 84 Fed. Reg. 23,987 (May 23, 2019). Excerpts follow from Proclamation 9894.

* * * *

4. In Proclamation 9705, I further stated that any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country, and noted that, should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, adjust the tariff as it applies to other countries, as the national security interests of the United States require.

5. The United States has successfully concluded discussions with Canada and Mexico on satisfactory alternative means to address the threatened impairment of the national security posed by steel articles imports from Canada and Mexico. The United States has agreed on a range of measures with Canada and Mexico to prevent the importation of steel articles that are unfairly

subsidized or sold at dumped prices, to prevent the transshipment of steel articles, and to monitor for and avoid import surges. These measures are expected to allow imports of steel articles from Canada and Mexico to remain stable at historical levels without meaningful increases, thus permitting the domestic industry's capacity utilization to continue at approximately the target level recommended in the Secretary's report. In my judgment, these measures will provide effective, long-term alternative means to address the contribution of these countries' imports to the threatened impairment of the national security.

6. In light of these agreements, I have determined that, under the framework in the agreements, imports of steel articles from Canada and Mexico will no longer threaten to impair the national security, and thus I have decided to exclude Canada and Mexico from the tariff proclaimed in Proclamation 9705, as amended. The United States will monitor the implementation and effectiveness of these measures in addressing our national security needs, and I may revisit this determination as appropriate.

7. In light of my determination to exclude, on a long-term basis, Canada and Mexico from the tariff proclaimed in Proclamation 9705, as amended, I have considered whether it is necessary and appropriate in light of our national security interests to make any corresponding adjustments to such tariff as it applies to other countries. I have determined that, in light of the agreed-upon measures with Canada and Mexico, it is necessary and appropriate, at this time, to maintain the current tariff level as it applies to other countries.

* * * *

3. Automobiles

As discussed in *Digest 2018* at 468, USTR initiated a Section 232 investigation in 2018 into the imports of motor vehicles and automotive parts to determine if those imports threaten to impair U.S. national security. On May 17, 2019, the President issued Proclamation 9888, "Adjusting Imports of Automobiles and Automobile Parts into the United States." 84 Fed. Reg. 23,433 (May 21, 2019). Excerpts follow from Proclamation 9888.

* * * *

2. The report found that automotive research and development (R&D) is critical to national security. The rapid application of commercial breakthroughs in automobile technology is necessary for the United States to retain competitive military advantage and meet new defense requirements. Important innovations are occurring in the areas of engine and powertrain technology, electrification, lightweighting, advanced connectivity, and autonomous driving. The United States defense industrial base depends on the American-owned automotive sector for the development of technologies that are essential to maintaining our military superiority.

3. Thus, the Secretary found that American-owned automotive R&D and manufacturing are vital to national security. Yet, increases in imports of automobiles and automobile parts, combined with other circumstances, have over the past three decades given foreign-owned producers a competitive advantage over American-owned producers.

4. American-owned producers' share of the domestic automobile market has contracted sharply, declining from 67 percent (10.5 million units produced and sold in the United States) in 1985 to 22 percent (3.7 million units produced and sold in the United States) in 2017. During the

same time period, the volume of imports nearly doubled, from 4.6 million units to 8.3 million units. In 2017, the United States imported over 191 billion dollars' worth of automobiles.

5. Furthermore, one circumstance exacerbating the effects of such imports is that protected foreign markets, like those in the European Union and Japan, impose significant barriers to automotive imports from the United States, severely disadvantaging American-owned producers and preventing them from developing alternative sources of revenue for R&D in the face of declining domestic sales. American-owned producers' share of the global automobile market fell from 36 percent in 1995 to just 12 percent in 2017, reducing American-owned producers' ability to fund necessary R&D.

6. Because "[d]efense purchases alone are not sufficient to support … R&D in key automotive technologies," the Secretary found that "American-owned automobile and automobile parts manufacturers must have a robust presence in the U.S. commercial market" and that American innovation capacity "is now at serious risk as imports continue to displace American-owned production." Sales revenue enables R&D expenditures that are necessary for long-term automotive technological superiority, and automotive technological superiority is essential for the national defense. The lag in R&D expenditures by American-owned producers is weakening innovation and, accordingly, threatening to impair our national security.

7. In light of all of these factors, domestic conditions of competition must be improved by reducing imports. American-owned producers must be able to increase R&D expenditures to ensure technological leadership that can meet national defense requirements.

8. The Secretary found and advised me of his opinion that automobiles and certain automobile parts are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States. …

9. The Secretary therefore concluded that the present quantities and circumstances of automobile and certain automobile parts imports threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

10. In reaching this conclusion, the Secretary considered the extent to which import penetration has displaced American-owned production, the close relationship between economic welfare and national security, *see* 19 U.S.C. 1862(d), the expected effect of the recently negotiated United States-Mexico-Canada Agreement (USMCA), and what would happen should the United States experience another economic downturn comparable to the 2009 recession.

11. In light of the report's findings, the Secretary recommended actions to adjust automotive imports so that they will not threaten to impair the national security. One recommendation was to pursue negotiations to obtain agreements that address the threatened impairment of national security. In the Secretary's judgment, successful negotiations could allow American-owned automobile producers to achieve long-term economic viability and increase R&D spending to develop cutting-edge technologies that are critical to the defense industry.

12. I concur in the Secretary's finding that automobiles and certain automobile parts are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and I have considered his recommendations.

13. I have also considered the renegotiated United States-Korea Agreement and the recently signed USMCA, which, when implemented, could help to address the threatened impairment of national security found by the Secretary.

14. Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to take action to adjust the imports of an article and its derivatives that are being

imported into the United States in such quantities or under such circumstances as to threaten to impair the national security. If that action is the negotiation of an agreement contemplated in 19 U.S.C. 1862(c)(3)(A)(i), and such an agreement is not entered into within 180 days of the proclamation or is not being carried out or is ineffective, then the statute authorizes the President to take other actions he deems necessary to adjust imports and eliminate the threat that the imported article poses to national security. *See* 19 U.S.C. 1862(c)(3)(A).

15. I have decided to direct the United States Trade Representative (Trade Representative) to pursue negotiation of agreements contemplated in 19 U.S.C. 1862(c)(3)(A)(i) to address the threatened impairment of the national security with respect to imported automobiles and certain automobile parts from the European Union, Japan, and any other country the Trade Representative deems appropriate, and to update me on the progress of such negotiations within 180 days. …

* * * *

F. OTHER ISSUES

1. Foreign Account Tax Compliance Act

On July 8, 2019, the U.S.-Costa Rica Agreement to Improve International Tax Compliance and to Implement the Foreign Account Tax Compliance Act ("FATCA"), with Supplemental Agreement, entered into force. The Costa Rica FATCA agreement was signed at San Jose March 20, 2019 and is available at https://www.state.gov/costa-rica-19-708-agreement-to-improve-international-tax-compliance-and-to-implement-fatca-with-supplemental-agreement/.

On July 17, 2019, the U.S.-Armenia Agreement for Cooperation to Facilitate the Implementation of FATCA entered into force. The Armenia FATCA agreement was signed at Yerevan on February 12, 2018. The full text of the agreement is available at https://www.state.gov/armenia-19-717-agreement-for-cooperation-to-facilitate-the-implementation-of-the-foreign-account-tax-compliance-act/.

On July 17, 2019, the U.S.-Dominican Republic Agreement for Cooperation to Facilitate the Implementation of FATCA entered into force. The Dominican Republic FATCA agreement was signed at Santo Domingo on September 15, 2016. The full text of the agreement is available at https://home.treasury.gov/system/files/131/FATCA-Agreement-DominicanRepublic-9-15-2016.pdf.

On August 12, 2019, the Dominica FATCA agreement entered into force. The agreement was signed at Bridgetown and Roseau June 7 and 15, 2018. The text is available at https://www.state.gov/dominica-19-812.

On September 9, 2019, the U.S.-Tunisia Agreement for Cooperation to Facilitate the Implementation of FATCA entered into force. The Tunisia FATCA agreement was signed at Tunis on May 13, 2019. The full text of the agreement is available at https://home.treasury.gov/system/files/131/FATCA-Agreement-Tunisia-5-13-2019.pdf.

On November 18, 2019, the U.S.-Ukraine Agreement for Cooperation to Facilitate the Implementation of FATCA entered into force. The Ukraine FATCA agreement was signed at Kyiv on February 7, 2017. The full text of the agreement is

available at https://home.treasury.gov/system/files/131/FATCA-Agreement-Ukraine-2-07-2017.pdf.

2. Tax Treaties

The Protocol Amending the November 6, 2003 Convention on Double Taxation with Japan, signed at Washington January 24, 2013, entered into force August 30, 2019. The protocol was transmitted by the President of the United States of America to the Senate on April 13, 2015 (Treaty Doc. 114-1, 114th Congress, 1st Session). See *Digest 2015* at 486-87. It was reported favorably by the Senate Committee on Foreign Relations July 10, 2019 (Senate Executive Report No. 116-3, 116th Congress, 1st Session). Senate advice and consent to ratification was provided on July 17, 2019. The protocol was ratified by the President of the United States on August 5, 2019 and by Japan on August 27, 2019. The exchange of instruments of ratification occurred at Tokyo on August 30, 2019. The full text is available at https://www.state.gov/japan-19-830.

See Chapter 4 regarding other tax treaties that received Senate advice and consent to ratification in 2019 (with Spain, Switzerland, and Luxembourg).

3. U.S. Opposition to Nord Stream 2

See discussion in Chapter 16 of the Protecting Europe's Energy Security Act of 2019 ("PEESA"), authorizing sanctions on persons with respect to providing vessels for the construction of the Nord Stream 2 pipeline, pursued by Russia in order to bypass Ukraine for gas transit to Europe, and opposed by the United States and a plurality of European countries.

4. Telecommunications

On November 27, 2019, the State Department issued a media note regarding U.S. participation in the World Radiocommunication Conference held in Egypt from October 28 to November 22, 2019 ("WRC-19"). The media note is available at https://www.state.gov/conclusion-of-the-world-radiocommunication-conference-2019/ and excerpted below.

* * * *

Agreements reached at WRC-19 will help pave the way for the global harmonization of 5G, and the development of an ecosystem of applications and services that will fuel the growth of the digital economy for years to come. WRC-19 successfully identified over 15 GHz of globally harmonized millimeter wave spectrum for 5G, plus additional spectrum for 5G on a regional or country basis.

These decisions reinforce U.S. leadership in 5G, with successful outcomes in the 26 GHz, 40 GHz, and 47 GHz bands all aligning with actions already taken by the United States in its own aggressive 5G spectrum rollout. With this groundwork set, the world can now benefit from global roaming and economies of scale while permitting flexibility in 5G deployment.

WRC-19 also advanced a forward-looking framework for 5G and satellite services, including critical passive weather systems, to coexist without limiting the opportunities and

benefits of 5G and incumbent services. The Conference reached consensus on additional agenda items covering a range of new technologies and services, from enabling our commercial space sector through growth of next generation non-geosynchronous orbit satellite constellations to innovative infrastructure platforms that keep us connected in the air and at sea.

Given how critical spectrum-enabled technologies and services are to our economy, we welcome the consensus reached in discussions on spectrum allocation and emerging technologies. At WRC-19, the United States reinforced American leadership in 5G and innovation in spectrum-based technologies.

* * * *

5. Intellectual Property

a. Special 301 Report

The "Special 301" Report is an annual congressional report that in effect reviews the global state of intellectual property rights ("IPR") protection and enforcement. USTR provides information about the Special 301 Report on its website at https://ustr.gov/issue-areas/intellectual-property/Special-301.

USTR issued the 2019 Special 301 Report in April 2019. The Report is available at https://ustr.gov/sites/default/files/2019_Special_301_Report.pdf. The 2019 Report lists the following countries on the Priority Watch List: Algeria, Argentina, Chile, China, India, Indonesia, Kuwait, Russia, Saudi Arabia, Ukraine, and Venezuela. It lists the following on the Watch List: Barbados, Bolivia, Brazil, Canada, Columbia, Costa Rica, Dominican Republic, Ecuador, Egypt, Greece, Guatemala, Jamaica, Lebanon, Mexico, Pakistan, Paraguay, Peru, Romania, Switzerland, Thailand, Turkey, Turkmenistan, the United Arab Emirates, Uzbekistan, and Vietnam. See *Digest 2007* at 605–7 and the *2019 Special 301 Report* at 5-11 and Annex 1 for additional background on the watch lists.

b. Investigation of China's Policies on Technology Transfer, IP and Innovation

As discussed in *Digest 2018* at 475-77, USTR determined that China's laws, policies, practices, and actions related to technology transfer, IP, and innovation are actionable under section 301 of the Trade Act of 1974, as amended, (the "Act") (19 U.S.C. 2411) and the United States imposed tariffs on certain goods imported from China. The tariff rate for certain categories of goods was modified in a notice published on May 9, 2019 from 10 percent to 25 percent. 84 Fed. Reg. 20,459 (May 9, 2019). Additional goods were included in the 301 action on August 20, 2019. 84 Fed. Reg. 43,304 (Aug. 20, 2019). The rate for the goods identified on August 20, 2019 was modified (from ten percent to 15 percent) on August 30, 2019. 84 Fed. Reg. 45,821 (Aug. 30, 2019). USTR employed a product exclusion process under which several exclusions were granted. See, *e.g.*, 84 Fed. Reg. 21,389 (May 14, 2019); 84 Fed. Reg. 25,895 (June 4, 2019); 84 Fed. Reg. 29,576 (June 24, 2019); 84 Fed. Reg. 32,821 (July 9, 2019); 84 Fed. Reg. 37,381 (July 31, 2019).

c. Investigation of France's Digital Services Tax

On July 10, 2019, USTR initiated an investigation on the Digital Services Tax ("DST") under consideration by the Government of France. 84 Fed. Reg. 34,042 (July 16, 2019). The Section 301 Committee held public hearings and received public comments as part of this investigation. According to the Federal Register notice, there was evidence that France's proposed DST would target large, U.S.-based tech companies. *Id*. USTR's investigation initially focused on concerns that the DST would discriminate against U.S. companies; the retroactivity of the tax to January 1, 2019; and the extraterritoriality and other apparent unreasonableness of the tax within the international tax system. *Id*. at 34,043.

d. Marrakesh Treaty

See Chapter 4 regarding U.S. ratification of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

e. Texas Advanced *case regarding extraterritoriality of U.S. IP law*

On May 21, 2019, the United States filed a brief in the U.S. Supreme Court opposing the petition for certiorari in *Texas Advanced Optoelectronic Solutions, Inc. v. Renesas Electronics America, Inc.*, No. 18-600. On June 24, 2019, the petition was denied. Excerpts follow from the U.S. brief.

* * * *

Any person who "without authority * * * offers to sell * * * any patented invention[ ] within the United States" is liable for infringement under 35 U.S.C. 271(a). The geographic scope of this clause is subject to three possible interpretations. Section 271(a) might be read to establish infringement liability for (1) an offer made anywhere to sell a patented invention within the United States; (2) an offer made within the United States to sell an invention anywhere; or (3) an offer made within the United States to sell an invention within the U.S. market.

The Federal Circuit has adopted the first of those interpretations. See *Transocean Offshore Deepwater Drilling, Inc.* v. *Maersk Contractors USA, Inc.*, 617 F.3d 1296 (2010); *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 769 F.3d 1371 (2014), vacated and remanded on other grounds, 136 S. Ct. 1923 (2016); pp. 3-4, *supra*. Petitioner advocates the second interpretation. See Pet. 16-19. In the view of the United States, however, the third interpretation, which requires a domestic offer for a domestic sale, is the best construction of the "offers to sell" clause. The Federal Circuit therefore was correct in this case when it held that respondent is not liable for infringement on its offer to make the 98.8% of sales that occurred outside the U.S. market.

Interpreting Section 271(a) to require both a domestic offer and a contemplated sale within the United States is the most reasonable construction of that provision's text in light of the surrounding statutory context, applicable canons of construction, and this Court's presumption against extraterritorial application of U.S. law. "The presumption that United States law governs domestically but does not rule the world applies with particular force in patent law." *Microsoft*

Corp. v. *AT&T Corp.*, 550 U.S. 437, 454-455 (2007). The Patent Act grants exclusive rights "only over the United States market" for the patented invention; U.S. law does not regulate sales in foreign markets. *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U.S. 518, 523 (1972); *id.* at 531. Petitioner's understanding of Section 271(a)'s "offers to sell" clause is especially problematic because that interpretation would make it unlawful to offer to perform an act—the sale of a U.S.-patented invention in a foreign market—that does not violate U.S. law and may not violate the foreign country's law.

Although the government does not agree with the Federal Circuit's interpretation of Section 271(a) in all respects, the court's rule produces the correct result in a case like this one, where a defendant offers in the United States to make sales in a foreign market. And this case does not present an opportunity for the Court to address the converse scenario that was at issue in *Transocean*, where a defendant makes an offer abroad to undertake sales within the United States. The petition for a writ of certiorari therefore should be denied.

* * * *

6. Application of U.S. Securities Law to Purchases of Interests in Foreign Companies

On May 20, 2019, the United States filed an amicus brief in the U.S. Supreme Court in *Toshiba Corp. v. Automotive Indus. Pension Trust Fund*, No. 18-486. The issue in the case is whether Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), applies to domestic purchases of American Depositary Receipts ("ADRs") for shares in Toshiba, a foreign corporation. Toshiba admitted certain fraudulent accounting practices, prompting a class action lawsuit alleging violations of Section 10(b) and Rule 10b-5 of the Securities and Exchange Commission ("SEC" or "Commission"), 17 C.F.R. 240.10b-5. In 2010, the Supreme Court held that § 10(b) does not apply extraterritorially and, therefore, does not provide a cause of action for foreign plaintiffs to sue foreign and American companies in U.S. courts for misconduct in connection with securities traded on foreign exchanges. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010). See *Digest 2010* at 504-09. The U.S. brief, excerpted below (with record citations and most footnotes omitted), recommends that the Supreme Court deny certiorari to allow the district court to consider an amended complaint on remand, as directed by the court of appeals. The U.S. brief explains that the court of appeals correctly applied the decision in *Morrison* to find that the claims in the *Toshiba* case could constitute a permissible domestic application of Section 10(b).

* * * *

The court of appeals correctly held that respondents' claims involve a permissible domestic application of Section 10(b), and the court correctly remanded for amendment of the complaint and further analysis of whether respondents can adequately allege fraud by petitioner "in connection with" respondents' unsponsored-ADR purchases. Petitioner's contrary arguments are inconsistent with *Morrison*, the text of Section 10(b), and subsequent developments in this Court and Congress.

***1. The court of appeals correctly applied* Morrison**

a. Federal statutes "apply only within the territorial jurisdiction of the United States" unless "a contrary intent appears." *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949). Until this Court decided *Morrison*, lower courts generally had agreed that the "text of Section 10(b) sheds

little light on when a transnational securities fraud falls within the statute's substantive prohibition." U.S. Amicus Br. at 13, *Morrison, supra* (No. 08-1191) (U.S. *Morrison* Br.). Rather than applying the presumption against extraterritoriality, courts "sought to ascertain Section 10(b)'s transnational reach by considering" perceived congressional intent. *Id.* at 15; see, *e.g.*, *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1337 (2d Cir. 1972) (Friendly, J.). The courts "uniformly agreed that Section 10(b) can apply to a transnational securities fraud either when fraudulent conduct has effects in the United States or when sufficient conduct relevant to the fraud occurs in the United States." U.S. *Morrison* Br. at 15. That approach was called the "conduct-and-effects test." *Morrison*, 561 U.S. at 275 (Stevens, J., concurring in the judgment).

In *Morrison*, the Court considered whether Section 10(b) applied to an alleged fraud involving misstatements, made by the Florida subsidiary of an Australian bank, that were reflected in the bank's financial statements and relied on by Australian investors who purchased the bank's shares on the Australian Stock Exchange. 561 U.S. at 251-253. In deciding that question, the Court thoroughly repudiated the conduct-and-effects test. *Id.* at 255-261. The Court explained that the test "disregard[ed] * * * the presumption against extraterritoriality," was "not easy to administer," and had produced "unpredictable and inconsistent" results. *Id.* at 255, 258, 260. The Court instead relied exclusively on the text of the statute, found "no affirmative indication * * * that § 10(b) applies extraterritorially," and "therefore conclude[d] that it does not." *Id.* at 265.

The Court then considered the argument that the claims involving alleged misstatements by the Florida subsidiary of the Australian bank "seek no more than domestic application" of Section 10(b). *Morrison*, 561 U.S. at 266. In rejecting that contention, the Court stated that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Ibid.* The Court explained that "Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" *Ibid.* (quoting 15 U.S.C. 78j(b)). Accordingly, the Court concluded, "it is * * * only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies." *Id.* at 267.[5]

In subsequent decisions, the Court has confirmed *Morrison*'s approach to identifying the permissible "domestic application[s] of [a] statute" that does not apply extraterritorially. *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2101 (2016). Courts "do this by looking to the statute's 'focus.'" *Ibid.* "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." *Ibid.* By contrast, "if the conduct relevant to the focus occurred in a foreign country,

[5] The *Morrison* litigation initially involved claims by "an American investor in [the bank's] ADRs." 561 U.S. at 252 n.1. Those claims were not before this Court. *Ibid.* The bank, however, conceded that "the securities law extends to protect domestic investors who purchase securities in domestic markets," including investors "who purchased the [b]ank's ADRs." *In re National Austl. Bank Sec. Litig.*, No. 03-cv-6537, 2006 WL 3844465, at *2 n.6 (S.D.N.Y. Oct. 25, 2006); see Resps. Br. at 9, 51, *Morrison, supra* (No. 08-1191). And in holding that applying Section 10(b) to the Australian transactions would be impermissibly extraterritorial, the Court was careful to distinguish the domestic ADR purchases. See 561 U.S. at 273 ("This case involves no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States.").

then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Ibid.*; see *WesternGeco LLC* v. *ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) ("[If] the conduct relevant to [the statute's] focus occurred in United States territory * * * , then the case involves a permissible domestic application of the statute.") (citation omitted).

b. The court of appeals correctly applied *Morrison* to respondents' claims. The *Morrison* Court concluded that, because the text of Section 10(b) "exclusively focuses on '*domestic* purchases and sales,'" the provision applies only to "'domestic transactions'" in securities. The court of appeals construed that holding to require it "to examine the location of the transaction"—respondents' purchase of the unsponsored Toshiba ADRs. Given the absence of any dispute that those ADRs "were purchased in the United States," the court correctly held that respondents' claims did not seek an impermissible extraterritorial application of Section 10(b).

Petitioner's core contention below was that "the existence of a domestic transaction is necessary but not sufficient under *Morrison*." In petitioner's view, a permissible domestic application of Section 10(b) also requires a "connection between" the defendant and domestic "transactions." *Ibid.* As the court of appeals correctly explained, that assertion conflates the question whether Section 10(b) *applies* with the question whether it has been *violated*. *Id.* at 32a. Respondents can ultimately obtain relief only if they show that petitioner engaged in fraud "in connection with the purchase or sale of " a security. 15 U.S.C. 78j(b). But the fact "that [petitioner] may ultimately be found not liable for causing the loss in value to the ADRs does not mean that [Section 10(b)] is inapplicable to the transactions."

In arguing that a defendant's connection (or lack thereof) to the relevant securities transaction bears on the extraterritoriality analysis, *Morrison*, 561 U.S. at 266-267, petitioner seeks to revisit *Morrison*'s holding as to the "focus" of Section 10(b). The *Morrison* Court explained that "the focus of the Exchange Act"—the "object[] of the statute's solicitude"—was not on the "deceptive conduct" of the defendant, but on "purchases and sales of securities in the United States." *Id.* at 266; see *RJR Nabisco*, 136 S. Ct. at 2100 ("[*Morrison*] concluded that the statute's focus is on domestic securities transactions."). That was not the only conceivable reading of the statute; the government argued that Section 10(b) should apply when the case involves "significant conduct in the United States that is material to" a fraudulent transaction abroad. *Morrison*, 561 U.S. at 270 (quoting U.S. *Morrison* Br. at 16). But the Court rejected that interpretation, holding instead that Section 10(b)'s "exclusive focus [is] on *domestic* purchases and sales." *Id.* at 268. Petitioner's argument here is irreconcilable with that square holding. Because the "conduct in this case that is relevant to [Section 10(b)'s] focus clearly occurred in the United States," the claims involve a "domestic application" of the statute. *Western-Geco*, 138 S. Ct. at 2138.

c. Relying on passages in *Parkcentral*, several of petitioner's amici contend that, even when a particular suit involves domestic securities transactions, application of Section 10(b) will still be impermissibly extraterritorial unless the defendant has engaged in some degree of domestic conduct with respect to the transaction. … The *Parkcentral* court relied on amorphous and atextual presumptions about Congress's intent, and it acknowledged that its approach would not "reliably determine when a particular invocation of § 10(b) will be deemed appropriately domestic or impermissibly extraterritorial," 763 F.3d at 216-217, thus replicating several principal defects that this Court identified in earlier Second Circuit law, see *Morrison*, 561 U.S. at 258-259. …The Ninth Circuit in this case rightly declined the invitation to adopt a repackaged

version of the conduct-and-effects test that the *Morrison* Court had rejected, and that raises the same practical concerns as the lower courts' pre-*Morrison* approach.

Efforts to reintroduce the conduct-and-effects test also contradict Congress's judgment. Shortly after the decision in *Morrison*, Congress amended the Exchange Act to codify the conduct-and-effects test in actions brought by the SEC or the Justice Department. … *SEC* v. *Scoville*, 913 F.3d 1204, 1215 (10th Cir. 2019). Applying a conduct-and-effects test to private securities-fraud actions would negate Congress's decision to limit that amendment to government enforcement suits. Cf., *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted; brackets in original).

2. The court of appeals correctly remanded this case to allow the district court to determine whether respondents can adequately allege a Section 10(b) violation

After correctly holding that respondents' claims involve a permissible domestic *application* of Section 10(b), the court of appeals correctly remanded to the district court to address whether respondents can adequately allege a *violation* of Section 10(b). In particular, the court noted that Section 10(b) requires an allegation that a defendant's fraud was "*in connection with*" the securities transaction that underlies the claim. *Id.* at 34a (quoting 15 U.S.C. 78j(b)).

Here, Section 10(b) requires respondents to allege and ultimately prove that petitioner "use[d]" or "employ[ed]" its fraudulent accounting practices "in connection with" respondent's purchase of the unsponsored ADRs in the United States. 15 U.S.C. 78j(b); see, *e.g.*, *SEC* v. *Zandford*, 535 U.S. 813, 819-820 (2002). The court of appeals held that respondents have not yet made adequate allegations on this point. And many of the strongest arguments advanced by petitioner and its amici against allowing this suit to go forward, although currently framed as grounds for concluding that application of Section 10(b) to these facts would be impermissibly extraterritorial, may be more persuasive in challenging respondents' efforts to satisfy the "in connection with" requirement. ... In particular, the distinction between sponsored and unsponsored ADRs, while irrelevant to the determination whether respondents' ADR purchases were "domestic" for purposes of *Morrison*, 561 U.S. at 267, may be relevant to whether petitioner "use[d]" or "employe[d]" fraudulent accounting practices "in connection with" respondents' purchases of the unsponsored ADRs, 15 U.S.C. 78j(b). For example, if petitioner can show that it "ch[o]se to list and transact [its] securities only in foreign markets precisely to avoid U.S. securities regulation and litigation," it would be more difficult for respondents to prove that petitioner's accounting fraud was "in connection with" domestic ADR purchases.

To succeed on their claims, moreover, private securities-fraud plaintiffs like respondents also must establish materiality, scienter, reliance, and loss causation. See *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005). Petitioner's contention that it had no involvement in the unsponsored ADRs at issue here may be relevant to those elements of respondents' cause of action. For example, the loss-causation inquiry is based on common-law proximate-causation principles, *id.* at 344-345, which require consideration of the directness of the link between the defendant's conduct and the plaintiff 's injury, see *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992), as well as the foreseeability of the harm, see *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 532-533 (1983). Respondents therefore must demonstrate that the injuries they suffered were not impermissibly indirect and were foreseeable results of petitioner's conduct. Although the United States takes no position on whether respondents can satisfy those requirements, the need for those additional

inquiries further belies petitioner's predictions that the decision below will have extreme practical effects.

* * * *

7. Presidential Permits

a. New Executive Order on Presidential Permits

On April 10, 2019, the President issued Executive Order 13867, "Issuance of Permits with Respect to Facilities and Land Transportation Crossings at the International Boundaries of the United States." 84 Fed. Reg. 15,491 (Apr. 15, 2019). E.O. 13867 revokes the prior executive orders (E.O. 11423 and E.O. 13337) that governed the delegation of authority to the Secretary to issue or deny permits on the basis of a national interest determination. Under the new E.O., the Secretary still is designated to receive permit applications and prepares a foreign policy recommendation for the President, who has the sole authority to issue or deny a permit. Excerpts follow from E.O. 13867.

* * * *

Section 1. *Purpose.* Presidents have long exercised authority to permit or deny the construction, connection, operation, or maintenance of infrastructure projects at an international border of the United States (cross-border infrastructure). Over the course of several decades, executive actions, Federal regulations, and policies of executive departments and agencies (agencies) related to the process of reviewing applications for Presidential permits, and issuing or denying such permits, have unnecessarily complicated the Presidential permitting process, thereby hindering the economic development of the United States and undermining the efforts of the United States to foster goodwill and mutually productive economic exchanges with its neighboring countries. To promote cross-border infrastructure and facilitate the expeditious delivery of advice to the President regarding Presidential permitting decisions, this order revises the process for the development and issuance of Presidential permits covering the construction, connection, operation, and maintenance of certain facilities and land transportation crossings at the international boundaries of the United States.

Sec. 2. *Cross-Border Infrastructure Presidential Permit Application Procedures.* (a) The Secretary of State shall adopt procedures to ensure that all actions set forth in subsections (b) through (h) of this section can be completed within 60 days of the receipt of an application for a Presidential permit for the types of cross-border infrastructure identified in subsection (b) of this section.

(b) Except with respect to facilities covered by Executive Order 10485 of September 3, 1953 (Providing for the Performance of Certain Functions Heretofore Performed by the President With Respect to Electric Power and Natural Gas Facilities Located on the Borders of the United States), as amended, and section 5(a) of Executive Order 10530 of May 10, 1954 (Providing for the Performance of Certain Functions Vested in or Subject to the Approval of the President), the Secretary of State is hereby designated to receive all applications for the issuance or amendment of Presidential permits for the construction, connection, operation, or maintenance, at the international boundaries of the United States, of:

(i) pipelines, conveyor belts, and similar facilities for exportation or importation of all products to or from a foreign country;

(ii) facilities for the exportation or importation of water or sewage to or from a foreign country;

(iii) facilities for the transportation of persons or things, or both, to or from a foreign country;

(iv) bridges, to the extent that congressional authorization is not required;

(v) similar facilities above or below ground; and

(vi) border crossings for land transportation, including motor and rail vehicles, to or from a foreign country, whether or not in conjunction with the facilities identified in subsection (b)(iii) of this section.

(c) Upon receipt of an application pursuant to subsection (b) of this section, the Secretary of State may:

(i) request additional information from the applicant that the President may deem necessary; and

(ii) refer the application and pertinent information to heads of agencies specified by the President.

(d) The Secretary of State shall, as soon as practicable after receiving an application pursuant to subsection (b) of this section, advise the President as to whether the President should request the opinion, in writing, of any heads of agencies concerning the application and any related matter. Any agency heads whose opinion the President requests shall provide views and render such assistance as may be requested, consistent with their legal authority, in a timely manner, not to exceed 30 days from the date of a request, unless the President otherwise specifies.

(e) With respect to each application, the Secretary of State may solicit such advice from State, tribal, and local government officials, and foreign governments, as the President may deem necessary. The Secretary shall seek responses within no more than 30 days from the date of a request.

(f) Upon receiving the views and assistance described in subsections (c), (d), and (e) of this section, the Secretary of State shall consider whether additional information may be necessary in order for the President to evaluate the application, and the Secretary shall advise the President accordingly. At the direction of the President, the Secretary shall request any such additional information.

(g) If, at the conclusion of the actions set forth in subsections (b) through (f) of this section, the Secretary of State is of the opinion that the issuance of a Presidential permit to the applicant, or the amendment of an existing Presidential permit, would not serve the foreign policy interests of the United States, the Secretary shall so advise the President, and provide the President with the reasons supporting that opinion, in writing.

(h) If, at the conclusion of the actions set forth in subsections (b) through (f) of this section, the Secretary of State is of the opinion that the issuance of a Presidential permit to the applicant, or the amendment of an existing Presidential permit, would serve the foreign policy interests of the United States, the Secretary shall so advise the President, and provide the President with the reasons supporting that opinion, in writing.

(i) Any decision to issue, deny, or amend a permit under this section shall be made solely by the President.

(j) The Secretary of State shall, consistent with applicable law, review the Department of State's regulations and make any appropriate changes to them to ensure consistency with this order by no later than May 29, 2020.

(k) Executive Order 13337 of April 30, 2004 (Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States), and Executive Order 11423 of August 16, 1968 (Providing for the Performance of Certain Functions Heretofore Performed by the President With Respect to Certain Facilities Constructed and Maintained on the Borders of the United States), as amended, are hereby revoked.

Sec. 3. *Existing Permits.* All permits heretofore issued pursuant to the orders enumerated in section 2(k) of this order, and in force at the date of this order, shall remain in full effect in accordance with their terms unless and until modified, amended, suspended, or revoked by the appropriate authority.

* * * *

b. Keystone XL pipeline

For background on the State Department's consideration of the application for a permit for the proposed Keystone XL pipeline (which dates back to the original application in 2008), see *Digest 2018* at 478-85, *Digest 2017* at 518-19, *Digest 2016* at 509-11, and *Digest 2015* at 502. On March 29, 2019, the President issued a permit authorizing TransCanada Keystone Pipeline, L.P., to construct, connect, operate, and maintain pipeline facilities at the international boundary between the United States and Canada. 84 Fed. Reg. 13,101 (Apr. 3, 2019). The 2019 permit supersedes and revokes a permit authorizing similar activities that the State Department had issued in 2017. In December 2019, the Department, consistent with the National Environmental Policy Act ("NEPA") of 1969, published a Final Supplemental Environmental Impact Statement ("EIS") addressing the Keystone XL pipeline. The Notice of Availability for the Final Supplemental EIS for the Keystone XL Pipeline was published in the Federal Register by the Environmental Protection Agency ("EPA") on December 20, 2019. 84 Fed. Reg. 70,187 (Dec. 20, 2019).

8. Corporate Responsibility Regimes

a. Kimberley Process

The Kimberley Process ("KP") is an international, multi-stakeholder initiative created to increase transparency and oversight in the diamond industry in order to eliminate trade in conflict diamonds, i.e. rough diamonds sold by rebel groups or their allies to fund conflict against legitimate governments. For background on U.S. participation in the KP, see *Digest 2016* at 511-12; *Digest 2014* at 506-07; *Digest 2013* at 183; *Digest 2004* at 653-54; *Digest 2003* at 704-709; and *Digest 2002* at 728-29.

Consistent with prior practice, the United States sent a delegation to the 2019 Kimberley Process Plenary in New Delhi, India, November 18-22, 2019. See November 25, 2019 State Department media note on the conclusion of the plenary, available at

https://www.state.gov/conclusion-of-the-2019-kimberley-process-plenary/. The outcome of the plenary is summarized in the media note as follows:

> The KP reform process did not reach consensus on a new, expanded definition of conflict diamonds that would include violence by a broader set of actors, including state security forces. The United States is committed to a strong and sustainable diamond industry and has expressed concern that the current definition's limited focus on rebel groups does not sufficiently protect the legitimacy of the rough diamond supply chain.
>
> The United States worked closely with the Central African Republic (CAR) Government and other KP members to make limited provisional modifications to the current KP oversight mechanism focused on the CAR. Under these modifications, the CAR Government can now export rough diamonds from the eight KP-compliant zones in the western CAR at will. The exports will be subject to quarterly reviews by the KP CAR Monitoring Team. In addition, importers must notify the Monitoring Team when they receive rough diamonds from CAR. Due to lack of government control and widespread rebel activity in the east, KP-compliant exports from eastern CAR are not possible.
>
> International endorsement for due diligence and responsible sourcing with respect to natural resources such as diamonds has been expressed in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, the Lusaka Declaration pertaining to responsible treatment of natural resources in Africa, and the UN Guiding Principles on Business and Human Rights. The United States continues to encourage our partners to express positions in the KP that reflect these endorsements.

b. Business and Human Rights

See Chapter 6.

9. Committee on Foreign Investment in the United States

As discussed in *Digest 2018* at 486-87, the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA") updated and strengthened the authorities of the Committee on Foreign Investment in the United States ("CFIUS"). Section 1727 of FIRRMA established that CFIUS should have implementing regulations in place no later than 18 months after its August 13, 2018 date of enactment. On September 17, 2019, the Department of the Treasury, as chair of CFIUS, published proposed regulations to implement FIRRMA. The proposed regulations were published in two parts: a revised version of 31 C.F.R. Part 800, applicable to "covered investments," and a new regulation at 31 C.F.R. Part 802, addressing real estate transactions. 84 Fed. Reg. 50,174 (Sep. 24, 2019) (correction at 84 Fed. Reg. 52,411 (Oct. 2, 2019)) and 84 Fed. Reg. 50,214 (Sep. 24, 2019).

Cross References

International crime issues relating to cyberspace, **Ch. 3.B.6**
Senate advice and consent to ratification of tax treaties, **Ch.4.A.1.**
Universal Postal Union, **Ch. 4.B.2.**
Marrakesh Treaty, **Ch. 4.B.3.**
Alimanestianu v. United States *(takings case),* **Ch. 8.F.**
Expropriation Exception to Immunity: de Csepel v. Hungary, **Ch. 10.A.2.**
U.S.-Mexico-Canada agreement on environmental cooperation, **Ch. 13.A.4.**
Cuba sanctions, **Ch. 16.A.4.**
Cyber activity sanctions, **Ch. 16.A.10**
Applicability of international law to conflicts in cyberspace, **Ch. 18.A.5.c.**

CHAPTER 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

1. UN Convention on the Law of the Sea

a. Meeting of States Parties to the Law of the Sea Convention

The United States participated as an observer to the 29th meeting of States Parties to the Law of the Sea Convention ("SPLOS") at the United Nations, June 17-19, 2019.

b. UN General Assembly Resolution on Oceans and the Law of the Sea

Emily Pierce, counselor for legal affairs for the U.S. Mission to the United Nations, delivered the U.S. statement at a joint debate on the General Assembly resolution on oceans and the law of the sea on December 10, 2019. Her statement is excerpted below and available at https://usun.usmission.gov/statement-at-a-joint-debate-on-agenda-items-74a-and-b-on-oceans-and-the-law-of-the-sea/.

* * * *

My delegation is pleased to co-sponsor the General Assembly resolution on oceans and the law of the sea.

The United States underscores the central importance of international law as reflected in the Law of the Sea Convention—the universal and unified character of which is emphasized in this resolution.

As we see attempts to impede the lawful exercise of navigational rights and freedoms under international law, it is more important than ever that we remain steadfast in our resolve to uphold these rights and freedoms.

Among the places where freedom of the seas is most threatened is the South China Sea. The assertion of unlawful and sweeping maritime claims—including through ongoing intimidation and coercion against long-standing oil and gas development and fishing practices by others—threatens the rules-based regime that has enabled the region to prosper.

Our position in the South China Sea—and elsewhere in the world—is simple: the rights and interests of all nations—regardless of size, power, and military capabilities—must be respected.

In this regard, we call on all States to resolve their territorial and maritime disputes peacefully and free from coercion, as well as fashion their maritime claims and conduct their activities in the maritime domain in accordance with international law as reflected in the Convention; to respect the freedoms of navigation and overflight and other lawful uses of the sea that all users of the maritime domain enjoy; and to settle disputes peacefully in accordance with international law.

The United States values the platform that the General Assembly provides to elevate these important issues. The annual oceans and law of the sea resolution serves as an opportunity for the global community to identify key ocean issues and develop constructive ways to address them.

In particular, we appreciate that this year's resolution recognizes many of the robust global and regional efforts to combat marine debris, which imposes significant social and economic costs and threatens marine ecosystems.

We are also pleased that this year's resolution supports the "UN Decade of Ocean Science for Sustainable Development" by highlighting the contributions of the 2019 informal consultative process on oceans and the law of the sea toward planning for the Decade, which will begin in 2020. Ocean science, ocean observing, and ocean exploration are key for understanding the full breadth of the ocean's bounty.

Turning to sustainable fisheries, the United States values deeply the important work being done throughout the world on sustainable fisheries management, which helps support economic activity and healthy marine ecosystems.

We wish to call particular attention to new language in this year's resolution related to enhancing fishing vessel safety, improving labor conditions, and addressing illegal, unreported, and unregulated fishing, including encouraging collaboration between the Food and Agriculture Organization, the International Labor Organization and the International Maritime Organization. This year's resolution also recognizes the valuable contributions of women to the fisheries sector as well as the challenges they face.

We would also like to draw attention to paragraphs that emphasize the importance of effective performance reviews of regional fisheries management organizations, which reflect the productive discussions held at the fourteenth round of informal consultations of States Parties (ICSP) to the UN Fish Stocks Agreement. We look forward to continuing substantive discussions at next year's ICSP on "Implementation of an ecosystem approach to fisheries management," as well as preparing for the next session of the resumed Review Conference for the Agreement. Next year we will also focus on reviewing actions as called for by the General Assembly to address the impacts of bottom fishing on vulnerable marine ecosystems and the long-term sustainability of deep-sea fish stocks, with a view to ensuring full implementation and strengthening commitments where necessary.

With regard to both resolutions, we refer you to our remarks delivered on November 21, 2019, regarding our position with respect to the 2030 Agenda for Sustainable Development, the Addis Ababa Action Agenda, technology transfer, the Paris Agreement and climate change, as well as reports of the Intergovernmental Panel on Climate Change.[*]

Before concluding, we would like to congratulate the Government of Norway for hosting another successful Our Ocean conference, at which participants announced commitments worth more than 63 billion dollars to address key issues facing the ocean. The United States announced 23 new commitments worth approximately 1.21 billion dollars to promote sustainable fisheries,

[*] Editor's note: These November 21, 2019 remarks are discussed and excerpted in Chapter 13 of this *Digest*.

combat marine debris, and support marine science, observation, and exploration. We look forward to the 2020 Our Ocean conference in Palau, as well as the 2021 conference in Panama.

We would also like to express our appreciation for the important leadership of Ambassador Rena Lee of Singapore in her role as president of the intergovernmental conference on an international instrument regarding the conservation and sustainable use of biodiversity beyond national jurisdiction. We look forward to working with delegations as the IGC continues and hope to have a broadly supported result that takes into account the views of all delegations.

* * * *

2. Maritime Claims

a. South China Sea

On July 20, 2019, the State Department issued a press statement regarding China's coercive behavior against other countries' oil and gas development activities in the South China Sea. The press statement is available at https://www.state.gov/chinese-coercion-on-oil-and-gas-activity-in-the-south-china-sea/ and excerpted below.

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* * * *

The United States is concerned by reports of China's interference with oil and gas activities in the South China Sea (SCS), including Vietnam's long-standing exploration and production activities. China's repeated provocative actions aimed at the offshore oil and gas development of other claimant states threaten regional energy security and undermine the free and open Indo-Pacific energy market.

* * * *

China's reclamation and militarization of disputed outposts in the SCS, along with other efforts to assert its unlawful SCS maritime claims, including the use of maritime militia to intimidate, coerce, and threaten other nations, undermine the peace and security of the region.

China's growing pressure on ASEAN countries to accept Code of Conduct provisions that seek to restrict their right to partner with third party companies or countries further reveal its intent to assert control over oil and gas resources in the South China Sea.

The United States firmly opposes coercion and intimidation by any claimant to assert its territorial or maritime claims.

China should cease its bullying behavior and refrain from engaging in this type of provocative and destabilizing activity.

* * * *

On August 22, 2019, the State Department released a further press statement, available at https://www.state.gov/china-escalates-coercion-against-vietnams-longstanding-oil-and-gas-activity-in-the-south-china-sea/, regarding China's actions interfering with Vietnam's oil and gas activities in the South China Sea. The August 22 press statement follows.

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* * * *

The United States is deeply concerned that China is continuing its interference with Vietnam's longstanding oil and gas activities in Vietnam's Exclusive Economic Zone (EEZ) claim. This calls into serious question China's commitment, including in the ASEAN-China Declaration on the Conduct of Parties in the South China Sea, to the peaceful resolution of maritime disputes.

China's redeployment of a government-owned survey vessel, together with armed escorts, into waters offshore Vietnam near Vanguard Bank on August 13, is an escalation by Beijing in its efforts to intimidate other claimants out of developing resources in the South China Sea (SCS).

In recent weeks, China has taken a series of aggressive steps to interfere with ASEAN claimants' longstanding, well-established economic activities, in an attempt both to coerce them to reject partnerships with foreign oil and gas firms, and to work only with China's state-owned enterprises. In the case of Vanguard Bank, China is pressuring Vietnam over its work with a Russian energy firm and other international partners.

China's actions undermine regional peace and security, impose economic costs on Southeast Asian states by blocking their access to an estimated $2.5 trillion in unexploited hydrocarbon resources, and demonstrate China's disregard for the rights of countries to undertake economic activities in their EEZs, under the 1982 Law of the Sea Convention, which China ratified in 1996.

U.S. companies are world leaders in the exploration and extraction of hydrocarbon resources, including offshore and in the South China Sea. The United States therefore strongly opposes any efforts by China to threaten or coerce partner countries into withholding cooperation with non-Chinese firms, or otherwise harassing their cooperative activities. The United States is committed to bolstering the energy security of our partners and allies in the Indo-Pacific region and in ensuring uninterrupted regional oil and gas production for the global market.

* * * *

b. Turkey

On July 9, 2019, the State Department issued a press statement expressing concern about Turkey's attempts to conduct drilling operations in the waters off Cyprus. The statement is available at https://www.state.gov/turkish-drilling-in-cypriot-claimed-waters-2/ and includes the following:

> The United States remains deeply concerned by Turkey's repeated attempts to conduct drilling operations in the waters off Cyprus and its most recent dispatch of the drillship Yavuz off the Karpas Peninsula. This provocative step raises tensions in the region. We urge Turkish authorities to halt these operations and encourage all parties to act with restraint and refrain from actions that increase tensions in the region. Energy resource development in the Eastern Mediterranean should foster cooperation, increase dialogue between the two communities and among regional neighbors, and provide a foundation for durable energy security and economic prosperity. We continue to believe the island's oil and gas resources, like all of its resources, should be equitably shared between both communities in the context of an overall settlement.

The United States has separately conveyed its views to Turkey that, under international law as reflected in the Law of the Sea Convention, islands generally generate an exclusive economic zone and continental shelf to the same extent as other land territory.

With regard to a maritime boundary memorandum of understanding that Turkey and Libya reportedly concluded on November 27, 2019, the United States notes that Greece also has maritime claims in the area addressed by the memorandum of understanding and that the memorandum of understanding cannot, as a legal matter, affect the rights or obligations of third states, such as Greece, without their consent.

3. Maritime Boundary Treaties with Kiribati and Micronesia

As discussed in *Digest 2018* at 492 the U.S. Senate gave its advice and consent to ratification of maritime boundary treaties with Kiribati and Micronesia. See *Digest 2013* at 363 for background on signing the treaty with Kiribati. See *Digest 2014* at 513 for background on signing the treaty with Micronesia. See *Digest 2016* at 526-27 regarding transmittal of the two treaties to the Senate. The President signed the U.S. instrument of ratification on March 27, 2019. The treaty with Kiribati, available at https://www.state.gov/kiribati-19-719, entered into force July 19, 2019 via an exchange of notes. The treaty with Micronesia, available at https://www.state.gov/micronesia-19-718, entered into force on July 18, 2019 via an exchange of notes.

4. Other Maritime Issues

a. Maritime Cybersecurity

On October 2, 2019, the State Department issued as a media note, available at https://www.state.gov/joint-statement-on-the-maritime-cybersecurity-event-during-the-one-conference/, the joint statement by the governments of the United States of America, Denmark, and the Netherlands from a maritime cybersecurity event on the margins of the One Conference in The Hague. The statement includes an affirmation by the three parties of their commitment to continued collaborative efforts in enhancing cybersecurity in the maritime sector. The joint statement includes the following:

> In our globalized economy, the maritime sector is critical to the trade and transportation of all nations. While digitization provides tremendous opportunities for economic and social growth, it also poses new security challenges. Maritime cybersecurity is a necessity to keep our people, ports, cargo, and ships safe and secure. Given the inherent connectivity of cyberspace and the interconnectivity of the international maritime transportation system, international cooperation is vital to keep our maritime sector digitally secure and promote economic opportunities. The maritime cybersecurity event brought together like-minded nations to share knowledge and expertise to prevent and respond to threats from cyberspace that could bring societies to a standstill. The participants committed to increasing cooperative engagements in the following areas of maritime cybersecurity:

awareness raising, information sharing and risk management. The participants will also visit the Ports of Rotterdam and Amsterdam where they delve into the cybersecurity issues of port operations and the ship-port interface.

b. Work of the International Law Commission on Sea Level Rise

See Chapter 7 for excerpts from the U.S. remarks on the work of the International Law Commission regarding sea level rise and international law.

c. Agreement Protecting Titanic Wreck Site

On December 19, 2019, the State Department announced in a media note that the United States had deposited with the United Kingdom its acceptance of the Agreement Concerning the Shipwrecked Vessel Royal Mail Ship ("RMS") Titanic, bringing the agreement into force on November 18, 2019. The media note, available at https://www.state.gov/united-states-accepts-agreement-protecting-titanic-wreck-site/, provides the following background on the agreement:

> Following the discovery in 1985 of the site of the RMS Titanic wreck, the United States, the United Kingdom, Canada, and France negotiated the Agreement to protect the integrity of the wreck site from unregulated salvage and other activities. The Agreement obligates each Party to enact common measures to regulate the actions of persons and vessels under its jurisdiction regarding activities related to the wreck.
>
> The Agreement reinforces the United States' collaborative efforts with the United Kingdom and others to preserve the wreck site as an international maritime memorial to the men, women, and children who perished aboard the ship. The RMS Titanic is of major national and international historical, cultural, and scientific significance and merits appropriate protection.

The Agreement Concerning the Shipwrecked Vessel RMS Titanic, signed at London November 6, 2003, entered into force November 18, 2019. The full text of the agreement is available at https://www.state.gov/multilateral-19-1118.

B. OUTER SPACE

1. Space Policy Directive 4

On February 19, 2019, President Trump signed a memorandum, Space Policy Directive 4, directed to administration officials, and entitled "Establishment of the United States Space Force." 84 Fed. Reg. 6049 (Feb. 25, 2019). Excerpts follow from Space Policy Directive 4.

* * * *

Sec. 3. *Legislative Proposal and Purpose.* The Secretary of Defense shall submit a legislative proposal to the President through the Office of Management and Budget that would establish the United States Space Force as a new armed service within the Department of the Air Force. The legislative proposal would, if enacted, establish the United States Space Force to organize, train, and equip forces to provide for freedom of operation in, from, and to the space domain; to provide independent military options for national leadership; and to enhance the lethality and effectiveness of the Joint Force. The United States Space Force should include both combat and combat support functions to enable prompt and sustained offensive and defensive space operations, and joint operations in all domains. The United States Space Force shall be organized, trained, and equipped to meet the following priorities:

(a) Protecting the Nation's interests in space and the peaceful use of space for all responsible actors, consistent with applicable law, including international law;

(b) Ensuring unfettered use of space for United States national security purposes, the United States economy, and United States persons, partners, and allies;

(c) Deterring aggression and defending the Nation, United States allies, and United States interests from hostile acts in and from space;

(d) Ensuring that needed space capabilities are integrated and available to all United States Combatant Commands;

(e) Projecting military power in, from, and to space in support of our Nation's interests; and

(f) Developing, maintaining, and improving a community of professionals focused on the national security demands of the space domain.

Sec. 4. *Scope*. (a) The legislative proposal required by section 3 of this memorandum shall, in addition to the provisions required under section 3 of this memorandum, include provisions that would, if enacted:

(i) consolidate existing forces and authorities for military space activities, as appropriate, in order to minimize duplication of effort and eliminate bureaucratic inefficiencies; and

(ii) not include the National Aeronautics and Space Administration, the National Oceanic and Atmospheric Administration, the National Reconnaissance Office, or other non-military space organizations or missions of the United States Government.

(b) The proposed United States Space Force should:

(i) include, as determined by the Secretary of Defense in consultation with the Secretaries of the military departments, the uniformed and civilian personnel conducting and directly supporting space operations from all Department of Defense Armed Forces;

(ii) assume responsibilities for all major military space acquisition programs; and

(iii) create the appropriate career tracks for military and civilian space personnel across all relevant specialties, including operations, intelligence, engineering, science, acquisition, and cyber.

Sec. 5. *United States Space Force Budget.* In accordance with the Department of Defense budget process, the Secretary of Defense shall submit to the Director of the Office of Management and Budget a proposed budget for the United States Space Force to be included in the President's Fiscal Year 2020 Budget Request.

Sec. 6. *United States Space Force Organization and Leadership.* (a) The legislative proposal required by section 3 of this memorandum shall create a civilian Under Secretary of the Air Force for Space, to be known as the Under Secretary for Space, appointed by the President by and with the advice and consent of the Senate.

(b) The legislative proposal shall establish a Chief of Staff of the Space Force, who will be a senior military officer in the grade of General or Admiral, and who shall serve as a member of the Joint Chiefs of Staff.

* * * *

2. Conference on Disarmament

On August 14, 2019, U.S. Permanent Representative to the Conference on Disarmament Robert A. Wood delivered remarks at a meeting on the prevention of an arms race in outer space. Ambassador Wood discussed threats to the outer space environment presented by Russia and China. His statement is excerpted below and available at https://geneva.usmission.gov/2019/08/14/statement-by-ambassador-wood-the-threats-posed-by-russia-and-china-to-security-of-the-outer-space-environment/

* * * *

The United States has explained in detail, many times our concerns about definitions and about verification related to objects in outer space and especially related to the draft "Treaty on the Prevention of the Placement of Weapons in Outer Space" that has been submitted to this body by Russia and China. We have previously provided lengthy examinations of the fundamental flaws in the PPWT.

Instead of repeating those arguments at length, I would like to apply the provisions of the draft PPWT to some real-world examples of weapon systems-specifically ground-based weapons—that are designed to damage, destroy or disrupt the on-orbit functioning of spacecraft in order to further the debate in this body. …

Let me start with the threat to outer space objects. Despite what the proponents of the draft PPWT would have us believe, right now, the greatest threat to satellites is not from weapons in outer space, but rather from ground-based anti-satellite weapons that are designed to "destroy, damage or disrupt the normal functioning of objects in outer space." The defenders of the draft PPWT would have us believe that the provisions of Article II of the draft text would in fact prohibit these types of ground-based threats. They point to the language in Article II that would obligate parties, "Not to resort to the threat or use of force against outer space objects of States Parties to the Treaty."

But what everyone in this room should understand is that, despite these claims, nothing in the draft PPWT, including in Article II, prohibits the development, testing, production, storage or deployment of these ground-based anti-satellite weapons. More importantly, despite expressing grave concerns over the threat to objects in space, these are precisely the types of weapons that Russia and China are developing and deploying today.

So let's look at some examples of the types of actual ground-based weapons … that are being developed by the very same states pushing for adoption of the treaty.

First, let us start with Russia and its development of a system that is designed to disrupt or damage outer space objects. Last year, Russian President Putin announced the deployment of a ground-based laser weapon called the *Peresvet* Combat Laser Complex. Russia's Ministry of Defense has publicly stated that this system is designed to "fight satellites." Our Russian colleagues have not explained what they mean by "fight satellites," but the United States

believes that this means the *Peresvet* laser is designed to either disrupt or damage the normal functioning of another nation's satellites. …

Second, let me address a system that is designed to "destroy" outer space objects per the draft PPWT definition. In 2007, China launched a ground-based missile that intentionally destroyed a Chinese weather satellite and created 3,000 pieces of debris in orbit because the Chinese missile was designed to strike the satellite using kinetic force. Most of this debris remains in orbit today, posing an indiscriminate threat to all spacecraft in Low Earth Orbit. Now, our Chinese colleagues have been one of the main proponents of the concept that the language in the draft PPWT on the "threat or use of force" would prohibit the development and deployment of ground-launched systems. Yet the United States judges that China has moved forward with the deployment of the missile system they tested in 2007. Like Russia, China has never tried to reconcile its development of this system with its outward-facing push for space arms control. The very fact that China is deploying such a weapon suggests that China is willing to use it during a conflict. And the implications of the use of such a debris-generating weapon for the security and long-term sustainability of the outer space environment are tremendous. Just as important is the fact that Russia is developing a similar ground-based ASAT missile. Such ground-based anti-satellite weapons are a significant threat to the outer space environment. If they were truly serious about wanting to prevent conflict from extending into space, then Russia and China would abandon their pursuit of such systems.

It is clear from these examples that Russia and China believe it is currently acceptable to attack satellites in orbit from the ground, whether through directed energy or missile strikes. At the same time, they hypocritically profess their concern about attacks on satellites and serve as the main proponents of the draft PPWT.

In addition, I want to remind my colleagues of a speech the United States gave to this body, exactly one year ago today about the on-orbit activities of a Russian Ministry of Defense satellite. This satellite exhibited abnormal behavior and raised questions for the United States about Russia's intent. The behavior was so inconsistent with the satellites' stated purpose that it could cause observers to question Russia's political commitment not to be the first to place weapons in outer space, which it would also be prohibited from doing under the draft PPWT.

These examples demonstrate that there is not an arms control solution to this issue at this time and that the fundamentally-flawed PPWT has not been, is not, and never will be the solution to the many threats facing the space environment. …

For its part, consistent with our efforts to strengthen stability in outer space, the United States will continue to pursue bilateral and multilateral TCBMs to encourage responsible actions in, and the peaceful use of, outer space including through the development and advancement of norms of behavior in outer space and best practices for space operations.

In this regard, I want to applaud the remarks of our UK colleague and welcome the UK's submission of the report on its 2019 Wilton Park conference on space security. …

The remarks by our UK colleague highlight an important point that spaceflight safety is a global challenge and it is in everyone's best interest to continue to encourage safe and responsible behavior in space while emphasizing the need for international transparency. In an effort to increase the sharing of data on satellite positions and to reduce the risk of collisions, the United States is now implementing a comprehensive policy for space traffic management (STM).

I would also underscore the point our UK colleague made regarding the importance of development guidelines for on-orbit servicing. The United States has already assisted in establishing an industry-led effort called the Consortium for Execution of Rendezvous and

Servicing Operations (CONFERS), which in February 2019 released a report on Recommended Design and Operational Practices. Voluntary efforts such as CONFERS offer technically-based and scientifically-sound ideas for States and space operators. These efforts are preferable alternatives to vague and unverifiable agreements that may have unforeseen negative impacts on novel or beneficial economic uses of space.

In this regard, we believe the Conference on Disarmament as well as the UN Disarmament Commission and COPUOS have roles to play in the process of developing these transparency and confidence building measures and best practices, taking into account the respective mandates of each body and with appropriate coordination to avoid unnecessary duplication of efforts within the UN system.

* * * *

Cross References

ILC's work on sea level rise and international law, **Ch. 7.C.2.**
Iran's attempted space launches, **Ch. 19.B.4.a.**

CHAPTER 13

Environment and Other Transnational Scientific Issues

A. LAND AND AIR POLLUTION AND RELATED ISSUES

1. Climate Change

On November 4, 2019, the United States formally initiated its withdrawal from the Paris Agreement. As explained in a November 4, 2019 press statement by Secretary of State Michael R. Pompeo, available at https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/, the United States submitted notification of its withdrawal to the UN. Withdrawal takes effect one year after delivery of the withdrawal notification, in accordance with the terms of the Paris Agreement. See *Digest 2017* at 547-49 regarding President Trump's decision to withdraw from the Paris Agreement.

The United States continued to participate in international climate change negotiations and meetings, including the 25th session of the Conference of the Parties ("COP25") to the UN Framework Convention on Climate Change ("UNFCCC") held in Madrid, Spain from December 2-13, 2019. See November 30, 2019 State Department media note, available at https://www.state.gov/u-s-delegation-to-the-25th-session-of-the-conference-of-the-parties-to-the-un-framework-convention-on-climate-change/.

Principal Deputy Assistant Secretary of State Marcia Bernicat delivered the U.S. national statement at COP25 on December 11, 2019, which is excerpted below and available at https://www.state.gov/united-states-national-statement-at-unfccc-cop25/.

* * * *

The United States continues to lead on clean, affordable, and secure energy while reducing all types of emissions—including greenhouse gases—over the last 15 years. Our last day as a Party to the Paris Agreement will be November 4, 2020, but we will remain focused on a realistic and pragmatic model—backed by a record of real world results. Our model shows how innovation and open markets lead to greater prosperity, fewer emissions, and more secure sources of energy. We remain fully committed to working with you, our global partners, to enhance resilience, mitigate the impacts of climate change, and prepare for and respond to natural disasters.

U.S. investments in research and development will continue to spur landmark breakthroughs across the full range of energy technologies—natural gas; wind; solar; nuclear; hydroelectric; clean coal and biofuels. Our investments will improve energy efficiency and storage as well. We have successfully proven the potential for carbon capture, utilization, and storage through demonstrations and large-scale industrial projects.

U.S. scientific research and data collection, transformed by our national laboratories' supercomputer modeling, provide the international scientific community with a deeper understanding of our shared environment. Open data from U.S. satellites help fight forest fires and track trends in deforestation. NOAA and NASA data and research help countries predict and prepare for the impacts of climate change, extreme weather, sea level fluctuations, and drought. U.S. companies develop resilient crops to withstand these phenomena. All of this work supports American businesses, farmers, and communities—as well as our friends and partners around the world.

Chile has named COP25 the "Blue COP," highlighting its focus on oceans. At this year's Our Ocean Conference in Norway, the United States announced 23 new commitments—that is, $1.2 billion dollars to promote sustainable fisheries, combat marine debris, and support marine science, observation, and exploration.

Since 2017, the U.S. Congress has appropriated $372 million dollars in foreign assistance to preserve and restore forests and other lands that help many of the countries represented in this room build resilience and reduce carbon emissions. The State Department also committed over $11 million dollars this year alone to address environmental degradation and climate change in the Pacific and Caribbean regions.

* * * *

2. Working Group Established by UN General Assembly Resolution 72/277 ("Towards a Global Pact for the Environment")

As discussed in *Digest 2018* at 500-01, the United States voted against UN General Assembly Resolution 72/277, which established an ad hoc open-ended working group to discuss the possibility of a new international instrument to address gaps in international environmental law and environment-related instruments. In 2019, the working group established by Resolution 72/277 met three times to fulfill its mandate to consider a report by the Secretary-General on possible gaps in international environmental law and "discuss …, as appropriate, and, if deemed necessary, the scope, parameters and feasibility of an international instrument, with a view to making recommendations" to the General Assembly "which may include the convening of an intergovernmental conference to adopt an international instrument." U.N. Doc. A/RES/72/277, ¶ 2 (May 10, 2018). The United States participated in all of the working group sessions and made two written submissions. The February 20, 2019 U.S. submission to the co-chairs of the working group is available at https://wedocs.unep.org/handle/20.500.11822/27600 and excerpted below.

* * * *

The United States is committed to engaging in transparent, open discussions among member states about whether there are gaps in the international environmental system that should be addressed to improve international environmental governance. We believe this open-ended working group provides an opportunity for member states to engage in substantive debate about how the international community can most effectively use our time and resources to address these environmental issues without prejudging the outcome of those deliberations. The mandate

for this working group set out in OP2 of 72/277 is clear and logical: we must determine what constitutes a gap and whether there are gaps before moving on to a discussion of options for addressing them.

The modalities resolution sets out a step-by-step process for undertaking these discussions, starting with consideration of the report submitted by the Secretary-General (Report A/73/419, "Gaps in international environmental law and environment-related instruments: towards a global pact for the environment"), which Member States commented on at length during the first substantive session in Nairobi from January 14-18. As the United States made clear during the meeting, we do not believe that the final report comports with the mandate set out in General Assembly Resolution 72/277 for the Secretary General to produce a "technical and evidence-based report," and we do not believe the working group should rely on the report as an objective or fully accurate reference text in its discussions going forward. The United States—and many other delegations—enumerated myriad concerns with each section of the report, highlighting numerous examples of bias, unfounded assertions, and inaccurate and out-of-date information.

Moreover, the United States understood there to be general agreement among Member States during the first substantive session that specific design elements of existing international environmental regimes do not constitute "gaps" in international environmental law and environment-related instruments as the authors of the report appear to allege. The United States does not believe that the authors of the report or this working group have the mandate or the expertise to second-guess careful and intentional decisions made by States Parties in the negotiation and implementation of existing environmental regimes developed over many years. These regimes are typically developed in delicate balance to achieve broad support. To mischaracterize necessary trade-offs as "gaps" threatens the overall balance of the regime, and it is in the hands of Parties to those regimes to make decisions within their mandate.

Furthermore, the United States rejects the report's assertion—unsupported by any evidence—that the lack of a "single overarching normative framework" setting out rules and principles of international environmental law somehow produces gaps or deficiencies in the international environmental system. There is no one-size-fits all approach to addressing environmental challenges. Many of the most successful environmental agreements, such as the Montreal Protocol or CITES, are narrowly tailored and specially designed to effectively address the particular environmental problems. This type of specialization contributes to the success of these regimes—it is not a so-called "gap" that needs to be addressed. Comments from other delegations during the first substantive session demonstrate that many other Member States share our view in this regard.

On this point, the United States does not support suggestions that Member States should reaffirm, reopen, or otherwise renegotiate environmental principles such as the 1992 Rio Principles, including by attempting to convert these non-legally binding principles into legally-binding obligations. The existing 1992 Rio Principles provide a set of common, aspirational principles that States have used as a guide in negotiating subsequent sectoral instruments where they saw fit to do so. Those principles have not been universally applied in the same way in every sector, but that was an intentional decision by States in developing each of the existing regimes, and—like other intentional decisions by States Parties in the negotiation and implementation of existing agreements—not a "gap" that this group has the mandate or expertise to second-guess. In the U.S. view, reopening discussions on the Rio Principles or their

application has the potential to undermine continuing implementation of existing international environmental agreements without delivering any actual environmental benefits.

Pursuant to the mandate for this working group set out in OP2 of 72/277, and logically, unless and until Member States have identified and agreed on particular gaps in international environmental law and environment-related instruments that need to be addressed, there is no mandate for the group to proceed to discussing possible options for addressing such gaps. For this reason, the United States views agenda item 4 of the proposed agenda for the second substantive session as consisting of two parts that should be taken in order in the program of work, starting with a discussion of possible gaps in international environmental law and environment-related instruments. We look forward to engaging with other Member States in a discussion of possible gaps under this agenda item during the next session.

* * * *

The April 12, 2019 U.S. submission to the working group is available at https://wedocs.unep.org/bitstream/handle/20.500.11822/27980/US_proposal.pdf?sequence=1&isAllowed=y and excerpted below.

* * * *

The United States has actively engaged in the ad-hoc open-ended working group. During the discussions at the first two substantive sessions of the working group, many have emphasized the importance that any recommendations delivered back to the General Assembly must be made with consensus and reflecting options that can be implemented and supported on a consensus basis. However, we regret that it is clear that there remains a lack of consensus on key issues.

No consensus on possible gaps to be addressed

The first two sessions have demonstrated that there is no emerging consensus on specific gaps in international environmental law and environment-related instruments to be addressed, or even a general sense among member states of areas where gaps may exist. As the United States noted in our previous submission and in our interventions, we do not believe the working group can rely on the Secretary General's report because it, and the possible "gaps" it identified, do not comport with the mandate in Resolution 72/277, and there were many inaccuracies in the report. No case has been made that any perceived gaps cannot be addressed through existing fora and mechanisms.

Further it should be noted that in negotiating existing environmental treaties and instruments, member states have in many cases made intentional choices to exclude certain elements. Such design choices are in no sense "gaps" that need to be filled, but purposeful decisions that take into account a careful balance of equities achieved by negotiating states and intentional decisions about what to regulate. Any working group recommendation must exclude such design choices from the conception of gaps.

Many options proposed are not feasible and lack support

Without consensus on the identification, or indeed the definition, of gaps, there can be no coherent discussion of possible options to address possible gaps, as laid out in the mandate given this group by the U.N. General Assembly in Resolution 72/277 and certainly there is no possibility of determining that a new instrument has been "deemed necessary." Nevertheless, and regrettably, the working group held unfocused discussions on a disparate set of options without a clear sense of what problems such options would in fact address. Several ideas were raised that

clearly do not enjoy consensus support, and the United States would not support inclusion in working group recommendations. For example:

- First, it is clear from the first two substantive sessions of the working group that there is no significant support, much less anything close to consensus, for negotiating a legally binding instrument. Indeed, many delegations have indicated that such an outcome would cross a red line for them. The United States will not support any recommendations to the General Assembly that include the possibility of a legally binding instrument.
- Second, there is also not convergence for proposals for a high-level declaration or renegotiating a common set of international environmental "principles"—even if in nonbinding form. In the working group discussions, a number of countries noted that such a negotiation would likely weaken certain standards and lead to more fragmentation and inconsistency if such principles were endorsed only by a subset of States. Some also felt that it would be almost impossible to achieve a general update of existing principles given the way that, for example, the Rio principles have been adapted in particular ways to be fit for purpose to address particular environmental issues.
- Nor should we seek to engineer an outcome that simply creates new layers of bureaucracy in the name of seeking undefined "synergies" among existing regimes, for example by creating elaborate new mechanisms or processes for joint action by treaty secretariats. We have found that such efforts often, in fact, increase costs rather than create efficiencies. Moreover, such approaches often disempower member states in their efforts to address concrete problems by focusing treaty secretariats away from their governing bodies and the priorities identified by member states, and towards external processes. While there are many positive current avenues for information sharing and cooperation—for example, participation of observers and information sharing channels—we do not see a value and have not seen any shared sense among member states that a top-down synergies effort is needed.

The way forward

The working group needs to take a realistic approach. In this context, a clear recommendation to New York is: no further action be taken. Member states have limited time and resources, and we should resist simply moving through the motions to negotiate an inapposite solution to an undefined problem. Such an approach would only yield failure, which could result in diminishing rather than increasing attention and energy to addressing environmental problems, and would in the meantime pull away limited technical, financial, and diplomatic resources.

In the absence of any consensus on specific gaps to be addressed, there is a general sense among many delegations that there is inadequate implementation of existing commitments and instruments. Rather than focusing on top-down approaches, however, the working group should consider how member states can focus efforts on finding pragmatic ways to improve implementation of existing commitments under treaties or instruments in which they have decided to participate, or in making progress on their own domestic priorities to seek clean air and clean water, and protect the health of their citizens. Of course, this will involve different solutions in different contexts, and the locus of such efforts must necessarily remain within the responsible governance bodies and existing processes for particular treaty regimes or instruments. Such efforts should involve appropriate engagement with non-state actors, including the private sector and civil society.

We have seen time and time again that identifying solutions to international environmental problems involves finding pragmatic solutions to specifically identified challenges—and not through debating general principles in the abstract. A more useful exercise would be to focus on finding ways to help member states improve the implementation of existing commitments. Our revitalized discussions under UNEP's Montevideo Programme, which has provided support for national-level enforcement of environmental law, has shown great promise on how we can support national-level enforcement of environmental law.

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The working group adopted recommendations for the General Assembly, and did not recommend convening an intergovernmental conference to adopt an international instrument, but rather recommended preparation by the UN Environment Assembly of a political declaration for a United Nations high-level meeting in the context of the commemoration of the creation of the United Nations Environment Programme. The United States made a concluding statement in connection with the adoption of the recommendations of the working group. The U.S. concluding statement is available at https://www.unenvironment.org/events/conference/towards-global-pact-environment and appears below. In August 2019, the UN General Assembly adopted resolution 73/333, endorsing the recommendations from the Working Group. U.N. Doc. A/RES/73/333.

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With respect to recommendations relating to multilateral environment agreements, including recommendations referring to policy coherence, we underscore that it is the governing bodies of such instruments that determine the policies and priorities to be addressed under those agreements and by their secretariats.

With respect to the language in paragraph 2(b) on means of implementation, the United States notes that the language is not to be understood to imply a call for increased finance from any particular country, and we emphasize the role of all sources in the mobilization of means of implementation. We underscore in particular the need for an expansion of the donor pool beyond traditional donors and the increasingly important role of domestic resource mobilization and private investment, noting in particular the need for good governance, transparency, and strong investment climates.

We will also be submitting a statement for the record, which was delivered in the second committee of the UNGA on November 8, 2018, setting out our general views regarding the 2030 Agenda, the Addis Ababa Action Agenda, the Paris Agreement, and other issues.

We want to reiterate that the United States supports strong levels of environmental protection as part of a balanced approach to promote economic growth and foster access to affordable and reliable energy while protecting the environment.

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3. ILC Draft Guidelines on Protection of the Atmosphere

On December 15, 2019, the United States submitted comments on the International Law Commission ("ILC") Draft Guidelines on Protection of the Atmosphere, as adopted by the ILC on first reading in 2018. Excerpts follow from the U.S. comments.

* * * *

General Observations

The United States has repeatedly expressed its concerns, through statements in the Sixth Committee, that the Commission's work on this topic would complicate rather than facilitate negotiations regarding environmental issues related to the atmosphere and thus could inhibit progress in this area. The draft guidelines that have been adopted on first reading essentially confirm this broad concern, but also raise specific issues with regard to their form and substance. In accordance with the comments below, it is the view of the United States that the Commission's time could more profitably be spent on other topics and the draft guidelines should not be adopted at second reading, but instead reconsidered in a working group to determine whether completion of this project is viable, in light of the comments received.

The draft guidelines are likely to give rise to confusion by virtue of the incongruence among their title, substance, and form. As we explained in general comments in the Sixth Committee regarding ILC work products, "[a]s the ILC has increasingly moved away from draft articles, its work products have been variously described as conclusions, principles or guidelines. It is not always clear what the difference is among these labels, particularly when some of these proposed conclusions, principles, and guidelines contain what appear to be suggestions for new, affirmative obligations of States, which would be more suitable for draft articles." In general international practice, documents entitled "guidelines" are not understood as setting forth international legal obligations. Draft guidelines 3, 4, and 8, however, all assert categorically that "States have the obligation" to undertake certain actions. While the Commission's Guide to Practice on Reservations to Treaties ("Guide to Practice on Reservations") provides some precedent for considering the scope of a State's obligations in the context of "guidelines," that topic necessarily concerned the ability to make reservations to binding treaty obligations. Moreover, the form of the Guide to Practice on Reservations was chosen to make it clear that the document was providing guidance as opposed to setting forth obligations. The draft guidelines, in contrast, are presented in a format that more closely resembles draft articles for a treaty or multilateral convention, with a preamble and apparent operative clauses that include provisions addressing "compliance" and "dispute settlement" that appear out of place in a non-binding set of guidelines.

Comments on Specific Provisions of the Draft Guidelines, accompanying commentary or both.

The actual content of the draft guidelines does nothing to clarify the confusion introduced by the choice of format. The core of the draft guidelines appears to be draft guideline 3, yet this draft guideline is confusing at best. This draft guideline states that the purported "obligation to protect the atmosphere" is to be fulfilled by "exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation." The best reading of draft guideline 3 is that it constitutes a simple assertion that States should comply with existing "applicable rules of international law" concerning atmospheric pollution and atmospheric degradation, and thus adds nothing to existing law. Even so, however, draft guideline 3 introduces needless confusion.

According to draft guideline 3, other "applicable rules of international law" require States to "prevent, reduce or control atmospheric pollution and atmospheric degradation." It is unclear, though, whether the Commission believes that international law at present requires States to do

all the elements indicated in this draft guideline, specifically to: (1) prevent atmospheric pollution; (2) prevent atmospheric degradation; (3) reduce atmospheric pollution; (4) reduce atmospheric degradation; (5) control atmospheric pollution; and/or (6) control atmospheric degradation. There are, therefore, at least six potentially independent legal obligations, that the Commission is asserting require distinct actions on the part of States. Yet there appears to be little basis for making that assertion. The commentary notes that the "prevent, reduce, or control" framework is borrowed from the Law of the Sea Convention (LOSC). The LOSC, however, is not addressing atmospheric pollution and degradation. Moreover, even in the context of protecting the marine environment, the LOSC includes specific provisions addressing what is meant by "prevent, reduce, or control" at Part XII Section 5. The absence of detailed provisions in the draft guidelines that would correspond to LOSC Part XII Section 5 in the context of atmospheric pollution and atmospheric degradation only contributes to the confusion introduced by draft guideline 3.

Draft guideline 8 similarly suffers from a lack of clarity concerning its legal underpinnings. In particular, draft guideline 8(1) provides that "States have an obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation." Unlike draft guideline 3, however, draft guideline 8(1) does not appear to incorporate existing applicable rules of international law to inform the purported obligation identified therein. In fact, none of the sources referenced in the corresponding commentary to this draft guideline establish the general obligation to cooperate set forth in draft guideline 8(1). Specifically, the commentary notes two political declarations, the preambles to two multilateral conventions, and three sets of draft articles produced by the Commission, none of which establish any legal obligation in respect of cooperation. The single example of a binding obligation to cooperate comes from the Convention on the Law of the Non-navigational Uses of International Watercourses, a treaty with only thirty-six parties addressing a wholly separate area of international law. The purported obligation in draft guideline 8(1) is therefore best understood as a recommendation that States cooperate and not as encompassing a legal obligation.

The essentially recommendatory or hortatory nature of draft guideline 8(1) is shared by draft guidelines 5, 6, and 7. Each of these draft guidelines contain assertions about what States "should be" doing with regard to distinct activities concerning the atmosphere. While the commentary to draft guidelines 5 and 7 acknowledge that their formulations are "simple and not overly legalistic" and "hortatory" respectively, it bears observing that these draft guidelines are policy prescriptions based on value judgments. Inclusion of such policy preferences in Commission products is inconsistent with the Commission's Statute, Article 1(1), which unambiguously states that the Commission "shall have for its object the promotion of the progressive development of international law and its codification." Policy prescriptions for diplomatic cooperation, however well-intentioned, are not part of the Commission's mandate and therefore should not be a part of the Commission's work.

The final four draft guidelines each address topics of general applicability within public international law that do not warrant special or specific consideration in the context of protection of the atmosphere. Specifically, draft guidelines 9, 10, 11, and 12 address "interrelationship among relevant rules," "implementation," "compliance," and "dispute settlement" respectively. Any one of these topics could be, and at least two have been, considered as topics by the Commission in their own right, but by addressing these general areas of law in the draft guidelines the Commission introduces needless confusion.

In particular, the United States sees no need for draft guideline 12(1)'s call to settle disputes relating to the protection of the atmosphere by peaceful means. Article 2(3) of the United Nations Charter, which is not mentioned in the commentary, requires that international disputes be settled by peaceful means, and this applies as well in the context of disputes relating to protection of the atmosphere. Nevertheless, the reference to peaceful settlement of disputes in draft guideline 12(1) gives the appearance that disputes concerning protection of the atmosphere enjoy a special status as compared with other types of disputes; in so doing, it weakens the general rule set forth in Article 2(3) of the United Nations Charter.

Similarly, draft guideline 9 concerning "interrelationship among relevant rules," gives the appearance that issues concerning fragmentation of international law are to be treated in a special way in the context of protection of the atmosphere. The Commission released in 2006 a lengthy report by a Study Group addressing exactly this topic, including in particular the relationship between trade and environmental regimes referenced in draft guideline 9(1). The report included extended considerations of international environmental law, but reached no definitive normative conclusion about the interaction between international environmental law and other international legal regimes. Notably, the Study Group's report cast doubt about the viability of harmonizing interpretation in precisely this context. The report did not directly address protection of the atmosphere. However, despite the topic of fragmentation having been the subject of exhaustive study by the Commission's Study Group, draft guideline 9 purports to identify specific norms of harmonization and systemic integration that should apply in the context of protection of the atmosphere. The United States sees no basis for establishing specific norms in this context and cautions the Commission against establishing a practice whereby previous Commission products and efforts intended to address broad topics are undermined by new projects with a narrow focus.

Finally, draft guidelines 10 and 11 address "implementation" and "compliance" respectively. As a general matter the means by which a State chooses to "implement" domestically and/or States may agree to achieve "compliance" with international legal obligations is left for States to decide and are not prescribed in advance by general public international law. While such issues could be addressed in a treaty, the United States does not see the utility in addressing these topics in the abstract in non-binding draft guidelines.

Conclusion

The United States' concerns previously expressed about this project remain for all of the above reasons. It is the view of the United States that the Commission's time could more profitably be spent on other topics and the draft guidelines should not be adopted at second reading, but instead reconsidered in a working group to determine whether completion of this project is viable, in light of the comments received.

* * * *

4. Environmental Cooperation Agreements

On November 30, 2018, the United States, Mexico, and Canada concluded a trilateral agreement on environmental cooperation. See November 30, 2018 media note, available at https://www.state.gov/united-states-mexico-and-canada-conclude-successful-negotiations-on-a-trilateral-agreement-on-environmental-cooperation/. The agreement takes effect when the U.S.-Mexico-Canada trade agreement ("USMCA") enters into force and would replace the North American Agreement on Environmental Cooperation ("NAAEC") that was a companion to the NAFTA. See Chapter 11 for

discussion of the USMCA and NAFTA. The trilateral Commission for Environmental Cooperation created under the NAAEC continues under the new ECA. The text of the ECA is available at https://www.epa.gov/international-cooperation/2018-agreement-environmental-cooperation-among-governments-united-states.

On December 10, 2019, the United States and Mexico also concluded the Environment Cooperation and Customs Verification Agreement, which, among other provisions, allows the parties to request certain customs information relating to trade in illegally taken wild flora and fauna, fisheries practices, and forest products. The text of this agreement is available at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/Environment-Cooperation-and-Customs-Verification-Agreement.pdf.

B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION

1. Fishing Regulation and Agreements

a. Central Arctic Fisheries Agreement

On July 29, 2019, Secretary Pompeo signed the U.S. instrument of acceptance for the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean. Through the Agreement, the United States agrees to prevent commercial fishing in the high seas of the central Arctic Ocean until there is adequate scientific information and a sufficient regulatory structure in place to manage such fisheries properly.

The State Department announced, in an August 27, 2019 media note available at https://www.state.gov/the-united-states-ratifies-central-arctic-ocean-fisheries-agreement/, that the United States had ratified the Agreement after depositing the instrument of acceptance for the United States with Canada. The United States is the fourth signatory to the Agreement, after Canada, the Russian Federation, and the European Union. The Agreement will enter into force once all ten signatories ratify. As described in the media note:

> There are currently no commercial fisheries in the Arctic high seas, with most of the region covered by ice year round. However, with an ever-increasing ice-free area in the summer for an increasingly lengthy portion of the year, parties anticipate that commercial fishing will be possible in the foreseeable future. This Agreement is the first multilateral agreement of its kind to take a legally-binding, precautionary approach to protect an area from commercial fishing before that fishing has even begun.
>
> Signed in Greenland on October 3, 2018, there were ten participants in the negotiation of the Agreement: Canada, the People's Republic of China, the Kingdom of Denmark (in respect of the Faroe Islands and Greenland), the European Union, Iceland, Japan, the Kingdom of Norway, the Republic of Korea, the Russian Federation, and the United States of America. The Agreement has two principal objectives: the prevention of unregulated fishing in the high seas portion of the central Arctic Ocean and the facilitation of joint scientific research and monitoring.

b. ICCAT Amendments

On November 18, 2019, in Mallorca, Spain, the Protocol to Amend the International Commission for the Conservation of Atlantic Tunas ("ICCAT") Convention was adopted by consensus of the ICCAT. The adoption of the protocol is the culmination of nearly a decade of work, including over six years of active negotiation. The amendments modernize the Convention's international fisheries governance regime, expand the species managed by the Commission, allow for participation by Taiwan as a "fishing entity," and provide for noncompulsory dispute resolution, among other achievements. The U.S. signed the Protocol at a signing ceremony on November 20, 2019. See entry entitled "Adoption and U.S. Signature of a Protocol to Amend the International Convention for the Conservation of Atlantic Tunas," available on NOAA webpage on significant developments for 2019, at https://www.gc.noaa.gov/gcil_sig_events.html.

On December 9, 2019, the State Department issued a media note, available at https://www.state.gov/the-united-states-signs-protocol-to-amend-the-international-commission-for-the-conservation-of-atlantic-tunas-convention/, to announce that the United States signed the newly adopted Protocol. The media note provides the following background on the ICCAT Convention:

> During the ICCAT annual meeting in Palma de Mallorca, Spain, November 18-25, ICCAT adopted a Protocol containing amendments that bring the organization in line with modern fisheries management standards, clarify ICCAT's mandate to manage certain species of sharks and rays, protect other species caught as bycatch in ICCAT fisheries, and protect the broader marine ecosystem. The amendments will also streamline the Commission's decision-making processes and ensure that all key fleets targeting ICCAT species, including Taiwan, can participate in and be bound by Commission decisions. Together, these amendments will strengthen U.S. efforts to ensure the science-based, sustainable management of fisheries resources that generate hundreds of millions of dollars in annual U.S. economic activity.

2. Our Ocean Conference

The U.S. delegation participated in the Our Ocean 2019 conference, hosted by Norway in Oslo, October 23-24, 2019. An October 21, 2019 State Department media note, available at https://www.state.gov/u-s-delegation-to-our-ocean-2019/, outlines top U.S. priorities for the conference:

1. fostering collaboration among government, business, and other partners to create innovative solutions for the challenges facing the ocean;
2. tackling marine debris and illegal, unreported, and unregulated (IUU) fishing; and
3. promoting a sustainable blue economy and maritime security.

Additional details about the 2019 conference are available at ourocean2019.org.

3. Arctic Council

On May 7, 2019, Secretary Pompeo delivered remarks at the Arctic Council Ministerial Meeting in Finland. His remarks are excerpted below and available at https://www.state.gov/remarks-at-the-arctic-council-ministerial-meeting-2/.

* * * *

When the United States held the chair, the Arctic states signed a science cooperation agreement to facilitate the movement of scientists, equipment, and data across our borders. The first meeting under this new agreement was convened here in Finland just a few months ago. This strengthens our ability to cooperate on scientific endeavors that will benefit all of peoples, from improving weather forecasting to studying outer space to learning more about the planet and the resources beneath our feet. We've also conducted joint exercises to prepare for possible marine oil pollution incidents, and we've increased our search and rescue capacities and preparedness, which has already helped save lives.

To build on these and so many other successes, it's up to each member of this council to ensure that our underlying bonds of trust and responsibility remain unbroken. That includes the United States; we can always do better. The Trump administration has sought to engage the Arctic with renewed vigor, openness, and respect, as I spoke about at length yesterday. America's new Arctic focus prioritizes close cooperation with our partners on emerging challenges, including the increased presence and ambitions of non-Arctic nations in the region.

In addition to sharing our vision, I also came here to listen. I've appreciated this opportunity today to hear from each of you, including on topics that we don't always agree on. Even on those topics, I think it is the case that we tend to agree much more than we disagree. For example, the Trump administration shares your deep commitment to environmental stewardship. In fact, it's one reason Chinese activity, which has caused environmental destruction in other regions, continues to concern us in the Arctic. The Arctic has always been a fragile ecosystem, and protecting it is indeed our shared responsibility. But once again, the keys are indeed trust and responsibility.

Collective goals, even when well-intentioned, are not always the answer. They're rendered meaningless, even counterproductive, as soon as one nation fails to comply. Regardless of whether our goal is in place, the United States strives to operate with honesty and transparency. Though we are not signing on to the collective goal for reduction of black carbon, America nonetheless recently reported the largest reduction in black carbon emissions by any Arctic Council state. We are doing our part, and we encourage other states to do the same, and to do so with full transparency. That's true for every issue before this council. Under President Trump, the United States seeks candid engagement and close cooperation.

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4. Sea Turtle Conservation and Shrimp Imports

The Department of State makes annual certifications related to conservation of sea

turtles, consistent with § 609 of Public Law 101-162, 16 U.S.C. § 1537 note, which prohibits imports of shrimp and shrimp products harvested with methods that may adversely affect sea turtles. On April 23, 2019, the Department of State certified which nations (or specific fisheries within those nations) have adequate measures in place to protect sea turtles during the course of commercial shrimp fishing. 84 Fed. Reg. 39,047 (Aug. 8, 2019). On August 9, 2019, the State Department issued a media note about the certification regarding sea turtle conservation and shrimp imports to the United States. The media note is available at https://www.state.gov/sea-turtle-conservation-and-shrimp-imports-to-the-united-states-2/ and includes the following:

> In 2019, the acting Under Secretary of State for Economic Growth, Energy, and the Environment certified 39 nations and one economy and granted determinations for nine fisheries as having adequate measures in place to protect sea turtles during the course of commercial shrimp fishing. …
>
> The U.S. government hopes other nations can contribute to the recovery of sea turtle species and become certified under Section 609 and currently provides technology and capacity-building assistance in order to assist them in doing so. If properly designed, built, installed, used, and maintained, [turtle excluder devices, or] TEDs allow 97 percent of sea turtles to escape the shrimp net without appreciable loss of shrimp. The U.S. government is also encouraging similar legislation in other countries to prevent the importation of shrimp harvested in a manner harmful to protected sea turtles. …

C. OTHER ISSUES

1. Biodiversity

In 2017, the UN General Assembly convened an intergovernmental conference ("IGC") to elaborate the text of an international legally binding instrument under the UN Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction ("BBNJ"). U.S. views regarding such an instrument are discussed in *Digest 2011* at 438-39 and *Digest 2016* at 560-68. The State Department held a public information session on August 7, 2019 in preparation for the third session of the IGC on BBNJ later than month at the UN. 84 Fed. Reg. 36,999 (July 30, 2019). The IGC met for its second session in March 2019. *Id*. The IGC met for its third session in August 2019. Additional information on the BBNJ process is available at *www.un.org/bbnj*.

2. Transboundary Environmental Issues

a. Aquifers

On October 22, 2019, Attorney-Adviser David Bigge delivered a statement for the United States on the law of transboundary aquifers at the 74th session of the UN General

Assembly Sixth Committee. Mr. Bigge's remarks are excerpted below and available at https://usun.usmission.gov/statement-at-the-74th-general-assembly-sixth-committee-agenda-item-85-the-law-of-transboundary-aquifers/.

* * * *

The United States continues to believe that the International Law Commission's work on transboundary aquifers constituted an important advance in providing a possible framework for the reasonable use and protection of underground aquifers, which are playing an increasingly important role as water sources for human populations.

There is still much to learn about transboundary aquifers. Specific aquifer conditions and state practices vary widely. The United States therefore continues to believe that context-specific arrangements provide the best way to address pressures on transboundary groundwaters in aquifers, as opposed to refashioning the draft articles into a global framework treaty or into principles. States concerned should take into account the provisions of these draft articles when negotiating appropriate bilateral or regional arrangements for the proper management of transboundary aquifers.

Numerous factors might appropriately be taken into account in any specific negotiation, such as hydrological characteristics of the aquifer at issue; present uses and expectations regarding future uses; climate conditions and expectations; and economic, social and cultural considerations. These factors will vary in each particular set of circumstances, and maintaining the articles as a resource in draft form seems to us the best way of ensuring that the draft articles will be a useful resource for states in all circumstances.

Further, many aspects of the draft articles go beyond current law and practice, and should be carefully considered by States in context-specific arrangements.

We therefore support commending the draft articles to the attention of governments, and encouraging states concerned to make appropriate bilateral or regional agreements or arrangements for the proper management of their transboundary aquifers, taking into account the provisions of the draft articles. With respect to this agenda item, the United States position has not changed since its last statement.

* * * *

b. Harm from hazardous activities

Also on October 22, 2019, Mr. Bigge delivered the U.S. statement on the prevention of transboundary harm from hazardous activities at the 74th meeting of the UN General Assembly Sixth Committee. That statement is excerpted below and available at https://usun.usmission.gov/statement-at-the-74th-general-assembly-sixth-committee-agenda-item-81-consideration-of-prevention-of-transboundary-harm-from-hazardous-activities/.

* * * *

The Commission's draft articles on prevention of transboundary harm from hazardous activities have marked a positive step toward encouraging States to establish the means to address such issues as notification in specific national and international contexts.

We continue to believe it is most appropriate for the draft articles to be treated as non-binding standards to guide the conduct and practice of states, and for the work on prevention of transboundary harm to remain formulated as draft articles. Retaining the current, recommendatory form of these draft articles and principles increases the likelihood that they will gain widespread consideration and fulfill their intended purposes of providing a valuable resource for States in this area. With respect to this agenda item, the United States position has not changed since our last statement.

As we have previously noted, both the draft articles and draft principles go beyond the present state of international law and practice, and are clearly innovative and aspirational in character rather than descriptive of current law or state practice. Both documents were designed as sources to encourage national and international action in specific contexts, rather than to form the basis of a global treaty. We therefore strongly support retaining these products in their current form.

* * * *

3. Sustainable Development

The November 21, 2019 U.S. statement regarding the 2030 Agenda for Sustainable Development, among other issues, which was referenced in remarks excerpted in Chapter 12, is excerpted below and available at https://usun.usmission.gov/united-states-second-committee-global-explanation-of-position/. Acting U.S. Representative to the Economic and Social Council Courtney Nemroff delivered the statement as a general explanation of position at the UN Second Committee.

* * * *

We underscore that many of the outcome documents referenced in various Second Committee resolutions, including the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda, are non-binding documents that do not create new or effect existing rights or obligations under international law.

We underscore that the 2030 Agenda also does not create any new financial commitments. The United States recognizes the 2030 Agenda as a global framework for sustainable development that can help countries work toward global peace and prosperity. We applaud the call for shared responsibility, including national responsibility, in the 2030 Agenda and emphasize that all countries have a role to play in achieving its vision. The 2030 Agenda recognizes that each country must work toward implementation in accordance with its own national policies and priorities. Further, the United States understands any references to "internationally agreed development goals" to be referring to the 2030 Agenda.

The United States also underscores that paragraph 18 of the 2030 Agenda calls for countries to implement the Agenda in a manner that is consistent with the rights and obligations of States under international law. We also highlight our mutual recognition that 2030 Agenda implementation must respect and be without prejudice to the independent mandates of other processes and institutions, including negotiations, and does not prejudge or serve as precedent for decisions and actions underway in other forums. For example, this Agenda does not represent a commitment to provide new market access for goods or services. This Agenda also does not interpret or alter any WTO agreement or decision, including the Agreement on Trade-Related Aspects of Intellectual Property.

Regarding the reaffirmation of the Addis Ababa Action Agenda, we note that much of the trade-related language in the outcome document has been overtaken by events since July 2015; therefore, it is immaterial, and our reaffirmation of the outcome document has no standing for ongoing work and negotiations that involve trade.

The United States submitted formal notification of its withdrawal from the Paris Agreement to the United Nations on November 4, 2019. The withdrawal will take effect one year from the delivery of the notification. Therefore, references to the Paris Agreement and climate change are without prejudice to U.S. positions.

With respect to references to the Intergovernmental Panel on Climate Change (IPCC) special reports, the United States has indicated at the IPCC that acceptance of such reports and approval of their respective Summaries for Policymakers by the IPCC does not imply U.S. endorsement of the specific findings or underlying contents of the reports. References to the IPCC special reports are also without prejudice to U.S. positions.

The United States reiterates our views on the Sendai Framework for Disaster Risk Reduction from the U.S. Explanation of Position delivered in 2015. We strongly support disaster risk-reduction initiatives designed to reduce loss of life and the social and economic impacts of disasters. This assistance helps recipients build a culture of preparedness, promote greater resilience, and achieve self-reliance.

With respect to the New Urban Agenda, the United States believes that each Member State has the sovereign right to determine how it conducts trade with other countries and that this includes restricting trade in certain circumstances. Economic sanctions, whether unilateral or multilateral, can be a successful means of achieving foreign policy objectives. In cases where the United States has applied sanctions, we have used them with specific objectives in mind, including as a means to promote a return to rule of law or democratic systems, to insist on the protection of human rights and fundamental freedoms, or to prevent threats to international security. We are within our rights to deploy our trade and commercial policy as tools to achieve our objectives. Targeted economic sanctions can be an appropriate, effective, and legitimate alternative to the use of force.

The United States enjoys strong and growing trade relationships across the globe. We welcome efforts to bolster those relationships, increase economic cooperation, and drive prosperity to all of our peoples through free, fair, and reciprocal trade.

However, as President Trump stated to the 73rd UN General Assembly on September 25, 2018, the United States will act in its sovereign interest, including on trade matters. The United States does not take our trade policy direction from the UN.

It is our view that the UN must respect the independent mandates of other processes and institutions, including trade negotiations, and must not involve itself in decisions and actions in other forums, including at the WTO.

The UN is not the appropriate venue for these discussions, and there should be no expectation or misconception that the United States would understand recommendations made by the General Assembly or the Economic and Social Council on these issues to be binding.

This includes calls that undermine incentives for innovation, such as technology transfer that is not both voluntary and on mutually agreed terms.

With regards to official development assistance, the proper forum to discuss eligibility measures is the Boards of the Multilateral Development Banks and the Organization for Economic Cooperation and Development. We do not accept the UN as the appropriate forum for determining eligibility for, and allocation of, these resources.

The United States also notes that the term "inclusive growth" appears throughout many of the resolutions. Part of the problem with placing inclusive growth at the forefront of economic discussions is that the term itself is vaguely defined and applied freely to economic discussions, with little consideration for the trade-offs between higher levels of sustainable, supply-led economic growth and a more equitable distribution of resources of that growth. The United States recognizes the importance of studying inequality and improving the measurements of income and consumption across populations; however, we want to ensure that any work or goal related to inclusivity remain grounded in evidence and proven best practices.

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4. Wildlife Trafficking

On November 6, 2019, the U.S. Department of State submitted the third annual report to Congress as required by the Eliminate, Neutralize, and Disrupt Wildlife Trafficking Act of 2016 ("END Wildlife Trafficking Act"). See November 6, 2019 Department media note, available at https://www.state.gov/eliminate-neutralize-and-disrupt-end-wildlife-trafficking-report-2019/. As explained in the media note:

> The END Wildlife Trafficking Act directs the Secretary of State, in consultation with the Secretaries of the Interior and Commerce, to submit to Congress a report that lists Focus Countries and Countries of Concern, as defined in the Act. Each Focus Country is a major source, transit point, or consumer of wildlife trafficking products or their derivatives. Identification as a Focus Country is neither a positive nor a negative designation. Many Focus Countries have taken significant steps to combat wildlife trafficking, including in partnership with the United States. A Country of Concern is defined as a Focus Country whose government has actively engaged in or knowingly profited from the trafficking of endangered or threatened species. The United States looks forward to continuing dialogue with both Focus Countries and Countries of Concern to thwart transnational organized crime engaged in wildlife trafficking.
>
> The 2019 Focus Countries are Bangladesh, Brazil, Burma, Cambodia, Cameroon, China, Democratic Republic of the Congo, Gabon, Hong Kong Special Administrative Region, India, Indonesia, Kenya, Laos, Madagascar, Malaysia, Mexico, Mozambique, Nigeria, Philippines, Republic of the Congo, South Africa, Tanzania, Thailand, Togo, Uganda, United Arab Emirates, Vietnam, and Zimbabwe. The 2019 Countries of Concern are Madagascar, Democratic Republic of the Congo, and Laos.

The 2019 END Wildlife Trafficking Report is available at https://www.state.gov/2019-end-wildlife-trafficking-report/.

5. Columbia River Treaty

The United States and Canada continued negotiations to modernize the Columbia River Treaty regime in 2019. See *Digest 2018* at 511 regarding the first four rounds of

negotiations, conducted in 2018. The fifth round of negotiations was held in February in Washington, DC. See March 1, 2019 State Department media note, available at https://www.state.gov/conclusion-of-the-fifth-round-of-negotiations-to-modernize-the-columbia-river-treaty-regime/. The sixth round of negotiations was held in April in Victoria, British Colombia. See April 12, 2019 State Department media note, available at https://www.state.gov/conclusion-of-the-sixth-round-of-negotiations-to-modernize-the-columbia-river-treaty-regime/. The seventh round was held in June in Washington, DC. See June 24, 2019 State Department media note, available at https://www.state.gov/conclusion-of-the-seventh-round-of-negotiations-to-modernize-the-columbia-river-treaty-regime/. The eighth round of negotiations was held in Cranbrook, British Colombia in September 2019. See September 12, 2019 State Department media note, available at https://www.state.gov/conclusion-of-the-eighth-round-of-negotiations-to-modernize-the-columbia-river-treaty-regime/. Further information on the Treaty and related meetings is available at https://www.state.gov/p/wha/ci/ca/topics/c78892.htm.

Cross references

Center for Biological Diversity *(case regarding the UNFCCC)*, **Ch. 4.C.2.**
ILC's work on protection of the environment in relation to armed conflicts, **Ch. 7.C.2.**
ILC's work on sea level rise and international law, **Ch. 7.C.2.**
Presidential permits (Keystone), **Ch. 11.F.7.**

CHAPTER 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2019, the United States extended two international agreements, entered into four new agreements, and received four requests pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("Convention"), to which the United States became a State Party in 1983, in accordance with the Convention on Cultural Property Implementation Act ("CPIA"), which implements parts of the Convention. Pub. L. 97-446, 96 Stat. 2351, 19 U.S.C. § 2601 *et seq*.

If the requirements of 19 U.S.C. § 2602(a)(1) and/or (e) are satisfied, the President has the authority to enter into or extend agreements to apply import restrictions for up to five years on archaeological and/or ethnological material of a nation, the government of which has requested such protections and has ratified, accepted, or acceded to the Convention. Accordingly, the United States took steps in 2019 to protect the cultural property of Bulgaria, China, Chile, Honduras, Ecuador, Algeria, Morocco, Turkey, Yemen, and Jordan, by extending an existing memorandum of understanding ("MOU"), or entering into a new one, or considering requests for measures, and imposing corresponding import restrictions on certain archaeological and/or ecclesiastical ethnological material. Current import restrictions and MOUs pertaining to those restrictions are listed at https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions.

1. Bulgaria

The United States and Bulgaria signed an MOU regarding the imposition of import restrictions on certain categories of archaeological and ethnological material on January 8, 2019, which entered into force January 14, 2019. 84 Fed. Reg. 112 (Jan. 14, 2019). The 2019 MOU supersedes and replaces the prior MOU, originally entered into in 2014. See *Digest 2014* at 574. The 2019 MOU is available at https://www.state.gov/19-114/.

2. China

The United States and China signed an MOU regarding the imposition of import restrictions on certain categories of archaeological material on January 10, 2019, which entered into force January 14, 2019. 84 Fed. Reg. 107 (Jan. 14, 2019). The 2019 MOU

supersedes and replaces the prior MOU, originally entered into in 2014. See *Digest 2014* at 573-74. The 2019 MOU is available at https://www.state.gov/19-114-1/.

3. Chile

On February 4, 2019, the U.S. Department of State received a request from the government of Chile under Article 9 of the Convention. Chile's request seeks U.S. import restrictions on archaeological material representing Chile's cultural patrimony. 84 Fed. Reg. 8777 (Mar. 11, 2019).

4. Honduras

The United States and Honduras signed an MOU regarding the imposition of import restrictions on certain categories of archaeological and ethnological material on March 5, 2019, which entered into force March 12, 2019. 84 Fed. Reg. 8807 (March 12, 2019). The 2019 MOU supersedes and replaces the prior MOU, originally entered into in 2004 and extended in 2009 and 2014. See *Digest 2009* at 527-28 and *Digest 2014* at 574-75. The 2019 MOU is available at https://www.state.gov/19-312.

5. Ecuador

The United States and Ecuador signed an MOU regarding imposition of import restrictions on certain categories of archaeological and ethnological material on May 22, 2019. The MOU is available at https://eca.state.gov/files/bureau/agreement_signed_-_imposition_of_import_restrictions_on_categories_of_archaeological_and_ethnological_material.pdf.*

6. Algeria

See *Digest 2018* at 514 for discussion of the request from the Government of Algeria under Article 9 of the Convention for U.S. import restrictions on archaeological and ethnological material representing Algeria's cultural patrimony. The United States and Algeria signed an MOU regarding the imposition of import restrictions on certain categories of archaeological material on August 15, 2019. 84 Fed. Reg. 41,909 (Aug. 16, 2019). The MOU is available at https://www.state.gov/algeria-19-815. The State Department's August 14, 2019 press notice regarding the MOU, available at https://www.state.gov/united-states-and-algeria-sign-cultural-property-agreement/, makes note that the agreement will protect, "some of the earliest human remains found at Ain Boucherit and cultural objects from many of Algeria's World Heritage sites, including Tipasa, Timgad, and Djémila."

* Editor's note: The MOU entered into force in 2020. 85 Fed. Reg. 8389 (Feb. 14, 2020).

7. Morocco

On June 12, 2019, the State Department received a request from the government of Morocco, under Article 9 of the Convention, seeking U.S. import restrictions on archaeological and ethnological material representing Morocco's cultural patrimony. 84 Fed. Reg. 43,642 (Aug. 21, 2019).

8. Turkey

On September 6, 2019, the State Department received the government of Turkey's request, under Article 9 of the Convention, seeking U.S. import restrictions on archaeological and ethnological material representing Turkey's cultural patrimony. 84 Fed. Reg. 52,550 (Oct. 2, 2019).

9. Yemen

On September 11, 2019, the State Department received the government of Yemen's request, under Article 9 of the Convention, for U.S. import restrictions on archaeological and ethnological material representing Yemen's cultural patrimony. 84 Fed. Reg. 52,550 (Oct. 2, 2019).

10. Jordan

On December 16, 2019, the United States and Jordan signed an MOU regarding the imposition of import restrictions on certain categories of archaeological material. The MOU is available at https://www.state.gov/jordan-20-201.[**]

B. CULTURAL PROPERTY: LITIGATION

As discussed in *Digest 2018* at 514-19, the United States won summary judgment in the case *United States v. Ancient Coin Collectors Guild (3 Knife Shaped Coins)*, 899 F.3d 295 (4th Cir. 2018). The U.S. Supreme Court denied ACCG's petition for review on February 19, 2019. *American Coin Collectors Guild v. United States*, No. 18-767. On April 8, 2019, the federal district court entered a default judgment and order of forfeiture vesting in the U.S. government all rights of title and possession in the coins. Pursuant to 19 U.S.C. § 2609, the coins are to be offered for return to China and Cyprus and then, should they decline, either transferred to ACCG or otherwise disposed of, in accordance with the statute. On September 23, 2019, U.S. Customs and Border Protection ("CBP") informed the State Department that, absent its objection, CBP would contact China and Cyprus to initiate repatriation. The State Department informed CBP of its consent.

[**] Editor's note: The MOU entered into force February 1, 2020. 85 Fed. Reg. 7204 (Feb. 7, 2020).

C. EXCHANGE PROGRAMS

1. Albania

On September 25, 2019, the United States and Albania signed a memorandum of understanding on the Fulbright Academic Exchange Program. The text of the MOU is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/. A September 25, 2019 State Department media note, available at https://www.state.gov/the-united-states-and-the-republic-of-albania-expand-fulbright-partnership/, provides background on the MOU and the Fulbright program in Albania:

> The MOU conveys the Albanian Government's commitment to provide sustainable support to the Fulbright Student Program, in order to provide more opportunities for students to participate in the Fulbright Program.
>
> The Fulbright program in Albania was established in 1991. Since then, more than 350 U.S. and Albanian scholars and students have conducted research, taught, or studied at U.S. and Albanian universities through the Fulbright Program.

2. Qatar

On January 13, 2019, the United States and Qatar signed a statement of intent ("SOI") to explore potential cooperation to promote cultural understanding. On the same day, the United States and Qatar signed an MOU on cooperation in the field of education. The English language versions of the SOI and the MOU are available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

3. Estonia

On August 30, 2019, the United States and Estonia signed a modification of their 2015 MOU regarding the Fulbright Academic Exchange Program. The text of the signed modification is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

4. Litigation: *ASSE International*

As discussed in *Digest 2018* at 520-21; *Digest 2017* at 580-81; Digest *2016* at 582-83; *Digest 2015* at 611; and *Digest 2014* at 576-79, ASSE International, a program sponsor in the State Department's J-1 Exchange Visitor Program ("EVP") challenged in federal court the imposition of sanctions by the Department of State for ASSE's violations of EVP regulations and then brought a second appeal after the Department imposed a lesser sanction. The government's brief on appeal, submitted May 15, 2019, is excerpted below and available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/. *ASSE Int'l v. Pompeo*, No. 18-55979 (9th Cir.).

* * * *

A. The State Department Correctly Imputed To Plaintiff The Misconduct Of Plaintiff's Third-Party Contractors.

In issuing a letter of reprimand to plaintiff, the State Department reasonably concluded that plaintiff—and plaintiff's third-party contractors ACO and The Cream Pot—had failed to ensure that Ms. Amari possessed sufficient English skills to participate in the Exchange Visitor Program and had failed to ensure that she was placed in a *bona fide* training program. One of plaintiff's own employees admitted that Ms. Amari had insufficient English to participate in her program. And there is likewise no dispute that The Cream Pot used Ms. Amari to fulfill an ordinary labor need, as she spent hours baking crepes in a restaurant kitchen. Because the State Department "articulated reasoned connections between the record and its conclusions," this Court should affirm the district court's judgment that the issuance of a letter of reprimand "was not arbitrary and capricious." ER19.

Before the agency and in district court, plaintiff argued that Ms. Amari was sufficiently proficient in English. *See, e.g.*, ER10-12. Plaintiff has abandoned that contention on appeal, and for good reason: The State Department reasonably credited the contemporaneous judgment of one of plaintiff's employees that Ms. Amari lacked the requisite language skills. *See* ER10. Before the agency and in district court, plaintiff also argued that Ms. Amari's crepe-baking tasks in fact constituted *bona fide* training. *See, e.g.*, ER12-14. Plaintiff has abandoned that contention on appeal as well, and for equally good reason: The State Department regulations explicitly provide that exchange programs must provide "bona fide training" and are *not* to be "used as substitutes for ordinary employment or work purposes." 22 C.F.R. § 62.22(b)(1)(ii).

On appeal, plaintiff simply asserts (Br. 42-49) that it cannot be held responsible for the misconduct of ACO or The Cream Pot restaurant. The district court correctly rejected this contention, which flies in the face of the regulations' plain terms. The governing regulation, 22 C.F.R. § 62.22(g)(1), provides that "[a]ny failure by any third party to comply with [Program] regulations"—not merely failures for which a sponsor shares fault—"will be imputed to the sponsors engaging such third party." *Id.* § 62.22(g)(1); *see ASSE*, 803 F.3d at 1065 (explaining that, under the State Department's regulations, "any violations committed by such third parties are 'imputed to the sponsors' themselves"). The regulations thus ensure that sponsors—which have ultimate responsibility for their program participants' health, safety, and welfare, *see* 22 C.F.R. §§ 62.10(d)(2), 62.50(a)(3))—cannot insulate themselves from their regulatory obligations or put exchange visitors at risk by subcontracting out their own duties.

Plaintiff observes (Br. 42) that the State Department's regulations elsewhere provide that a sponsor may be sanctioned for its own regulatory violations, *see* 22 C.F.R. § 62.50(a), and argues (Br. 44-45) that § 62.22(g)(1) should be read to create liability for a sponsor only when a third party's regulatory violations resulted from the sponsor's failure to comply with the sponsor's supervisory obligations. This argument is foreclosed by the text of § 62.22(g)(1)—which permits the imputation of "any" third-party violations, and which "contains no … language implying a requisite state of mind" on the part of the sponsor. *See United States v. Kent*, 945 F.2d 1441, 1446 (9th Cir. 1991); *accord United States v. Wilson*, 438 F.2d 525 (9th Cir. 1971) (per curiam) (holding that a regulation speaking solely of action, with no reference to volition, imposes strict liability).

Plaintiff incorrectly contends (Br. 46) that, if § 62.22(g)(1) permits the imputation of all third-party violations to the associated sponsor, the State Department's "detailed and specific list of the responsibilities program sponsors bear with respect to their third parties" would be

superfluous. But enforcing the express terms of the imputation provision does not render those oversight provisions superfluous. Both the imputation provision and the oversight provisions have the practical effect of encouraging sponsors to supervise their third parties carefully.

However, the provisions address misconduct by different entities. A sponsor that fails to discharge its oversight responsibilities has failed to comply with regulations governing its own primary conduct and may be sanctioned on that basis. The imputation provision of § 62.22(g)(1) serves a different function: It allows the State Department to hold a sponsor accountable for the regulatory violations committed by the sponsor's third parties, even if the sponsor is not directly at fault.

We note that the State Department retains discretion to tailor its choice of sanction to "the nature and seriousness of the [sponsor's] violation[s]." 22 C.F.R. § 62.50(b)(1). Here, for example, the State Department imposed the minimum sanction—a letter of reprimand—in part because "ASSE's third parties kept [their misconduct] hidden." ER151. Nothing in the regulations, however, relieves a sponsor of responsibility for the conduct of its third parties.

Plaintiff argues (Br. 47) that, as a policy matter, the State Department should not hold it strictly liable for the regulatory violations of its third parties if plaintiff has fully discharged its supervisory responsibilities. That approach would undermine the purposes of the regulations: to protect foreign nationals who participate in the Exchange Visitor Program, to ensure that they receive genuine training, and to ensure they have a positive experience in the United States. In any event, plaintiff's policy arguments are no basis to disregard the plain terms of the regulations.

…[T]he State Department has consistently maintained—in accordance with the plain terms of its regulations—that "[a]ny failure by any third party to comply with" the regulations "will be imputed to the sponsors engaging such third party." 22 C.F.R. § 62.22(g)(1).

Plaintiff mistakenly suggests (Br. 50-53) that the State Department held it responsible for the conduct of unidentified third parties with which plaintiff had no relationship. The State Department did no such thing. Rather, the State Department imputed to plaintiff the misconduct of ACO and The Cream Pot Restaurant. There is no dispute that these entities are third parties encompassed by the imputation provision. Plaintiff responds that, by taking notice of the fact that DHS had granted Ms. Amari T Non-Immigrant Status, the State Department imputed the conduct underlying DHS's determination (which plaintiff speculates may have been committed by entities that were not plaintiff's third parties) to plaintiff. But plaintiff has misunderstood the State Department's letter of reprimand, which did not impute the conduct giving rise to DHS's determination to ASSE itself—as evinced by the fact that the Department did not cite § 62.22(g)(1) when making that specific finding. *See* ER48-50; ER151. In noting the fact that "DHS considers Ms. Amari to have shown sufficient evidence of human trafficking while participating in ASSE's exchange visitor program to merit" T-visa status, ER151, the Department faulted no entity other than ASSE itself, *see* ER151-52.

B. The State Department Permissibly Took Into Account DHS's Grant Of T-Visa Status To Ms. Amari.

In addition to finding the two regulatory violations discussed above, the State Department also concluded that plaintiff had "committed acts of omission and commission which had or could have had the effect of endangering" Ms. Amari's welfare. ER48 (citing 22 C.F.R. § 62.50(a)(3)). The State Department made this third finding for two reasons. First, the State Department noted that plaintiff had left Ms. Amari at risk of exploitation by failing to ensure that she had sufficient English skills and by permitting her placement in a labor position instead of a

bona fide training program. ER49. And second, the State Department noted that DHS found that Ms. Amari had shown sufficient evidence of human trafficking to warrant T-visa status. ER49 & n.4.

Plaintiff does not appear to contend that it was impermissible for the State Department to take into account DHS's grant of T-visa status in making this third finding. Plaintiff suggests, however, that the State Department should instead have credited the allegedly formal determination of the State Department's Bureau of Diplomatic Security ("Bureau") that Ms. Amari's circumstances did not rise to the level of criminal human trafficking. But no such formal determination was made. Plaintiff relies principally on an email dated February 13, 2012—just weeks after the State Department learned of Ms. Amari's complaints—in which an agent at the Bureau's District of Columbia headquarters stated that Ms. Amari's case "does not resemble a trafficking situation in my humble opinion… . I am not seeing the coercion and exploitation that I associate with trafficking in my mind." Br. 10-11 (quoting ER252-53). This statement, which reflects the preliminary and subjective opinion of a single Diplomatic Security agent, does not constitute a final determination that Ms. Amari was not a victim of criminal trafficking. Plaintiff also relies on meeting notes setting forth the Bureau's process in Ms. Amari's case, Br. 11 (citing ER271), but those simply summarize the email discussed above. ER271. Finally, plaintiff relies on a "Summary of Investigation." Br. 10-11 (citing ER267). But that summary does not discuss whether Amari was the victim of criminal trafficking.

Even assuming that the Bureau of Diplomatic Security had formally determined that Ms. Amari was not a trafficking victim, its assessment would not undermine DHS's independent determination that Ms. Amari had shown sufficient evidence to qualify for T-visa status. For one, the Bureau investigates criminal conduct, *see, e,g.*, 18 U.S.C. §§ 1542-1546, 1590, and the standard for a criminal prosecution is more demanding than the showing needed for a T-status determination. For another, DHS is the Executive Branch agency with exclusive authority to adjudicate applications for T-visa status; the Bureau has no role in that process and no authority to make those determinations. ER15 & n.7; *see* 8 U.S.C. § 1101(a)(15)(T). DHS's formal determination to grant T-visa status to Ms. Amari was "the unified work product of a U.S. government agency carrying out governmental responsibilities" that is "clothed with a presumption of regularity." *See Angov v. Lynch*, 788 F.3d 893, 905 (9th Cir. 2015). It was entirely reasonable for the Department to rely on DHS's formal determination, and to credit that formal determination over the preliminary opinion of a Diplomatic Security agent that Amari's case did not resemble a criminal-trafficking situation. *See ASSE Int'l*, 803 F.3d at 1077 n.16 (finding "no error" in the Department's reliance on the fact of DHS's T-status determination).

Plaintiff responds (Br. 24-25) that, at a minimum, the State Department was required to discuss the Bureau of Diplomatic Security's alleged finding in issuing the letter of reprimand. But agency action is reversible on this ground only if the agency "entirely failed to consider an important aspect of the problem" before it. *Motor Vehicle Mfrs. Ass'n ofU.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The evidence to which plaintiff points falls short of that high threshold. As explained, the Bureau never made a formal finding. And even if the Bureau had made a formal finding, its conclusion would not undermine the fact that DHS had granted Ms. Amari T-visa status, or the fact that, in DHS's view, Ms. Amari had introduced enough evidence of human trafficking to entitle her to that status.

Finally, even if the State Department were obliged to address the Bureau's alleged finding, remand is unwarranted because a finding of human trafficking was not necessary to support the State Department's third finding. That finding, as explained, was premised not

merely on DHS's grant of T-visa status but also on other regulatory violations that plaintiff no longer contests. Specifically, ACO and The Cream Pot "abused the purpose of the Exchange Visitor Program" by using Amari to fulfill The Cream Pot's labor needs. ER151. "Together with ASSE's inappropriate selection of Ms. Amari and failure to assess Ms. Amari's English language skills adequately," the third-party contractors' actions could have placed Amari in jeopardy. ER151. Moreover, the State Department's issuance of a letter of reprimand was predicated not merely on its third finding but on "multiple regulatory violations" by plaintiff and its third-party contractors, most of which plaintiff again no longer contests. ER151. Particularly given the State Department's decision to impose the least severe sanction available, it is apparent that the choice of sanction would have remained the same even had the Department not relied on DHS's T-status determination. Indeed, plaintiff itself relies on evidence suggesting that Ms. Amari was aware that her limited English skills made her unqualified for the Exchange Visitor Program. Br. 10-11 (citing ER267). That only underscores the extent to which plaintiff and its third-party contractors failed to ensure that Ms. Amari was qualified for (and placed in) a suitable training program, and failed to adequately oversee her experience while in their care.

* * * *

5. *Capron v. Massachusetts*—the au pair program

See *Digest 2018* at 521-25 for discussion of the U.S. brief filed in 2018 in the U.S. Court of Appeals for the First Circuit in *Capron v. Massachusetts*, No. 17-2140. On December 2, 2019, the First Circuit Court of Appeals affirmed the district court's dismissal of the case, disagreeing with the U.S. position that the federal regulations for the U.S. au pair program regarding wages and hours preempt state law. *Capron v. Massachusetts*, 944 F.3d 9 (1st Cir. 2019). The court also acknowledged (see final paragraph in excerpts below) the possibility that the federal regulations could be revised to expressly preempt state and local law. Excerpts follow from the decision.[***]

* * * *

We now turn to the heart of the dispute: are the state law measures at issue—in whole or in part—preempted, insofar as they protect au pair participants by imposing obligations on their host families as their employers that may be enforced against those host families? The Supremacy Clause provides that federal law "shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. This Clause gives Congress "the power to preempt state law," which Congress may exercise either expressly or impliedly. *Arizona v. United States*, 567 U.S. 387, 399, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012). A federal agency, however, also may preempt state law through its regulations, and a federal agency, too, may do so either expressly or impliedly. See *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).

* * * *

[***] Editor's note: Plaintiffs have filed a petition for writ of certiorari in the Supreme Court of the United States. Supreme Court denied cert. Case no. 19-1031 (June 22, 2020).

The notion that underlies obstacle preemption is that the federal government would want a federal measure to be preemptive of any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of that federal measure, *Hines*, 312 U.S. at 67, 61 S.Ct. 399; see also *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000). …

* * * *

The plaintiffs … tie up their argument for finding obstacle preemption this way. They contend that the enforcement of each of the challenged Massachusetts measures necessarily would frustrate the federal objective of establishing such a nationally uniform system of compensation. The enforcement of each such measure, they argue, necessarily would exceed the regulatory ceiling that the Au Pair Program established by imposing an independent and additional state obligation on host families not imposed by the Au Pair Program itself.

* * * *

To show the requisite ceiling-setting intent, the plaintiffs focus chiefly on the provision of the au pair exchange program regulations that is entitled "Wages and hours." 22 C.F.R. § 62.31(j). The provision states: "Sponsors shall require that au pair participants: (1) Are compensated at a weekly rate based upon 45 hours of child care services per week and paid in conformance with the requirements of the [FLSA] as interpreted and implemented by the [DOL]." *Id.* That provision further states, with respect to hours, that sponsors "shall require" that "au pair participants ... do not provide more than 10 hours of child care per day, or more than 45 hours of child care in any one week." Id. § 62.31(j)(2).

* * * *

But, the text of this provision imposes the obligation to require that au pair participants receive a certain amount of weekly compensation only on the sponsors. No obligation, enforced by the DOS, is imposed on the host families themselves. The obligation that DOS may enforce against the sponsors is defined, moreover, in terms that make it hard to draw the ceiling-setting inference that the plaintiffs ask us to make.

An au pair participant is clearly paid "in conformance with" the FLSA minimum wage for a domestic worker who provides 45 hours a week in childcare services, so long as that participant receives not less than that minimum amount of weekly compensation. Indeed, the plaintiffs concede that this text does not forbid au pair participants from being paid more. Thus, the plaintiffs acknowledge, for example, that, in accord with this provision, a host family may voluntarily pay an au pair participant more than the minimum wage required by the FLSA for that amount of work without creating any conflict with this provision. But, if a sponsor would meet its obligation—which is the obligation that the regulations empower the DOS to enforce—in the event a host family chooses to be that generous, then we fail to see what in the provision's text indicates that a host family may not be required to pay that higher wage in order to comply with a state wage and hour law. After all, a sponsor would be no less able to fulfill its obligation to ensure that au pair participants are paid "in conformance with" the FLSA—given that it merely sets a non-preemptive floor—in that circumstance.

The au pair exchange program regulations do contain a section that purports to describe the "objectives" of the Au Pair Program. See 22 C.F.R. § 62.31(a)-(b). But, this provision does not refer to a federal governmental interest in setting a uniform national standard for either au

pair participant wages or for host family recordkeeping requirements. *Id.* Nor do the plaintiffs contend otherwise, as they do not argue that the "objectives" provision itself supports their position about what the implicit objectives of the Au Pair Program are.

The "objectives" section does state that "[a]u pair participants provide up to forty-five hours of child care services per week and pursue not less than six semester hours of academic credit ... during their year of program participation." *Id.* § 62.31(a). But, neither the "objectives" section nor any other provision of the DOS regulations refers—at least in any express way—to an agency interest in capping, based on the FLSA minimum wage, the costs of a host family that chooses to have an au pair participant provide the full amount of childcare services that the Au Pair Program allows. Nor do the Au Pair Program regulations reference state wage and hour laws, which is not surprising given the lack of any indication that the agency anticipated at the time of the regulations' promulgation that state wage and hour laws would apply to domestic workers. …

From all one can tell from the text of these provisions, in other words, the Au Pair Program operates parallel to, rather than in place of, state employment laws that concern wages and hours and that protect domestic workers generally, at least with respect to the obligations that such state law wage and hour measures impose on host families to do more than what the FLSA itself requires. Thus, the text of au pair exchange program regulations themselves does not supply the affirmative evidence that the state measures at issue will frustrate the federal scheme's objectives that the plaintiffs need to identify if they are to meet their burden to show obstacle preemption.

* * * *

IV.

We recognize that the DOS, as reflected in its amicus filing, reads its current regulations—as well as the regulatory history that we have just reviewed—differently than we do. We thus consider the contentions that the DOS makes, too. …

In doing so, however, we are mindful that we may not defer to an "agency's conclusion that state law is preempted." *Wyeth*, 555 U.S. at 576, 129 S.Ct. 1187. Instead, we must attend to the "thoroughness, consistency, and persuasiveness" of the agency's explanation of how state law affects the federal regulatory scheme that the agency administers. *Id.* at 577, 129 S.Ct. 1187. And here, as we will explain, the DOS's explanation, even if not in conflict with any previously articulated and well-considered DOS explanation, fails to warrant a finding of either field or obstacle preemption.

Like the plaintiffs, the DOS points to the fact that the "Exchange Visitor Program" regulations for certain other exchange visitor programs, unlike those for the Au Pair Program, explicitly reference state and local minimum wage laws. See 22 C.F.R. § 62.32(i)(1)(i). The DOS contends that this aspect of the regulations shows that when the DOS "intends to require payment in accordance with state and local law for [other exchange visitor program] participants the Department say[s] so expressly[.]" But, as we have noted, by terms, the "Exchange Visitor Program" regulations address only the obligations that sponsors must meet in order to avoid the sanctions that the DOS may impose on them under the regulations. The regulations do not, by terms, purport to define the obligations of the employers themselves that those whom they employ may enforce against them. …

The DOS does not attempt to account for this disjuncture between the Au Pair Program's focus on the obligations of sponsors and the state wage and hour measures' focus on the

obligations of the employers to the domestic workers whom they employ. The DOS merely asserts that, because sponsors of au pair exchange programs are not required to ensure that employers comply with state wage and hour laws, while the sponsors of other exchange visitor programs are so required, the participants in au pair exchange programs may not independently ensure that their employers do comply with those state laws. There is no indication, however, that the participants in those other exchange visitor programs would be prevented from enforcing their state law wage and hour rights against their employers unless the sponsors of those programs were required to show that the employers of those participants complied with them. The DOS thus fails to provide a persuasive explanation for drawing the negative inference that, because au pair exchange programs are not required to ensure such compliance, au pair participants may not enforce state wage and hour rights against their employers.

The DOS also asserts that the federal obligations on sponsors to require that au pairs are paid "in conformance with the requirements of the FLSA" based on the au pair having worked 45 hours in a week should be understood to be a preemptive ceiling on what the au pair participant may claim as a wage from her host family. But, as we have explained, that language simply does not by terms establish such a ceiling. …

The DOS separately contends that the regulations that govern the Au Pair Program should be construed to be preemptive in the same way that the federal statute that authorized the President of the United States to impose sanctions on Burma that was at issue in *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 380, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000), was construed to be. The DOS contends that the regulations, like the federal Act in *Crosby*, are "drawn not only to bar what they prohibit but to allow what they permit." *Id*. But, in *Crosby*, as the Court expressly recognized, Congress's purpose was clear—to give the President full discretion in regard to trade with "Burma." *Id*. at 374-76, 120 S.Ct. 2288. It is not similarly clear that, in setting the compensation obligation of a sponsor of an au pair exchange program—enforceable only by the DOS against that sponsor—the regulatory scheme's purpose was to set not only the minimum amount that the sponsor must ensure that au pair participants must receive but also a ceiling on what a state may require a host family to pay that au pair participant. In fact, the wages and hours obligation that the DOS imposes on sponsors is pegged to the requirements of a federal statute that itself makes clear that the floor that it sets for the wage that employers must pay is not also a ceiling on what states may require them to pay. See 29 U.S.C. § 218.

Turning to the DOS's discussion of the regulatory history, the DOS points only to the very same passages in the agency commentary that we have already reviewed. The DOS does not purport to examine the context within which the passages appear. Instead, it seizes on certain phrases in isolation. As we have explained, though, considered in context, the passages that the DOS invokes show that the agency intended to establish a uniform rather than variable compensation floor—pegged to the FLSA minimum—that sponsors would be obliged to ensure was met. … The agency interest in ensuring that kind of uniformity, however, accords with the agency having merely established a floor for sponsors to meet. The DOS thus fails to explain why these references affirmatively indicate that the agency also had the requisite ceiling-setting intent.

There is, moreover, regulatory text that appears to point directly against the DOS's view. Specifically, DOS appears to acknowledge that the au pair regulations include an "employment component," and that the general "Exchange Visitor Program" regulations' requirement that sponsors who "work with programs with an employment component" must have "Responsible

Officers" who have "a detailed knowledge of federal, state, and local laws pertaining to employment" applies to the Au Pair Program. See 22 C.F.R. § 62.11(a).

To respond to this seemingly problematic language, the DOS contends that state wage and hour laws only apply to "Exchange Visitor Programs" that have additional, specific regulations regarding state laws on top of the general regulations, such as the summer work-travel program. According to the DOS's construction of the regulations, the general "Exchange Visitor Program" regulations' requirement that sponsors have "Responsible Officers" who understand all state laws that are relevant to their programs applies to the Au Pair Program only "with respect to matters" beyond wage and hour laws, such as state negligence laws. But, insofar as this assertion by the DOS depends on our granting the negative inference that the plaintiffs ask us to draw from the requirement that sponsors of other exchange visitor program ensure that employers of the participants in those programs do comply with such laws, we have already explained why such an inference is unwarranted. … And, insofar as this assertion does not depend on that premise, it cannot be squared with the plain text of the regulations, for reasons that we have already explained. See id.

Thus, while we do owe respectful deference to the DOS's own view of its regulations, the portions of the regulatory text and the passages in the underlying regulatory history that the DOS invokes to support the assertions that it makes about them simply do not support those assertions. And, of course, an agency's mere "conclusion that state law is pre-empted" is not one to which we may defer. *Wyeth*, 555 U.S. at 576-77, 129 S.Ct. 1187.

There is one last set of materials to which the DOS—and, in passing, the plaintiffs—point: a series of agency guidance documents and fact sheets concerning changes to the federal minimum wage that were issued by the USIA and the DOS between 1997 and 2007. The DOS does not contend that we owe such material any deference. But, the DOS does contend that these materials show that the Au Pair Program regulations were long understood by the agency itself to oust state minimum wage laws. We do not agree.

The 1997 agency documents merely clarify that federal changes to minimum wage laws affect the stipend and wage calculated in the 1995 regulations. Thus, these guidance documents serve only to reinforce the conclusion—already evident from the text—that the DOS regulations apply only to sponsoring organizations and that Au Pair Program participants' actual entitlement to wages that they may enforce against their host families comes from the FLSA—not the DOS regulations. In particular, the documents warn host families that if they fail to "abide by the ... au pair stipend increases" they are "in violation of federally-mandated minimum wage law," not DOS regulations. These documents thus show, at most, that state wage and hour laws were not considered, not that they were considered and preempted.

* * * *

… We thus do not see how that one guidance document, insofar as it even comports with the text of the DOS regulations themselves, could supply the basis for inferring an intent from the Au Pair Program to transform the non-preemptive FLSA floor on the wage and hour rights that au pair participants have vis-a-vis their host family employers into a preemptive federal ceiling on those rights.

In fact, if we are considering past agency practice, the DOS acknowledges that, when litigation first arose to enforce a state wage and hour measure for the benefit of au pair participants in 2015, a DOS spokesperson publicly stated that au pair exchange program sponsors must "comply with all other applicable federal, state, and local laws, including any state

minimum wage requirements." Lydia DePillis, Au Pairs Provide Cheap Child Care. Maybe Illegally Cheap., Wash. Post, Mar. 20, 2015. With regard to communicating these requirements to au pair sponsor agencies, moreover, the DOS spokesman went on to say: "The Department has been communicating with au pair sponsors to confirm that they are aware of their obligations under the regulations—including with respect to host family requirements—and will continue to do so." *Id.* 17

We recognize that the DOS asserts that it is not "clear" that the agency's public response at that time represented a considered view. We do not suggest otherwise. But, insofar as the agency means to invoke other aspects of its past practice that it concedes do not represent the kind of considered agency view that merits deference to demonstrate how unthinkable it has always been that the Au Pair Program could function if state wage and hours laws could be enforced against host families, this aspect of the agency's past history at least suggests that the supposedly unthinkable was thought.

The regulatory history does suggest that the au pair exchange program regulations were promulgated at a time when it may not have been evident that there were independently enforceable wage and hour protections for domestic workers beyond those established by the FLSA itself. … State laws providing such protections are never mentioned by the agency. But, the fact that the agency may not have had those state laws in view does not permit us to conclude that the agency must therefore have preempted them, at least given the sponsor-targeting, floor-setting words that the agency chose to use in the regulations and what the history underlying those words reveals about the agency's focus. For, while we may assume that the DOS would be free to preempt such state laws now by revising the regulations, it may not simply ascribe to them, retrospectively, a ceiling-setting character that neither the text, nor the regulatory history, nor even past practice demonstrates that they have had.

* * * *

E. INTERNATIONAL EXPOSITIONS

Expo Dubai 2020

In 2019, the Department of State terminated its relationship with the partner selected for the U.S. Pavilion at Expo Dubai 2020. The U.S. Congress did not appropriate funds for participation in Expo 2020. See December 17, 2019 State Department media note, available at https://www.state.gov/u-s-participation-in-expo-2020-dubai-in-jeopardy/.[****]

[****] Editor's note: The State Department announced in January 2020 that the U.S. would have a Pavilion at Expo Dubai 2020 due to the generosity of the government of the United Arab Emirates.

Cross References

Visa Regulations and Restrictions, **Ch. 1.B.4.**
Chabad v. Russia, **Ch. 10.A.6.b.**

CHAPTER 15

Private International Law

A. COMMERCIAL LAW/UNCITRAL

1. UNCITRAL

The U.S. statement at the UN General Assembly Sixth Committee on the report of the United Nations Commission on International Trade Law ("UNCITRAL") on the work of its 52nd session is excerpted below.

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* * * *

The United States welcomes the Report of the 52nd session of the United Nations Commission on International Trade Law and commends the efforts of UNCITRAL's Member States, observers, and Secretariat in continuing to promote the development and harmonization of international commercial law.

We were pleased that UNCITRAL approved a number of new guides and legal instruments in 2019. We would like to thank the Secretariat for its excellent work managing the update of the Model Legislative Provisions on Public-Private Partnerships and accompanying Legislative Guide. Developed with the assistance of experts and Member States, this updated guide should better promote the sound management of such partnerships with its emphasis on enhancing transparency, fairness, and sustainability, while reducing the risk of corruption and the misuse of public funds.

We note that the Practice Guide to the UNCITRAL Model Law on Secured Transactions was the final product concluded by the very productive working group on Secured Transactions. We hope this Practice Guide will serve as a useful reference to individuals and businesses looking for practical, actionable advice on how to operate and structure transactions under the UNCITRAL Model Law.

We were also pleased that UNCITRAL approved the Model Law on Enterprise Group Insolvency and its Guide to Enactment. We hope this law will contribute to the establishment of harmonized national enterprise group insolvency laws that protect and maximize the value of the assets and operations of enterprise groups and their members, while also providing appropriate protection to creditors. In addition, and relatedly, we were pleased that UNCITRAL updated its Legislative Guide on Insolvency Law to address the obligations of directors of enterprise group companies in the period approaching insolvency.

We note with satisfaction that UNCITRAL undertook a number of suggestions made in prior years to improve its working methods and become more efficient. As a result, the Commission session this year was well organized and more streamlined, and we look forward to UNCITRAL's continued efforts to structure its agenda and meetings to maximize both efficiency and effectiveness.

We look forward to continuing our productive engagement with UNCITRAL this year. We welcome planned discussions on the appropriate size and composition of UNCITRAL's membership. We hope such discussions will focus on ensuring UNCITRAL can maintain and improve upon its ability to develop and promote effective, usable instruments supporting stable and predictable legal outcomes for citizens and businesses of our country, and the world.

* * * *

2. Singapore Convention on Mediation

On August 7, 2019, U.S. Chargé d'Affaires Rafik Mansour addressed a roundtable following the signing ceremony of the Singapore Convention on Mediation. See *Digest 2018* at 529 regarding the conclusion of the Singapore Convention (the United Nations Convention on International Settlement Agreements Resulting from Mediation). Chargé Mansour's remarks on behalf of the United States are excerpted below and available at https://sg.usembassy.gov/remarks-charge-daffaires-mansour-at-the-singapore-convention-on-mediation-roundtable-lunch/?_ga=2.202703698.238228175.1580748886-698237648.1580748886.

* * * *

… I would like to thank the Government of Singapore and the UN Commission on International Trade Law (UNCITRAL) for hosting this ceremony today. As we gather to sign the Singapore Convention on Mediation, we are casting a spotlight for the world on the importance of mediation as a means to settle disputes and further promote international commerce.

The United States was an early proponent of the Singapore Convention, having recognized the need for a way to bolster confidence that once a mediated settlement had been reached by parties to a dispute in different countries, stakeholders could rely on it being enforced across national boundaries. And, the United States is proud to be among the first countries signing the Singapore Convention.

The Singapore Convention on Mediation will make it easier for companies operating across borders to resolve their disputes with partners through mediation. The United States believes that the Singapore Convention will support the efforts of many companies, including American ones, to encourage their overseas partners to make greater use of mediation. In fact, a coalition of business groups wrote to Secretary of State Pompeo last November, highlighting how the Singapore Convention will reduce costs for businesses and reduce the need for duplicative litigation, by encouraging mediation as a viable path to resolving commercial disputes.

On behalf of the U.S. government, I would like to take this opportunity to thank UNCITRAL, its Secretary Anna Joubin-Bret, and her outstanding team for all their tireless

efforts on the Convention, as well as delegates from Singapore, who spearheaded the negotiations. …

We believe that this Convention represents UNCITRAL's work at its best—bringing together lawyers and experts from different legal cultures to work together to develop an instrument that will address a significant need and that will benefit cross-border trade and facilitate international commerce around the world. The Convention truly has the potential to become one of UNCITRAL's most significant accomplishments and one of its most successful instruments.

The United States looks forward to continuing to work with all of you to support the Singapore Convention and encourage the greater use of mediation as a means to resolve cross-border commercial disputes. …

* * * *

3. U.S. Ratification of the UN Convention on the Assignment of Receivables in International Trade

The United States of America became the second State Party to the UN Convention on the Assignment of Receivables in International Trade when it deposited its instrument of ratification at UN Headquarters in New York on October 15, 2019. The Convention requires that five States Parties ratify before it can enter into force. The Convention was endorsed by the General Assembly and opened for signature and ratification in 2001. See *Digest 2001* at 792. The U.S. instrument of ratification, including understandings and declarations, appears below. U.N. Doc. No. C.N.567.2019.TREATIES-X.17 (Depositary Notification).

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* * * *

UNDERSTANDINGS

(1) It is the understanding of the United States that paragraph (2) (e) of Article 4 excludes from the scope of the Convention the assignment of-

(A) receivables that are securities, regardless of whether such securities are held with an intermediary; and

(B) receivables that are not securities, but are financial assets or instruments, if such financial assets or instruments are held with an intermediary.

(2) It is the understanding of the United States that the phrase 'that place where the central administration of the assignor or the assignee is exercised,' as used in Articles 5 (h) and 36 of the Convention, has a meaning equivalent to the phrase, 'that place where the chief executive office of the assignor or assignee is located.'

(3) It is the understanding of the United States that the reference, in the definition of 'financial contract' in Article 5 (k), to 'any other transaction similar to any transaction referred to above entered into in financial markets' is intended to include transactions that are or become the subject of recurrent dealings in financial markets and under which payment rights are determined by reference to-

(A) underlying asset classes; or

(B) quantitative measures of economic or financial risk or value associated with an occurrence or contingency. Examples are transactions under which payment rights are determined by reference to weather statistics, freight rates, emissions allowances, or economic statistics

(4) It is the understanding of the United States that because the Convention applies only to 'receivables,' which are defined in Article 2 (a) as contractual rights to payment of a monetary sum, the Convention does not apply to other rights of a party to a license of intellectual property or an assignment or other transfer of an interest in intellectual property or other types of interests that are not a contractual right to payment of a monetary sum.

(5) The United States understands that, with respect to Article 24 of the Convention, the Article requires a Contracting State to provide a certain minimum level of rights to an assignee with respect to proceeds, but that it does not prohibit Contracting States from providing additional rights in such proceeds to such an assignee.

DECLARATIONS

(1) Pursuant to Article 23 (3), the United States declares that, in an insolvency proceeding of the assignor, the insolvency laws of the United States or its territorial units may under some circumstances-

(A) result in priority over the rights of an assignee being given to a lender extending credit to the insolvency estate, or to an insolvency administrator that expends funds of the insolvency estate for the preservation of the assigned receivables (see, for example, title 11 of the United States Code, sections 364 (d) and 506 (c)); or

(B) subject the assignment of receivables to avoidance rules, such as those dealing with preferences, undervalued transactions and transactions intended to defeat, delay, or hinder creditors of the assignor.

(2) Pursuant to Article 36 of the Convention, the United States declares that, with respect to an assignment of receivables governed by enactments of Article 9 of the Uniform Commercial Code, as adopted in one of its territorial units, if an assignor's location pursuant to Article 5 (h) of the Convention is the United States and, under the location rules contained in section 9-307 of the Uniform Commercial Code, as adopted in that territorial unit, the assignor is located in a territorial unit of the United States, that territorial unit is the location of the assignor for purposes of this Convention.

(3) Pursuant to Article 37 of the Convention, the United States declares that any reference in the Convention to the law of the United States means the law in force in the territorial unit thereof determined in accordance with Article 36 and the Article 5 (h) definition of location. However, to the extent under the conflict-of-laws rules in force in that territorial unit, a particular matter would be governed by the law in force in a different territorial unit of the United States, the reference to 'law of the United States' with respect to that matter is to the law in force in the different territorial unit. The conflict-of-laws rules referred to in the preceding sentence refer primarily to the conflict-of-laws rules in section 9-301 of the Uniform Commercial Code as enacted in each State of the United States.

(4) Pursuant to Article 39 of the Convention, the United States declares that it will not be bound by chapter V of the Convention.

(5) Pursuant to Article 40, the United States declares that the Convention does not affect contractual anti-assignment provisions where the debtor is a governmental entity or an entity constituted for a public purpose in the United States."

* * * *

4. Convention on the recognition and enforcement of foreign judgments in civil or commercial matters

On June 18, 2019, State Department Attorney Adviser Michael Coffee delivered the U.S. opening statement at a diplomatic conference to finalize the text of a convention on the recognition and enforcement of foreign judgments in civil or commercial matters. Mr. Coffee's remarks are excerpted below.

* * * *

Since the 1800s, federal and state courts in the United States have recognized and enforced foreign judgments, both in furtherance of the principle of international comity and as a result of domestic law. Long ago, we realized that this was an appropriate course of action. In light of increasing transnational business relations and the recognition that transnational friendship and commerce would be advanced by the flow of judgments between countries, the United States proposed that the Hague Conference on Private International Law undertake work on this topic beginning in the early 1990s.

We now find ourselves poised to take a step toward realizing our shared goals. Over the next two weeks, we have an opportunity to find common ground on a series of final issues and achieve our shared objective of securing consensus in this body on a convention on the recognition and enforcement of foreign judgments in civil or commercial matters. This would be a significant accomplishment that we hope will promote global commerce and friendship and facilitate cross-border movement of persons and goods.

…We look forward to working with the delegations to reach consensus.

With that said, it is essential that we remain realistic in the coming weeks about the need to finalize an instrument that will promote harmony among jurisdictions. While the instrument might not be the most ambitious with respect to the matters covered or the manner in which it applies to those matters, we must not lose sight of the contribution that such a convention will provide. We should resist letting the perfect be an enemy of the good. In this regard, the United States delegation believes that the following goals are critical: (1) to draft an instrument that will be understandable to those for whom we are negotiating—litigants, attorneys and judges, and (2) to ensure that any new convention that emerges from this process will be implementable—and will be implemented—by a maximum number of States taking into account the domestic legal process that each state will need to follow in ratifying or otherwise bringing the new convention into force as a matter of their domestic law. If we fall short on either of these goals, we will have negotiated a convention of, at best, limited benefit.

As we think about the scope of the Convention, the United States would like to limit the need for a State to declare that it will not apply the Convention to particular subject matters as well as the likelihood that courts will rely on public policy to refuse to recognize or enforce a foreign judgment. For this reason, the United States believes that it is essential to obtain consensus on the inclusion of particular matters within the scope of the Convention. To do

otherwise will invite complication in implementation, which will not assist the beneficiaries of this Convention.

Similarly, we seek convention provisions that are understandable in, and work within, a maximum number of legal systems. While we focus on how a provision will operate within our system, we will strive to listen to other delegations concerning the manner in which that provision will operate within their system. Ultimately we seek solutions that will work for all. We are confident that all delegations will apply a similar approach.

We also emphasize consideration of ratifiability throughout these negotiations. Any text that cannot be applied because it cannot be brought into force does not help anyone. We have long ago learned that it is difficult to become party to a contentious treaty. For this reason, we focus on substance and drafting of the entirety of the text. We can promise that you will be hearing from us about issues such as a mechanism on the establishment of treaty relations to increase the chances for the United States to become party to the convention currently being negotiated.

* * * *

B. FAMILY LAW

See Chapter 2 for discussion of litigation regarding the Hague Abduction Convention.

C. INTERNATIONAL CIVIL LITIGATION

GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, et al.

In September 2019, the United States filed an amicus brief in the U.S. Supreme Court in support of the petitioner in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC,* et al., No. 18-1048. The issue in the case is whether the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards allows a nonsignatory to an arbitration agreement to compel arbitration based on the application of domestic-law agency and contract doctrines, such as equitable estoppel. The U.S. brief, arguing that the New York Convention does not categorically prohibit enforcement by a nonsignatory, is excerpted below.

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* * * *

The court of appeals erred in interpreting the New York Convention to categorically prohibit a nonsignatory to an arbitration agreement from compelling arbitration based on the application of domestic-law contract and agency principles, such as equitable estoppel. The court's interpretation of the Convention runs counter to its text, context, purpose, drafting history, the post-ratification understanding of Contracting States, and the Executive Branch's interpretation of the treaty. The Convention requires Contracting States to recognize and enforce arbitration agreements that satisfy its provisions as to form. But the Convention does not prohibit

Contracting States from determining the scope of such agreements—including who is bound by or can enforce them—in accordance with domestic law providing for enforcement by nonsignatory parties under contract law and agency principles. Thus, just as a nonsignatory to a domestic arbitration agreement may enforce that agreement "through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel," *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 631 (2009) (citation and internal quotation marks omitted), so too may a nonsignatory to an international arbitration agreement rely on those doctrines in an appropriate case.

A. The New York Convention Does Not Categorically Prohibit The Application Of Domestic-Law Doctrines That Allow Nonsignatories To Compel Arbitration

Under principles of interpretation that this Court has applied to treaties to which the United States is a party, a court begins "with the text of the treaty and the context in which the written words are used." *Air France* v. *Saks*, 470 U.S. 392, 397 (1985). In addition, the Court considers the "overall structure" and "purpose" of a treaty. *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999). "Because a treaty ratified by the United States is 'an agreement among sovereign powers,' [this Court will] also consider[] as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." *Medellin* v. *Texas*, 552 U.S. 491, 507 (2008) (quoting *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)). And the Court has recognized that the Executive Branch's interpretation of a treaty "is entitled to great weight." *Id.* at 513 (citation omitted). These interpretive principles support the conclusion that the Convention does not require the parties before the court to have signed a written arbitration agreement if applicable domestic-law principles otherwise demonstrate that the nonsignatory parties are entitled to invoke the agreement.

1. The court of appeals "h[eld] that, to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities." But no provision of the Convention purports to define who may properly be considered a "party" to an arbitration agreement entitled to enforce it in court—let alone to limit that category only to those who signed the agreement. See, *e.g.*, 1 Gary B. Born, *International Commercial Arbitration* § 10.01[C], at 1412 (2d ed. 2014) ("[T]he New York Convention refers only to the basic principle that international arbitration agreements bind their parties, without addressing the question of how an arbitration agreement's parties are determined."). Nor does the Convention address whether equitable estoppel or other doctrines may be applied to determine whether a nonsignatory may be bound by or enforce a covered agreement. Dorothee Schramm et al., *Article II, in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary On the New York Convention*, at 62, 64 (Herbert Kronke et al. eds., 2010) (Schramm) ("[I]t is not infrequent for arbitration proceedings to involve parties who did not sign th[e] instrument, or who signed it in a different name…. The national law governing the arbitration agreement determines whether and under which conditions the non-signatory is bound by the arbitration agreement and is thus a proper party to the arbitration."). The Convention therefore does not displace ordinary principles of contract law and agency that function to identify "which non-signatories may be held to be parties to—and consequently both bound and benefitted by—an arbitration agreement." Born § 10.01, at 1406.

The Convention's silence on whether nonsignatories may be deemed to be parties or otherwise entitled to enforce an arbitration agreement resolves this case. Congress provided that

"Chapter 1 [of the FAA] applies to actions and proceedings brought under [Chapter 2]" in the absence of a conflict with the Convention, 9 U.S.C. 208, and this Court has interpreted Chapter 1 to permit enforcement of arbitration agreements based on " 'traditional principles' of state law [that] allow a contract to be enforced by or against" nonsignatories "through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,' " *Arthur Andersen*, 556 U.S. at 631 (citation omitted). Those "background principles of state contract law" concern "the scope of agreements" to arbitrate, "including the question of who is bound by them." *Id.* at 630. Because the Convention does not restrict the permissible scope of international arbitration provisions, it does not conflict with the application of doctrines governing when a nonsignatory may enforce those agreements. See Restatement of the Law: The U.S. Law of International Commercial and Investor-State Arbitration § 2.3(b) (Proposed Final Draft Apr. 24, 2019) (approved by the membership of the American Law Institute at the May 2019 Annual Meeting…) ("Upon request, a court enforces an international arbitration agreement against or in favor of a nonsignatory to the agreement to the extent that the nonsignatory: (1) is deemed to have consented to such agreement, or (2) is otherwise bound by or entitled to invoke the agreement under applicable law.").

The court of appeals reached a contrary conclusion by relying on the Convention's requirement that Contracting States "recognize an agreement in writing under which the parties undertake to submit to arbitration," Convention art. II(1), 21 U.S.T. 2519, and its definition of "[t]he term 'agreement in writing' " to "include an arbitral clause in a contract or an arbitration agreement, signed by the parties," *id.* art. II(2), 21 U.S.T. 2519. Those provisions addressing an arbitration agreement's form "establish a rule of presumptive validity applicable to those agreements" that satisfy those provisions and "preclude[] Contracting States from requiring additional or more demanding formal requirements under national law." Born §§ 4.04[A][1][b][i], at 494, and 4.06[A][1], at 618. The Convention thereby sets a uniform international standard guaranteeing that written arbitration agreements that are signed will be valid and enforceable—but it does not limit the scope of those agreements or prevent the application of domestic-law doctrines governing who may properly be deemed to be bound by them. See Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* ¶ 2.42 (6th ed. 2015) ("The requirement of a signed agreement in writing * * * does not altogether exclude the possibility that an arbitration agreement concluded in proper form between two or more parties might also bind other parties.").

It would be anomalous to interpret the Convention's provisions regarding the form of an arbitration agreement to restrict the permissible scope of an arbitration agreement, because those form provisions serve different functions. One "purpose of [the written-form provision] is to ensure that a party is aware that he is agreeing to arbitration." Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, at 171 (1981). Written-form provisions also serve an evidentiary function by "provid[ing] a readily-verifiable evidentiary record of the parties' agreement to arbitrate," including their agreement on "critical issues such as the arbitral seat, institutional rules, language, number of arbitrators and the like." Born § 5.02[A][1], at 661-662. "In cases where there is concededly a valid agreement to arbitrate between some parties," as established by compliance with the form provisions, "the question whether that agreement extends to another party is more closely akin to determining the scope of the agreement than to determining whether any agreement has been formed or whether an agreement is valid." *Id.* § 10.01[E], at 1417.

In addition to prescribing the form of an agreement that Contracting States must recognize as valid, the Convention provides that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration." Convention art. II(3), 21 U.S.T. 2519. Outokumpu contends that "the term 'the parties' should have the same meaning every time Article II uses it," and that "[t]he logical reading of the Article II text is that 'one of the parties' requesting arbitration must be a 'party' to—a signatory of—the arbitration agreement." Resps. Br. in Opp. 21, 23. But the context of the provisions makes clear that when the Convention uses the term "party," it sometimes refers to parties to an arbitration agreement, see, *e.g.*, Convention arts. II(1), V(1)(a), 21 U.S.T. 2519, 2520; sometimes refers to the litigants in court seeking to compel arbitration, *id.* art. II(3), 21 U.S.T. 2519; and sometimes refers to the individuals or entities who participated in arbitration or who are seeking to enforce an arbitral award, see, *e.g.*, *id.* art. V(1), 21 U.S.T. 2520. To be sure, sometimes the only "parties" involved are those who signed the arbitration agreement. But in other cases, background principles of contract law and agency demonstrate that a nonsignatory to an agreement should be deemed a "party" or otherwise bound by or entitled to enforce the agreement. In such a case, the Convention's use of the term "party" should not be read to confine the scope of the agreement by binding, and limiting enforcement to, only its signatories.

Notably, the Convention's use of the term "party" mirrors the similarly varied use of the term "party" in Chapter 1 of the FAA. Like the Convention, the FAA sometimes uses the term "party" to refer to the parties to an arbitration agreement, 9 U.S.C. 9 ("[i]f the parties in their agreement have agreed"); sometimes refers to the litigants seeking to enforce the agreement in court, 9 U.S.C. 3 (court shall grant a stay "on application of one of the parties"); and sometimes refers to the individuals who participated in an arbitration, 9 U.S.C. 9 ("any party to the arbitration may apply"). In *Arthur Andersen*, this Court observed that the reference to "parties" in the FAA's stay provision "refers to parties to the litigation rather than parties to the contract." 556 U.S. at 630 n.4. And while the stay provision requires that the claims be "referable to arbitration under an agreement in writing, " 9 U.S.C. 3, this Court reasoned that "[i]f a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the statute's terms are fulfilled." *Arthur Andersen*, 556 U.S. at 631. So too here, if a written and signed international arbitration agreement is made enforceable by or against a nonsignatory under domestic-law contract or agency principles, the Convention's terms are fulfilled.

It would be particularly unwarranted to interpret Article II of the Convention to restrict enforcement of an arbitration agreement to those who signed the agreement, because the definition of the term "agreement in writing" uses non-exhaustive language, stating that it "shall *include*"—but is not textually *limited to*— "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Convention art. II(2), 21 U.S.T. 2519 (emphasis added); see, *e.g.*, *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.") (citation omitted). Because the signature of the parties is not an unalterable prerequisite to a valid "agreement in writing" within the meaning of the Convention, Article II(2) cannot sensibly be read to limit the scope of those entitled to enforce an agreement to only the signatories.

In line with that understanding, a recommendation issued by the United Nations Commission on International Trade Law (UNCITRAL), which is responsible for promotion of

the Convention and its effective implementation and uniform interpretation, proposes that Article II(2) should "be applied recognizing that the circumstances described therein are not exhaustive." *Report of the United Nations Commission on International Trade Law on the work of its 39th Session, 19 June – 7 July, 2006*, Annex II, at 62, U.N. Doc. A/61/17, GAOR 61st Sess., Supp. No. 17 (2006) (*UNCITRAL Report*). The Restatement likewise provides that "Article II(2)'s list of writings" should be understood "as illustrating, not exhausting, the documentation that meets the Convention's requirements as to form," based on "the FAA provisions that implement the Convention[], the plain meaning of 'include' * * * , international trends, and sound policy." Restatement § 2.4 cmt. b. Thus, while an "agreement in writing" clearly includes signed, written agreements, it does not by its terms exclude written agreements intended to encompass nonsignatories who are, as a matter of domestic law, properly deemed parties to the agreement or are otherwise bound by or entitled to enforce it.

2. The context and structure of the Convention further demonstrate that Article II does not limit a nonsignatory's ability to compel enforcement of an arbitration agreement in accordance with domestic law. With respect to enforcement of an arbitral *award*, the Convention expressly provides that the Convention should not be read to "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." Convention art. VII(1), 21 U.S.T. 2520-2521. The Convention accordingly sets a floor that requires Contracting States to recognize awards under specified circumstances, but it does not establish a ceiling preventing broader recognition of awards in accordance with domestic-law principles. See, *e.g.*, *Commissions Imp. Exp. S.A.* v. *Republic of the Congo*, 757 F.3d 321, 328 (D.C. Cir. 2014) (the Convention "expressly preserves, under Article VII, arbitral parties' right to rely upon domestic laws that are *more favorable* to award enforcement than are the terms of the Convention"). And in proceedings governed by the Convention, courts have approved reliance on background principles of contract and agency law to determine "whether a third party not named in an arbitral award may have that award enforced against it under a theory of alter-ego liability, or any other legal principle concerning the enforcement of awards or judgments." *CBF Indústria de Gusa S/A* v. *AMCI Holdings, Inc.*, 850 F.3d 58, 75 (2d Cir. 2017).

Although Article VII of the Convention does not expressly mention arbitration agreements in addition to form provisions, and the question therefore is not whether the agreement is presumptively valid but rather who may enforce it.

3. That interpretation of the Convention also "accords with its objects and purposes." *Abbott* v. *Abbott*, 560 U.S. 1, 20 (2010). "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to *encourage* the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (emphasis added).

The Convention thus should be interpreted in accordance with the "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); see Schramm 48 (concluding that it would be "overly formalistic and even counterproductive to deny the validity of [an] arbitral clause solely on Article II grounds"). As this Court has recognized when interpreting Chapter 1 of the FAA, the federal policy favoring arbitration "cannot possibly require the disregard of state law *permitting* arbitration by or against

nonparties to the written arbitration agreement." *Arthur Andersen*, 556 U.S. at 630 n.5. The Convention likewise does not override such laws, which would put international agreements at a disadvantage compared to similar domestic agreements. See Restatement § 2.4 cmt. b (observing that "no compelling policy supports maintaining more rigorous writing standards for international arbitration agreements than for agreements falling under FAA Chapter 1"); see also Convention art. III, 21 U.S.T. 2519 (prohibiting Contracting States from "impos[ing] substantially more onerous conditions * * * on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards"). While the application of domestic-law contract and agency principles will not necessarily lead to a uniform *outcome* in all cases, it will lead to a uniform *approach* to enforcement of arbitration agreements, in accordance with the Convention's purpose.

The Eleventh Circuit's contrary rule, interpreting the Convention to categorically prohibit enforcement of an international arbitration agreement by a nonsignatory, is also in tension with the Convention's objective of giving effect to an arbitration agreement's terms. Cf. *Volt Info. Sciences, Inc.* v. *Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) (observing that the FAA's "primary purpose" is to "ensur[e] that private agreements to arbitrate are enforced according to their terms"). If domestic-law contract and agency principles establish that the signatories must be deemed to have consented to a nonsignatory's enforcement of an arbitration agreement in appropriate circumstances, and the nonsignatory then seeks to compel arbitration in accordance with that understanding, the Convention should not be interpreted to stand in the way of enforcement. See, *e.g.*, Restatement § 2.3 Reporters' Note a (observing that "the general proposition that nonsignatories can be bound by or invoke an arbitration agreement" is "practically and logically necessary to give effect to parties' agreements to arbitrate," and that courts may permissibly "rely on a range of ordinary contract, agency, and related principles" to "determine the parties' intent with respect to nonsignatories").

4. The Convention's negotiating history reinforces the conclusion that Article II was not intended to restrict the permissible scope of an arbitration agreement or dictate who may enforce it. As this Court has recognized, "[i]n their discussion of [Article II], the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." *Scherk*, 417 U.S. at 520 n.15 (citing G. W. Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference, May/June 1958*, at 24-28 (1958)).

In particular, the negotiating history reflects the drafters' intent to impose duties on Contracting States to enforce arbitration agreements that satisfied the form provisions triggering the rule of presumptive validity. See Haight 21-28. For example, "[t]he United Kingdom delegate felt strongly * * * that these provisions for the recognition of agreements were necessary" to prevent Contracting States from "kill[ing] an arbitration before it was even born by permitting litigation in their courts in spite of agreements to arbitrate." *Id.* at 25. And the drafters "appeared unwilling to qualify the broad undertaking not only to recognize but also to give effect to arbitral agreements" through the Article II(3) provision on compelling arbitration. *Id.* at 28. Nothing in this history indicates that Article II of the Convention was intended to regulate the scope of arbitration agreements or displace domestic-law doctrines concerning who is bound by or may enforce a valid agreement.

5. The "post ratification understanding" of Contracting States, *Zicherman*, 516 U.S. at 226, further confirms that the Convention does not categorically prohibit a nonsignatory from enforcing an international arbitration agreement pursuant to contract and agency doctrines such as assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, or estoppel.

In cases arising under the Convention, "disputes over the identities of the parties to international arbitration agreements, and the application of non-signatory doctrines, have been left almost entirely to national courts, arbitral tribunals and commentary." Born § 10.01[C], at 1412. In resolving those disputes, foreign courts have often invoked domestic-law contract and agency principles—including principles of estoppel—to enforce international arbitration agreements between signatories and nonsignatories. See *id.* §§ 10.01[D], at 1412-1414, 10.02[A]-[P], at 1419-1484; see also *id.* § 10.02[K], at 1473 (observing that the estoppel doctrine is particularly well-recognized "in common law jurisdictions" and that civil law jurisdictions apply "similar conceptions * * * under rubrics of good faith, abuse of right, or *venire contra factum proprium*").

For example, the Federal Supreme Court of Switzerland recently rejected the argument that Article II of the Convention prohibits a nonsignatory from enforcing an arbitration agreement. See Bundesgericht [BGer], Case No. 4A_646/2018 (Apr. 17, 2019), ¶ 2.4 (English translation) (rejecting argument that Article II prohibits applying "a valid arbitration agreement to third Parties that do not meet the formal requirement"). The Court reasoned that the form specifications in Article II(2) apply only to the initial signing of the contract and do not limit the ability of nonsignatory third parties to enforce the contract under domestic law, including Swiss law providing that an arbitration agreement may encompass a nonsignatory who performs the contract. *Ibid.* (concluding that "[t]he wording 'signed by the Parties'" in Article II(2) should "be understood as meaning that the arbitration agreement must be signed by the (original) parties to the agreement when the agreement is concluded," with no additional requirement that a nonsignatory "meet any additional formal requirement" in order to enforce or be bound by an arbitration clause pursuant to domestic-law principles); see also Nathalie Voser & Luka Groselj, *Switzerland: Extension Of Arbitration Agreement To Non-Signatory Upheld Under New York Convention (Swiss Supreme Court)*, Mondaq (June 28, 2019) (summarizing decision).

Courts in other Contracting States likewise have concluded that the Convention's form provisions in Article II do not bar application of domestic-law doctrines that govern when a nonsignatory may invoke or be bound by an arbitration agreement. See, *e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice], Case No. III ZR 371/12 (May 8, 2014) (German-language text of decision and English-language summary prepared by the German Arbitration Institute available at http://www.disarb.org/en/47/datenbanken/rspr/bgh-case-no-iii-zr-371-12-date-2014-05-08-id1603) (decision by the German Federal Court of Justice concluding that the form provisions in Article II would not prevent applying an arbitration clause to a nonsignatory under domestic-law doctrines); Phillippe Pinsole, *A French View on the Application of the Arbitration Agreement to Non-signatories, in The Evolution and Future of International Arbitration* (Stavros Brekoulakis et al. eds., 2016) ¶ 12.33, at 214 (providing English translation of Paris Court of appeal cases) (international arbitration clauses encompass "all parties directly involved in the performance of the contract and in the disputes to which they may give rise, once it has been established that their situation and their activities allow to presume that they were aware of the existence and scope of the arbitration clause, even if they did not sign the contract containing it").

Domestic legislation implementing the Convention in Contracting States also illustrates the general understanding that the Convention does not categorically prohibit nonsignatories from enforcing an arbitration agreement. Some Contracting States have expressly authorized courts to compel arbitration when requested by any "person claiming through or under" a party to an international arbitration agreement—indicating that the request may come from a nonsignatory. *E.g.*, *International Arbitration Act*, ch. 143A, s. 5 (Sing.); *International Arbitration Act 1974* (Cth.) pt II, s. 7.4 (Austl.). Peru's national legislation governing international arbitration agreements provides that such agreements "comprise[] all those whose consent to submit to arbitration is determined in good faith by their active and decisive participation in the negotiation, execution, performance or termination of the contract that contains the arbitration agreement" and "those who seek to attain any rights or benefits from the contract, pursuant to its terms." Cecilia O'Neill de la Fuente & José Luis Repetto Deville, *Main Features of Arbitration in Peru*, 23 ILSA J. Int'l & Comp. L. 425, 431 (2017) (providing English translation of Peruvian Arbitration Law Article 14). And UNCITRAL's Model Law on International Commercial Arbitration, which is intended to be consistent with the Convention and has been adopted by dozens of Contracting States, contains no language confining the right to enforce an arbitration agreement only to those who signed the agreement. See *UNCITRAL Model Law on International Commercial Arbitration*, 1985, Ch. II, Arts. 7 & 8 (amended 2006). The post-ratification common practice of Contracting States in implementing the Convention through judicial decisions and domestic legislation thus weighs against interpreting Article II to restrict enforcement of arbitration agreements to signatories.

6. Consistent with the practice of other Contracting States, the Executive Branch has previously taken the position that the Convention does not prohibit courts from determining that "non-signatories may be bound by an agreement to arbitrate under 'ordinary principles of contract and agency,' including '(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/ alter ego; and (5) estoppel.'" Gov't Amicus Br. at 11, *AMCI Holdings, Inc.*, *supra* (No. 15-1133) (citation omitted); see *id.* at 14 (stating that under Chapter 2 of the FAA, courts may "compel participation in arbitration by entities that have not signed an arbitration agreement when they are nonetheless bound to the agreement for a valid legal reason"). "In the view of the United States," that interpretation of the Convention "is consistent with judicial decisions on the interpretation and enforcement of both domestic and international arbitration agreements, as well as the text and purpose of the Convention and its implementing legislation, the FAA." *Id.* at 9. The Executive Branch has also taken the position that the Convention "sets a 'floor,' but *not* a 'ceiling,' for enforcement of arbitral awards," with no "obligation on a Contracting Party to deny recognition to an arbitral agreement or arbitral award" even if it "is not required to be enforced under the Convention." Gov't Amicus Br. at 7, 9, *Commissions Imp. Exp.*, *supra* (No. 13-7004).

It is "well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott*, 560 U.S. at 15 (quoting *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982)); *ibid.* (noting Court's deference in *Sumitomo* to "the Executive's interpretation of a treaty as memorialized in a brief before this Court"). That principle stems both from the fact that the Executive, as the Branch constitutionally responsible for negotiating and enforcing treaties, is in the best position to explain the intent of the treaty parties, *Sumitomo*, 457 U.S. at 185; see U.S. Const. Art. II, § 2, Cl. 2, and from the recognition that the "Executive is well informed concerning the diplomatic consequences resulting from this Court's interpretation[s]," *Abbott*, 560 U.S. at 15. This "well-established canon of deference" provides further confirmation that the

Convention does not categorically prohibit enforcement of arbitration agreements by a nonsignatory. *Ibid.*

B. The Application Of Domestic-Law Contract And Agency Doctrines That Allow A Nonsignatory To Compel Arbitration Turns On The Parties' Consent As Informed By Those Domestic Laws

As described, the New York Convention does not prevent Contracting States from providing for a nonsignatory to enforce an arbitration agreement in accordance with domestic-law contract and agency principles. Courts considering whether a nonsignatory may enforce or be bound by an arbitration agreement, however, must take care to ensure that the nonsignatory party's participation is not inconsistent with the parties' consent regarding arbitration, as informed by those domestic laws.

1. "[I]nternational commercial arbitration is fundamentally consensual in nature," Born § 10.01, at 1406, and the Convention specifically refers to the agreement of the parties to "undertake to submit to arbitration," Convention art. II(1), 21 U.S.T. 2519; see *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (observing that arbitration is a "matter of consent, not coercion") (citation omitted). Domestic-law doctrines that permit nonsignatories to enforce an arbitration agreement often "provide a basis for concluding that an entity is in reality a party to the arbitration agreement * * * because that party's actions constitute consent to the agreement, notwithstanding the lack of its execution of the agreement." Born § 10:01[D], at 1414. Thus, "nonsignatories may be bound by or entitled to invoke an arbitration agreement to the extent that they may be deemed to have assented to the arbitration agreement under ordinary principles of contract law, as well as other legal doctrines that operate legally to bind parties." Restatement § 2.3 cmt. a; see *ibid.* ("Despite the multiplicity of theories for finding that a nonsignatory is bound or may invoke an arbitration agreement, the primary purpose of each inquiry is to discern the intent of the parties.").

2. a. In any given case, the question whether a nonsignatory may enforce or be bound by an arbitration agreement will depend on the circumstances of the dispute and the agreement. Thus, while domestic-law principles of contract and agency "provide[] the structure for evaluating particular contractual language and factual settings," courts must in each case examine "the parties' intentions and the legal consequences of those intentions." Born § 10.01[E], at 1414. In all cases, "[a] party who attempts to compel arbitration must show that a valid agreement to arbitrate exists, that the movant is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes within the clause's scope." *InterGen N.V.* v. *Grina*, 344 F.3d 134, 142 (1st Cir. 2003). Thus, in situations in which courts have applied doctrines such as "incorporation by reference, assumption, veil piercing/alter ego and estoppel," the "court[s] ha[ve] found an agreement to arbitrate" based on "the totality of the evidence support[ing] an objective intention to agree to arbitrate," *Sarhank Grp.* v. *Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005), with a particular focus on the "context of the case," *Sourcing Unlimited, Inc.* v. *Asimco Int'l, Inc.*, 526 F.3d 38, 46 (1st Cir. 2008) (deeming it "significant" that "[t]he party who is a signatory to the written agreement requiring arbitration is the party seeking to avoid arbitration").

b. In conducting that analysis, any effort to bind a nonsignatory sovereign nation to an arbitration agreement would raise special concerns. In international disputes, the analysis of consent by a sovereign encompasses additional considerations, reflected in principles of sovereign immunity, that support the conclusion that a sovereign cannot be bound to resolve a dispute through litigation or arbitration in the absence of express consent. See, e.g., *Application*

of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v. Yugoslavia (Serbia & Montenegro)*), 1993 I.C.J. 325, 342 (Sept. 13) (Order) (requiring an "unequivocal indication of a voluntary and indisputable acceptance" of consent to International Court of Justice jurisdiction) (internal quotation marks omitted); see also *Fireman's Fund Ins. Co.* v. *United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/02 /01, Decision on the Preliminary Question ¶ 64 (July 17, 2003) ("[T]he Tribunal does not believe that under contemporary international law a foreign investor is entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement [with a State].").

Notably, in suits involving the U.S. Government, this Court has previously recognized "that equitable estoppel will not lie against the Government as it lies against private litigants." *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 419 (1990); see *Heckler* v. *Community Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984) ("[I]t is well settled that the Government may not be estopped on the same terms as any other litigant."). Similarly, with respect to third-party beneficiary principles, this Court has recognized that "the modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387 (2015); see also, *e.g.*, *Kremen* v. *Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003) ("When a contract is with a government entity, a more stringent test [than otherwise] applies: Parties that benefit are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary. The contract must establish not only an intent to confer a benefit, but also an intention to grant the third party enforceable rights.") (citations, ellipses, and internal quotation marks omitted). In the context of international disputes as well, doctrines such as equitable estoppel and asserted third-party beneficiary status should not provide a basis to compel arbitration against a sovereign absent a clear expression of consent.

3. In the lower court proceedings in this case, the parties disputed whether nonsignatory GE Energy could enforce the arbitration agreement with Outokumpu under principles of equitable estoppel. The United States takes no position on the question whether equitable estoppel provides an available basis to seek enforcement of that arbitration agreement under a choice-of-law analysis, or whether, assuming estoppel principles could apply, they would support GE Energy's effort to enforce the arbitration agreement based on the particular facts of this case.

The court of appeals did not consider those questions because it erroneously concluded "that, to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities." This Court should reverse that categorical rule and clarify that the Convention does not bar the application of domestic-law doctrines that allow an arbitration agreement to be enforced by or against a nonsignatory where the applicable law provides for enforcement of an otherwise valid agreement.

* * * *

Cross References

Children's Issues, **Ch. 2.B.**
Hague Abduction Convention Cases, **Ch. 2.B.2.c.**
U.S. securities law & purchases of interests in foreign companies, **Ch. 11.F.6.**

CHAPTER 16

Sanctions, Export Controls, and Certain Other Restrictions

This chapter discusses selected developments during 2019 relating to sanctions, export controls, and certain other restrictions relating to travel or U.S. government assistance. It does not cover developments in many of the United States' longstanding financial sanctions regimes, which are discussed in detail at https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx. It also does not cover comprehensively developments relating to the export control programs administered by the Commerce Department or the defense trade control programs administered by the State Department. Details on the State Department's defense trade control programs are available at https://pmddtc.state.gov/ddtc_public.

A. IMPOSITION, IMPLEMENTATION, AND MODIFICATION OF SANCTIONS

1. Iran

a. General

The State Department issued a fact sheet on April 4, 2019 regarding the U.S. campaign to apply maximum pressure on the Iranian regime to change its behavior. The fact sheet is available at https://www.state.gov/maximum-pressure-campaign-on-the-regime-in-iran/ and excerpted below.

* * * *

The U.S. sanctions have cut off Iran's access to billions of dollars in oil revenue and are driving its exports lower than ever before. Since last May, **1.5 million barrels/day** of Iranian crude have been taken off the market and purchases of Iranian crude will soon be at zero.

Starting with the re-imposition of our sanctions on November 5, 2018, Iran's access to revenue from the sale of crude oil was immediately restricted. Overall, our sanctions have denied the regime direct access to as much as **$10 billion** in oil revenue since May 2018.

More than **20 countries** that were once regular oil customers of Iran have zeroed out their imports. **Three jurisdictions that were granted waivers in November are already at zero.**

The Trump Administration has designated over **970 Iranian entities and individuals** in more than **26 rounds of sanctions**—more than any other Administration in U.S. history.

Just last week a vast network of front companies based in Iran, the U.A.E., and Turkey was sanctioned for procuring and transferring more than a billion dollars and euros to the Islamic Revolutionary Guard Corps.

We have designated Evin Prison, where the Ministry of Intelligence and Security (MOIS) and the Islamic Revolutionary Guard Corps maintain permanent wards to hold political prisoners, and subject prisoners to brutal tactics.

In response to ongoing censorship activities by the regime, we have designated the IRGC's Electronic Warfare and Cyber Defense Organization, Iran's Supreme Council for Cyberspace and the National Cyberspace Center.

We have also sanctioned more than **70 Iran-linked financial institutions** and their foreign and domestic subsidiaries. **SWIFT has disconnected every sanctioned Iranian bank** from its system and even disconnected the Central Bank of Iran.

More than **100 corporations** have exited the Iranian market, taking with them billions of dollars in investment.

The Iranian economy is in a tailspin because of the regime's poor policies, its continued commitment to terrorism, and our targeted pressure. **The rial has lost two-thirds of its value**, reports indicate Iran is in a recession, and **inflation has hit a record 40 percent**. Iran's total trade has declined by nearly 25 percent since March 2018.

INCREASING DIPLOMATIC ENGAGEMENT

Europe has pushed back against Iranian terror activity. After a foiled bomb plot in Paris and a thwarted assassination plan in Denmark last year, the European Union in January sanctioned Iran's Ministry of Intelligence and Security and two of its agents for their roles.

Countries, including the **United Kingdom, Germany, France, Denmark, the Netherlands, Albania, and Serbia**, have acted on their own to address the threat of Iranian terrorism, whether by recalling Ambassadors, expelling Iranian diplomats, denying landing rights to Mahan Air, or eliminating visa-free travel.

Germany recently announced its decision to deny Mahan Air landing rights.

Panama issued a Presidential Decree to pull registration and de-flag Iranian vessels following the United States' exposure of an oil-for-terror network.

Albania expelled Iran's Ambassador to Tirana and another Iranian diplomat for involvement in thwarted terrorist plots.

The United States, along with the U.K., France, and Germany, continue to hold Iran accountable for defying its international obligations. Our countries expressed strong concern to the UN Secretary General following **Iran's launch of a medium range ballistic missile** in December and its attempted **satellite launches** in January and February. These launches and others defy UN Security Council Resolution 2231.

The EU Foreign Affairs Council's conclusions in February underscored its concern regarding Iran's ballistic missile program, support of terrorism in Europe, human rights conditions in Iran, and the regime's ongoing role in regional conflicts.

RESTORING DETERRENCE

We have exposed the lethal aid that Iran is sending to militants in Yemen, Bahrain, and Afghanistan; including ballistic missiles, attack UAVs, and explosive boats. Representatives of over **70 countries toured the Iran Materiel Display**, seeing clear and tangible evidence that Iran is sending weapons to its militant partners, which were used to attack international shipping and civilian infrastructure in the Gulf.

We are continuing to disrupt the Qods Force's illicit shipments of oil, which benefit terrorist groups like Hizballah as well as the Assad regime. More than **75 tankers** involved in illicit shipping schemes have been denied the flags they need to sail.

The United States continues to build the partner capacities of several regional nations to defend themselves against the threats posed by Iran.

* * * *

The State Department issued a statement on May 8, 2019, the first anniversary of the Trump Administration's new Iran strategy. The statement is available at https://www.state.gov/first-anniversary-of-president-trumps-new-iran-strategy/ and excerpted below.

* * * *

One year ago today, President Trump announced the United States would cease to participate in the Joint Comprehensive Plan of Action …

One year later, President Trump has made good on his promise to counter Iran in a comprehensive campaign of maximum pressure. We have imposed the toughest sanctions ever on the Iranian regime, designating nearly 1,000 individuals and entities in the past year. The Trump Administration has taken Iran's oil exports to historic lows, and stopped issuing Significant Reduction Exceptions to importers of Iranian oil, effectively zeroing out purchases of Iranian crude. In May, Secretary Pompeo tightened restrictions that impede Iran's ability to reconstitute its past nuclear weapons program and prevent Iran from shortening the time it would take to produce fissile material for a nuclear weapon. Today, President Trump announced a new sanctions authority targeting trade in Iranian metals. This targets Iran's largest non-oil related export and further degrades the regime's ability to fund terror and instability in the Middle East. The Iranian regime's announcement today that it intends to expand its nuclear program is in defiance of international norms and a blatant attempt to hold the world hostage. Its threat to renew nuclear work that could shorten the time to develop a nuclear weapon underscores the continuing challenge the Iranian regime poses to peace and security worldwide.

The United States is committed to denying the Iranian regime all paths to a nuclear weapon. We will continue to impose maximum pressure on the regime until it abandons its destabilizing ambitions. We call on the international community to hold the Iranian regime accountable for its threat to expand its nuclear program.

America is not countering Iran alone. Since our withdrawal from the deal, our allies and partners have stepped up to counter Iranian aggression with us. We have acted with countries from nearly every continent to disrupt Iran's illicit oil shipping operations. The European Union passed new sanctions against Iranian entities in response to two foiled terror plots last year. Other nations have responded to Iran's malign activity by recalling ambassadors, expelling Iranian diplomats, eliminating visa-free travel, or denying landing rights to Mahan Air.

Moving forward, we will continue to build on the already significant successes of our pressure campaign. As outlined in the 12 demands in my May 21, 2018 speech,[*] we will continue to apply maximum pressure on the Iranian regime until its leaders change their destructive behavior, respect the rights of the Iranian people, and return to the negotiating table.

[*] Editor's note: See *Digest 2018* at 749-50 for discussion of the May 21, 2018 speech by Secretary Pompeo.

* * * *

b. Implementation of UN Security Council resolutions

As discussed in *Digest 2015* at 636, the UN Security Council unanimously adopted resolution 2231 on July 20, 2015. Resolution 2231 endorsed the JCPOA; terminated the provisions of prior UN Security Council resolutions addressing the Iranian nuclear issue—namely, resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010), and 2224 (2015)—and imposed new obligations on UN Member States with respect to the transfer to or from Iran of certain nuclear, missile and arms-related items and assistance, as well as the continued implementation of other targeted measures (asset freeze and travel ban) on designated persons or entities. The United States' cessation of participation in the JCPOA did not have any effect on Resolution 2231, which remains in effect, although some of the new obligations imposed therein will, by their explicit terms, begin to sunset in 2020 unless further action is taken.

c. U.S. sanctions and other controls

Further information on Iran sanctions is available at https://www.state.gov/iran-sanctions/ and https://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx.

(1) New Executive Orders

(a) E.O. 13871

On May 8, 2019, the President issued E.O 13871, "Imposing Sanctions With Respect to the Iron, Steel, Aluminum, and Copper Sectors of Iran." 84 Fed. Reg. 20,761 (May 10, 2019). The President acted in order to "deny the Iranian government revenue …that may be used to provide funding and support for the proliferation of weapons of mass destruction, terrorist groups and networks, campaigns of regional aggression, and military expansion." The persons whose property is blocked under the E.O. are described in Section 1 of the order and the blocked financial institutions are described in Section 2. Excerpts follow from Sections 1 and 2 of E.O. 13871.

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* * * *

any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(i) to be operating in the iron, steel, aluminum, or copper sector of Iran, or to be a person that owns, controls, or operates an entity that is part of the iron, steel, aluminum, or copper sector of Iran;

(ii) to have knowingly engaged, on or after the date of this order, in a significant transaction for the sale, supply, or transfer to Iran of significant goods or services used in connection with the iron, steel, aluminum, or copper sectors of Iran;

(iii) to have knowingly engaged, on or after the date of this order, in a significant transaction for the purchase, acquisition, sale, transport, or marketing of iron, iron products, aluminum, aluminum products, steel, steel products, copper, or copper products from Iran;

(iv) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of any person whose property and interests in property are blocked pursuant to this section; or

(v) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this section.

…

Sec. 2. (a) The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to impose on a foreign financial institution the sanctions described in subsection (b) of this section upon determining that the foreign financial institution has, on or after the date of this order, knowingly conducted or facilitated any significant financial transaction:

(i) for the sale, supply, or transfer to Iran of significant goods or services used in connection with the iron, steel, aluminum, or copper sectors of Iran;

(ii) for the purchase, acquisition, sale, transport, or marketing of iron, iron products, aluminum, aluminum products, steel, steel products, copper, or copper products from Iran; or

(iii) for or on behalf of any person whose property and interests in property are blocked pursuant to this order.

* * * *

(b) E.O. 13876

On June 24, 2019, the President issued E.O. 13876, sanctioning the Supreme Leader's Office and authorizing further sanctions on those associated with it. 84 Fed. Reg. 30,573 (June 26, 2019). A State Department press release available at https://www.state.gov/executive-order-to-impose-sanctions-on-the-office-of-the-supreme-leader-of-iran/, provides the following information on the target of the new order:

> The Supreme Leader's Office has enriched itself at the expense of the Iranian people. It sits atop a vast network of tyranny and corruption that deprives the Iranian people of the freedom and opportunity they deserve. Today's action denies Iran's leadership the financial resources to spread terror and oppress the Iranian people.
>
> Sections 1, 2, and 5 of the E.O. are excerpted below.

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* * * *

Section 1. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) the Supreme Leader of the Islamic Republic of Iran and the Iranian Supreme Leader's Office (SLO); or

(ii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(A) to be a person appointed by the Supreme Leader of Iran or the SLO to a position as a state official of Iran, or as the head of any entity located in Iran or any entity located outside of Iran that is owned or controlled by one or more entities in Iran;

(B) to be a person appointed to a position as a state official of Iran, or as the head of any entity located in Iran or any entity located outside of Iran that is owned or controlled by one or more entities in Iran, by any person appointed by the Supreme Leader of Iran or the SLO;

(C) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of any person whose property and interests in property are blocked pursuant to this section;

(D) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly any person whose property and interests in property are blocked pursuant to this section; or

(E) to be a member of the board of directors or a senior executive officer of any person whose property and interests in property are blocked pursuant to this section.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted before the date of this order.

Sec. 2. (a) The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to impose on a foreign financial institution the sanctions described in subsection (b) of this section upon determining that the foreign financial institution has knowingly conducted or facilitated any significant financial transaction for or on behalf of any person whose property and interests in property are blocked pursuant to section 1 of this order.

(b) With respect to any foreign financial institution determined by the Secretary of the Treasury in accordance with this section to meet the criteria set forth in subsection (a) of this section, the Secretary of the Treasury may prohibit the opening, and prohibit or impose strict conditions on the maintaining, in the United States of a correspondent account or a payable-through account by such foreign financial institution.

(c) The prohibitions in subsection (b) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted before the date of this order.

* * * *

Sec. 5. The unrestricted immigrant and nonimmigrant entry into the United States of aliens determined to meet one or more of the criteria in subsection 1(a) of this order would be detrimental to the interests of the United States, and the entry of such persons into the United

States, as immigrants or nonimmigrants, is hereby suspended. Such persons shall be treated as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions).

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On July 31, 2019, OFAC designated Foreign Minister Mohammad Javad Zarif pursuant to E.O. 13876 because Zarif acted or purported to act for or on behalf of, directly or indirectly, the Supreme Leader of the Islamic Republic of Iran. July 31, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm749.

On November 4, 2019, OFAC designated nine individuals and one entity pursuant to E.O. 13876: Mohammad BAGHERI, Hossein DEHGHAN, Mohammad Mohammadi GOLPAYEGANI, Gholamali HADDAD-ADEL, Vahid HAGHANIAN, Mojtaba KHAMENEI, Ebrahim RAISI, Gholam Ali RASHID, and Ali Akbar VELAYATI and the Armed Forces General Staff. November 4, 2019 Treasury Department press release, available at https://home.treasury.gov/index.php/news/press-releases/sm824. The press release says that:

> the action targets Ali Khamenei's appointees in the Office of the Supreme Leader, the Expediency Council, the Armed Forces General Staff, and the Judiciary. Treasury's action coincides with the 40th anniversary of Iranian militants seizing the U.S. embassy in Tehran, holding more than 50 Americans hostage for 444 days.

(c) Proclamation banning travel to the United States by Iranian Regime Elite

On September 26, 2019, the President announced a proclamation restricting entry into the United States for senior Iranian government officials and members of their families. See State Department press statement, available at https://www.state.gov/iranian-regime-elite-and-families-can-no-longer-travel-to-the-united-states/. Excerpts follow from the press statement.

> This Presidential Proclamation is per the authority vested in the President by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182 (f) and 1185 (a)) and section 301 of title 3, United States Code.
>
> The Government of Iran is the world's leading state sponsor of terrorism. The regime has destabilized the Persian Gulf region with attacks on oil and shipping infrastructure. [Its] support for the Houthis in Yemen and Shia militias in Iraq and Syria contribute[s] to the regional instability and the humanitarian crises in those countries. The Iranian regime continues to suppress members of ethnic and religious minorities in Iran, as well as unjustly detaining foreign citizens to perpetuate their foreign policy aims.

(2) Section 1245 of NDAA and E.O. 13846 (oil purchases from Iran)

On April 29, 2019 and again on October 25, 2019, the President determined "that there is a sufficient supply of petroleum and petroleum products from countries other than Iran to permit a significant reduction in the volume of petroleum and petroleum products purchased from Iran by or through foreign financial institutions." 84 Fed. Reg. 22,327 (May 17, 2019) and 84 Fed. Reg. 59,917 (Nov. 7, 2019). The President made the determination under Section 1245(d)(4)(B) and (C) of the National Defense Authorization Act for Fiscal Year 2012, Public Law 112–81, and based on reports submitted to the Congress by the Energy Information Administration, and other relevant factors. *Id.*

On April 22, 2019, the State Department announced that the United States would not issue any additional "Significant Reduction Exceptions" to existing importers of Iranian oil. See press statement, available at https://www.state.gov/decision-on-imports-of-iranian-oil/. See also April 22, 2019 fact sheet, available at https://www.state.gov/advancing-the-u-s-maximum-pressure-campaign-on-iran/. As the fact sheet explains, "Targeting Iran's oil exports is critical because they have historically been the regime's single largest source of revenue, which it uses to support terrorist proxies, fuel its missile development, and engage in other destabilizing behavior."

On July 22, 2019, the State Department announced in a press statement, available at https://www.state.gov/the-united-states-to-impose-sanctions-on-chinese-firm-zhuhai-zhenrong-company-limited-for-purchasing-oil-from-iran/, that the United States was imposing sanctions (pursuant to E.O. 13846) on Chinese firm Zhuhai Zhenrong Company Limited for purchasing oil from Iran. 84 Fed. Reg. 41,802 (Aug. 15, 2019) (corrected effective date in 84 Fed. Reg. 48,205 (Sep. 12, 2019)). The press statement explains further:

> Zhuhai Zhenrong Company Limited knowingly engaged in a significant transaction for the purchase or acquisition of crude oil from Iran. The transaction in question took place after the expiration of China's Significant Reduction Exception (SRE) on May 2, 2019, and was not covered by that SRE. Among other things, the imposition of these sanctions blocks all property and interests in property of Zhuhai Zhenrong Company Limited that are in the United States or within the possession or control of a U.S. person, and provides that such property and interests in property may not be transferred, paid, exported, withdrawn, or otherwise dealt in. Additionally, the United States is imposing several restrictions as well as a ban on entry into the United States on Youmin Li, a corporate officer and principal executive officer of Zhuhai Zhenrong Company Limited. To implement my action today, the Department of the Treasury is adding Zhuhai Zhenrong Company Limited and Youmin Li to its List of Specially Designated Nationals and Blocked Persons.

On September 25, 2019, the State Department announced further sanctions on Chinese firms for engaging in transactions for the transport of oil from Iran. See press statement, available at https://www.state.gov/the-united-states-imposes-sanctions-on-

chinese-companies-for-transporting-iranian-oil/. The press statement includes the following:

> The following Chinese firms are sanctioned under E.O. 13846 for knowingly engaging in a significant transaction for the transport of oil from Iran: China Concord Petroleum Co., Limited, Kunlun Shipping Company Limited, Pegasus 88 Limited, and COSCO Shipping Tanker (Dalian) Seaman & Ship Management Co, Ltd. The United States is imposing additional sanctions on the following two Chinese companies, which own or control one or more of the four companies identified above, and had knowledge of their sanctionable conduct: Kunlun Holding Company Ltd. and COSCO Shipping Tanker (Dalian) Co., Ltd. The United States is also imposing sanctions on the following five individuals, who are executive officers of one or more of the six companies identified above: Bin Xu, Yi Li, Yu Hua Mao, Luqian Shen, and Yazhou Xu. The transaction in question took place after the expiration of China's Significant Reduction Exception (SRE) on May 2, 2019, and was not covered by that SRE. This action targets the specific entities named today, and does not target their parent companies or any other entities in their corporate groups.

(3) Nonproliferation sanctions

(a) E.O. 13382

E.O. 13382, entitled "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters," subjects those designated to sanctions for their ties to, or support for persons previously designated for involvement in, Iran's weapons of mass destruction ("WMD") programs.

On March 22, 2019, the United States announced designations of 31 Iranian individuals and entities under E.O. 13382. See March 22, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm634 and OFAC SDN List Update, available at https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20190322.aspx (persons designated for providing support to previously-designated Iranian defense entities: fourteen individuals—Mansur ASGARI, Mohammad Mahdi Da'emi ATTARAN, Ruhollah Ghaderi BARMI, Sa'id BORJI, Reza EBRAHIMI, Gholam Reza ETA'ATI, Jalal HAJJLU, Mohammad Hossein HAGHIGHIAN, Sayyed Asghar HASHEMITABAR, Mehdi MASOUMIAN, Mohammad Reza MEHDIPUR, Akbar MOTALLEBIZADEH, Mohammad Javad SAFARI, and Mohsen SHAFA'I—and seventeen entities ABU REIHAN GROUP, BU ALI GROUP, HEIDAR KARAR GROUP, KIMIYA PAKHSH SHARGH, PARADISE MEDICAL PIONEERS COMPANY, PUYA ELECTRO SAMAN NIRU, SADRA RESEARCH CENTER, SHAHID AVINI GROUP, SHAHID BABA'I GROUP, SHAHID CHAMRAN GROUP, SHAHID FAKHAR MOGHADDAM GROUP, SHAHID KARIMI GROUP, SHAHID KAZEMI GROUP, SHAHID MOVAHHED DANESH GROUP, SHAHID SHOKRI SCIENCE AND TECHNOLOGY RESEARCH CENTER, SHAHID ZEINODDIN GROUP, and SHEIKH BAHA'I SCIENCE AND TECHNOLOGY RESEARCH

CENTER). The State Department provided a fact sheet, available at https://www.state.gov/the-imposition-of-new-u-s-sanctions-in-connection-with-a-key-iranian-nuclear-organization-as-iran-refuses-to-answer-questions-related-to-its-secret-nuclear-archive/, and a press statement, available at https://www.state.gov/united-states-imposes-new-nuclear-sanctions-on-iran-as-it-refuses-to-answer-questions-related-to-its-secret-nuclear-archive/, as well as a briefing by senior administration officials, available at https://www.state.gov/senior-administration-officials-on-iran/, regarding the March 22, 2019 nuclear sanctions. The briefing includes the following additional information about those designated.

> …You have Mohammad Reza Mehdipur, head of Shahid Karimi Group – has been involved in explosion and shock research. Shahid Chamran Group work has included studies on electronic acceleration and research related to pulse power and wave generation. Shahid Fakhar Moghaddam Group has attempted to procure X-ray equipment from foreign suppliers. Mansur Asgari oversaw projects on exploding bridge-wire or EBW detonators. Pulse Niru manufactures pulse power devices and produces particle accelerators. And Reza Ebrahimi was involved in numerous explosive experiments relevant to the development of a nuclear weapon.
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> …
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> …[O]ne of the targets being designated today, Pulse Niru, procures advanced technologies from China, Russia, and other foreign suppliers. We are pursuing those actors just as aggressively as the Iranian defense organizations they support.

On April 10, the State Department published the designation of Reza Ebrahimi pursuant to E.O. 13382 in the Federal Register. 84 Fed. Reg. 14,441 (Apr. 10, 2019).

On June 7, 2019, OFAC designated Persian Gulf Petrochemical Industries Company ("PGPIC"), as well as its network of 39 subsidiary petrochemical companies and foreign sales agents, for providing financial support to Khatam al-Anbiya Construction Headquarters, the engineering conglomerate of the IRGC. June 7, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm703. According to the press release, "PGPIC and its group of subsidiary petrochemical companies hold 40 percent of Iran's total petrochemical production capacity and are responsible for 50 percent of Iran's total petrochemical exports." On June 12, 2019, OFAC published in the Federal Register the names of the 40 PGPIC entities designated pursuant to E.O. 13382. 84 Fed. Reg. 27,399 (June 12, 2019). The designated entities are: PERSIAN GULF PETROCHEMICAL INDUSTRY CO; ARVAND PETROCHEMICAL COMPANY, BANDAR IMAM ABNIROO PETROCHEMICAL COMPANY, BANDAR IMAM BESPARAN PETROCHEMICAL COMPANY, BANDAR IMAM FARAVARESH PETROCHEMICAL COMPANY, BANDAR IMAM KHARAZMI PETROCHEMICAL COMPANY, BANDAR IMAM KIMIYA PETROCHEMICAL COMPANY, BANDAR IMAM PETROCHEMICAL COMPANY, BU ALI SINA PETROCHEMICAL COMPANY, FAJR PETROCHEMICAL COMPANY, HENGAM PETROCHEMICAL COMPANY, HORMOZ UREA FERTILIZER COMPANY, IRANIAN INVESTMENT PETROCHEMICAL GROUP COMPANY, GACHSARAN POLYMER INDUSTRIES,

DAH DASHT PETROCHEMICAL INDUSTRIES, BROOJEN PETROCHEMICAL COMPANY, ILAM PETROCHEMICAL COMPANY, ATLAS OCEAN AND PETROCHEMICAL (AOPC), IRANIAN PETROCHEMICAL INVESTMENT DEVELOPMENT MANAGEMENT COMPANY, KAROUN PETROCHEMICAL COMPANY, KHOUZESTAN PETROCHEMICAL COMPANY, LORDEGAN UREA FERTILIZER COMPANY, MOBIN PETROCHEMICAL COMPANY, MODABBERAN EQTESAD COMPANY, NPC INTERNATIONAL, NPC ALLIANCE CORPORATION, NOURI PETROCHEMICAL COMPANY, PARS PETROCHEMICAL COMPANY, PAZARGAD NON INDUSTRIAL OPERATION COMPANY, PERSIAN GULF APADANA PETROCHEMICAL COMPANY, PERSIAN GULF BID BOLAND GAS REFINERY COMPANY, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO, PERSIAN GULF FAJR YADAVARAN GAS REFINERY COMPANY, PETROCHEMICAL INDUSTRIES DEVELOPMENT MANAGEMENT COMPANY, RAHAVARAN FONOON PETROCHEMICAL COMPANY, SHAHID TONDGOYAN PETROCHEMICAL COMPANY, URMIA PETROCHEMICAL COMPANY, HEMMAT PETROCHEMICAL COMPANY, NAGHMEH FZE, PETROCHEMICAL NON-INDUSTRIAL OPERATIONS & SERVICES CO.

On July 18, 2019, OFAC designated the following seven entities—(1) BAKHTAR RAAD SEPAHAN COMPANY; (2) TAWU MECHANICAL ENGINEERING AND TRADING COMPANY; (3) SANMING SINO-EURO IMPORT AND EXPORT CO., LTD.; (4) HENAN JIAYUAN ALUMINUM INDUSTRY CO., LTD.; (5) TAMIN KALAYE SABZ ARAS COMPANY; (6) SUZHOU ZHONGSHENG MAGNETIC INDUSTRY CO., LTD.; (7) SUZHOU A-ONE SPECIAL ALLOY CO., LTD—and five individuals—(1) Afsaneh Karimi-Adegani; (2) Sohayl Talebi; (3) Salim Borji; (4) Mehdi Najafi; (5) Mohammed Fakhrizadeh— pursuant to E.O. 13382. 84 Fed. Reg. 37,005 (July 30, 2019); Treasury Department press release at https://home.treasury.gov/news/press-releases/sm736. A July 18, 2019 State Department media note, available at https://www.state.gov/designation-of-persons-linked-to-iranian-weapons-of-mass-destruction-procurement-network/, provides additional background on the designations:

> Today, the United States designated 12 entities and individuals based in Iran, Belgium, and China that are linked to the nuclear proliferation-sensitive activities of the Iran Centrifuge Technology Company—known by its Persian acronym, TESA.

In an August 28, 2019 press statement, available at https://www.state.gov/designation-of-individuals-and-entities-linked-to-iranian-procurement-networks-under-e-o-13382-blocking-property-of-weapons-of-mass-destruction-and-their-supporters/, the State Department announced the designation under E.O. 13382 of individuals and entities linked to Iranian procurement networks. OFAC made the designations pursuant to E.O. 13382 of individuals and entities in two networks engaged in procurement for Iranian military organizations: one, led by Hamed Dehghan, procuring for the IRGC and Iranian regime's missile program; the second, led by Seyed Hossein Shariat, procuring for Iran's Ministry of Defense and Armed Forces Logistics ("MODAFL"). See August 29, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm759. The designated individuals are Shaghayegh AKHAEI, Hadi DEHGHAN, Hamed DEHGHAN, Mahdi

EBRAHIMZADEH, Seyed Hossein SHARIAT; the designated entities are: ASRE SANAT ESHRAGH COMPANY, EBTEKAR SANAT ILYA LLC, GREEN INDUSTRIES HONG KONG LIMITED, PISHTAZAN KAVOSH GOSTAR BOSHRA, LLC, and SHAFAGH SENOBAR YAZD COMPANY LIMITED. OFAC Resource Center at https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20190828.aspx.

On September 3, 2019, the Department of State announced the designation of the Iran Space Agency and two of its research institutes under E.O. 13382. 84 Fed. Reg 66,052 (Dec. 2, 2019); see also September 3, 2019 State Department press statement, available at https://www.state.gov/united-states-imposes-new-sanctions-designations-on-irans-space-program-as-tehran-continues-to-use-civilian-space-agencies-to-advance-its-ballistic-missile-programs/. The press statement explains:

> The United States will not allow Iran to use its space launch program as cover to advance its ballistic missile programs. Iran's August 29 attempt to launch a space launch vehicle underscores the urgency of the threat. …

The Department of State also published a fact sheet on September 3, 2019 regarding the designations of the Iran Space Agency and two of its research institutes. The fact sheet, available at https://www.state.gov/new-sanctions-designations-on-irans-space-program/, is excerpted below.

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Space launch vehicle (SLV) technologies, such as those developed by Iran's space program, are virtually identical and interchangeable with those used in ballistic missiles. Iran's civilian space launch vehicle program allows it to gain experience with various technologies necessary for development of an ICBM …

Iran continues to use its space organizations to engage in activities in defiance of UNSCR 2231. Further, the UN Secretariat continues to document Iran's attempts to procure prohibited items for its missile program in violation of UNSCR 2231.

Our actions today show … the importance of achieving a deal that prevents Iran from developing ballistic missile capabilities that could contribute to a nuclear weapon delivery system. This is why Secretary Pompeo has called for a new comprehensive deal that addresses all elements of Iran's malign behavior.

Further, Iran's accelerating pace of missile activity demonstrates the pressing need to return to the ballistic missile prohibitions contained in UNSCR 1929, which includes the legally-binding provision that Iran shall not undertake any activity related to ballistic missiles capable of delivering nuclear weapons. We have been clear with our fellow Security Council members about the importance of holding Iran accountable for its defiance of resolutions related to the development and proliferation of ballistic missiles—which includes returning to the standard in UNSCR 1929.

* * * *

Designated Entities:

- The Iran Space Agency (ISA) was founded in April 2003 to coordinate and publicize Iran's space efforts. It pursues development of communication and remote sensing satellites and launch vehicle technology. ISA is responsible for carrying out the plans and programs approved by the Supreme Space Council.
- The Iran Space Research Center (ISRC) is in charge of carrying out the day-to-day work approved by the Supreme Space Council. It serves as ISA's primary partner for research and development activities and its research centers account for the majority of ISA's labor, property holdings, and technical workforce. ISRC, along with ISA, has worked with the UN-designated liquid propellant ballistic missile organization Shahid Hemmat Industrial Group (SHIG) on several projects.
- The Astronautics Research Institute (ARI) was established under Iran's Ministry of Research, Science, and Technology, but is now subordinate to ISA. It managed the Kavoshgar project, which is launched on the Safir SLV, the first stage of which is based on a Shahab-3 medium range ballistic missile.

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In a December 11, 2019 press statement, the State Department announced the designation of three Iranian entities under E.O. 13382: the Islamic Republic of Iran Shipping Lines ("IRISL"), its China-based subsidiary, E-Sail Shipping Company Ltd, and the Iranian airline Mahan Air. To allow exporters of humanitarian goods to Iran sufficient time to find alternate shipping methods, the sanctions against IRISL and E-Sail Shipping Company Ltd would come into effect after a 180-day wind down period. See press statement, available at https://www.state.gov/united-states-designates-key-iranian-shipping-and-aviation-entities/.

(b) Iran Freedom and Counter-Proliferation Act ("IFCA")

On October 31, 2019, the State Department issued a fact sheet regarding findings by the Secretary of State pursuant to the Iran Freedom and Counter-Proliferation Act of 2012 ("IFCA"). Secretary Pompeo also issued a press statement on the IFCA findings, which is available at https://www.state.gov/secretary-pompeo-imposes-new-sanctions-on-iran-and-extends-nuclear-restrictions/. The fact sheet is available at https://www.state.gov/findings-pursuant-to-the-iran-freedom-and-counter-proliferation-act-ifca-of-2012/, and excerpted below.

> Pursuant to Section 1245 of the Iran Freedom and Counter-Proliferation Act of 2012 (IFCA), the Secretary of State has made two findings: one identifying the construction sector of Iran as being controlled directly or indirectly by the Islamic Revolutionary Guard Corps (IRGC); and one identifying four strategic materials as ones that are being used in connection with the nuclear, military, or ballistic missile programs of Iran.

> First, the Secretary of State, in consultation with the Secretary of the Treasury, has determined that the construction sector of Iran is controlled directly or indirectly by the IRGC. As a result of this determination, the sale, supply, or transfer to or from Iran of raw and semi-finished metals, graphite, coal, and software for integrating industrial purposes will be sanctionable if those materials are to be used in connection with the Iranian construction sector.
>
> Second, the Secretary of State, in consultation with the Secretary of the Treasury, has determined that the following certain types of those materials are used in connection with the nuclear, military, or ballistic missile programs of Iran: stainless steel 304L tubes; MN40 manganese brazing foil; MN70 manganese brazing foil; and stainless steel CrNi60WTi ESR + VAR (chromium, nickel, 60 percent tungsten, titanium, electro-slag remelting, vacuum arc remelting). As a result of this determination, the sale, supply, or transfer to or from Iran of those materials will be sanctionable (regardless of end-use or end-user).

On November 18, 2019, Secretary Pompeo announced that the United States would terminate the sanctions waiver related to the nuclear facility at Fordow, effective December 15, 2019. November 18, 2019 remarks to the press, available at https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press/; see also November 22, 2019 State Department fact sheet, available at https://www.state.gov/this-week-in-iran-policy-november-18-22/. The decision to terminate the IFCA sanctions waiver followed Iran's announcement that it would begin uranium enrichment activities at the Fordow facility. *Id*.

On December 2, 2019, the State Department published two reports in the Federal Register pursuant to Section 1245(e) of IFCA, covering the periods from January 1, 2014 to December 31, 2016, and from January 1, 2017 to December 31, 2018. 84 Fed. Reg. 66,265 (Dec. 3, 2019). The reports cover the determinations of the Secretary of State, in consultation of the Secretary of the Treasury, concerning: (1) whether Iran is (A) using any of the materials described in subsection (d) of Section 1245 of IFCA as a medium for barter, swap, or any other exchange or transaction, or (B) listing any of such materials as assets of the Government of Iran for purposes of the national balance sheet of Iran; (2) which sectors of the economy of Iran are controlled directly or indirectly by Iran's Islamic Revolutionary Guard Corps ("IRGC"); and (3) which of the materials described in subsection (d) are used in connection with the nuclear, military, or ballistic missile programs of Iran.

On December 16, 2019, the State Department issued an advisory on the export of metal products to Iran that could be used to advance Iran's proliferation programs and other malign activities. The advisory, in the form of a fact sheet available at https://www.state.gov/state-department-advisory-on-the-export-of-metals-products-to-iran/, is excerpted below.

> The U.S. Department of State is issuing this advisory to alert persons globally to the U.S. sanctions risks for parties involved in transfers or exports to Iran of graphite electrodes and needle coke, which are essential materials for Iran's steel industry. The U.S. Government is taking strong action to deny the Government of

Iran revenue derived from Iran's steel sector, since such funds may be used to advance the Iranian regime's malign behavior, including its proliferation programs, campaigns of regional aggression, and support for terrorist groups.

…

II. Authorities and Sanctions

Executive Order 13871 (Imposing Sanctions with Respect to the Iron, Steel, Aluminum, and Copper Sectors of Iran): E.O. 13871 authorizes the blocking of property of any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, to have knowingly engaged in a significant transaction for the sale, supply, or transfer to Iran of significant goods or services used in connection with the iron, steel, aluminum, or copper sectors of Iran. Such goods or services could include exports of graphite electrodes or needle coke.

The Iran Freedom and Counter-Proliferation Act of 2012 (IFCA): IFCA Section 1245(a)(1) requires the Secretary of State to impose 5 or more of the sanctions described in section 6(a) of the Iran Sanctions Act of 1996 with respect to a person (individual or entity) if the Secretary of State determines that the person knowingly sells, supplies, or transfers graphite, directly or indirectly, to or from Iran if the graphite (1) is to be used in connection with the energy, shipping, or shipbuilding sectors of Iran or any sector of the economy of Iran determined to be controlled directly or indirectly by Iran's Revolutionary Guard Corps (IRGC); or (2) is sold, supplied, or transferred to or from an Iranian person included on the list of specially designated nationals and blocked persons maintained by the Office of Foreign Assets Control of the Department of the Treasury. Of note, the sanctions menu described in section 6(a) of the Iran Sanctions Act of 1996 includes blocking sanctions.

(c) Other sanctions relating to Iran's nuclear program

On May 3, 2019, the State Department announced additional steps relating to Iran's nuclear activities. See fact sheet, available at https://www.state.gov/advancing-the-maximum-pressure-campaign-by-restricting-irans-nuclear-activities/; see also press statement, available at https://www.state.gov/secretary-pompeo-tightens-nuclear-restrictions-on-iran/. The new actions listed in the fact sheet are:

- Starting May 4, assistance to expand Iran's Bushehr Nuclear Power Plant beyond the existing reactor unit will be exposed to sanctions.
- In addition, any involvement in transferring enriched uranium out of Iran in exchange for natural uranium will now be exposed to sanctions. The United States has been clear that Iran must stop all proliferation-sensitive activities, including uranium enrichment, and we will not accept actions that support the continuation of such enrichment.
- We will also no longer permit the storage for Iran of heavy water it has produced in excess of current limits; any such heavy water must not be made available to Iran in any fashion.

…

- … We are permitting the temporary continuation of certain ongoing nonproliferation projects that constrain Iran's nuclear activities and that help maintain the nuclear *status quo* in Iran until we reach a comprehensive deal that resolves Iran's proliferation threats.
- Specifically, we are permitting the following nonproliferation activities to continue, for a renewable duration of 90 days:
    - the redesign of the Arak reactor to prevent it from becoming a factory for weapons-grade plutonium;
    - modification of infrastructure at the Fordow facility to help ensure that the facility is no longer used for uranium enrichment work;
    - work at the existing unit at the Bushehr Nuclear Power Plant to ensure safe and transparent operations, as well as to facilitate foreign fuel supply and take-back that precludes any legitimate need for Iran to enrich uranium and denies it access to spent fuel from which plutonium might be separated;
    - provision of enriched uranium on an as-needed basis for the Tehran Research Reactor (TRR) under international verification so as to preclude any need for indigenous TRR fuel production; and
    - the transfer out of Iran of scrap and spent nuclear reactor fuel, to ensure that such sensitive material cannot be reprocessed or further enriched in Iran.

(4) Human Rights, Cyber, and other sanctions programs (CISADA, TRA, E.O. 13553, E.O. 13606, E.O. 13608, and E.O. 13846)

Executive Order 13553 implements Section 105 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA") (Public Law 111-195), as amended by the Iran Threat Reduction and Syria Human Rights Act of 2012 ("TRA"). OFAC designated the IRGC-QF, the Fatemiyoun Division, and the Zaynabiyoun Brigade under E.O. 13553 on January 24, 2019. Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm590.

E.O. 13606 of April 22, 2012, is entitled "Blocking the Property and Suspending the Entry Into the United States of Certain Persons With Respect to Grave Human Rights Abuses by the Governments of Iran and Syria via Information Technology." In a February 13, 2019 media note, available at https://www.state.gov/iran-based-entities-and-individuals-sanctioned-under-e-o-13606-and-13224/, the State Department announced sanctions on an Iran-based entity and four associated individuals under E.O. 13606 and E.O. 13224 (related to terrorism). As explained in the media note, the designated entity and individuals "organize international conferences in support of the Islamic Revolutionary Guard Corps-Qods Force's (IRGC-QF's) efforts to recruit and collect intelligence from foreign attendees, including U.S. persons."

In addition, the Department of the Treasury designated a separate Iran-based entity and six associated individuals involved in a malicious cyber campaign targeting current and former U.S. government personnel to gain access to and implant malware on their computer systems. 84 Fed. Reg. 4901 (Feb. 19, 2019) (designating the following pursuant to E.O. 13606: entity NET PEYGARD SAMAVAT COMPANY and

individuals Hossein ABBASI, Mojtaba MASOUMPOUR, Behzad MESRI, Milad MIRZABEYGI, Hossein PARVAR, and Mohammad Bagher SHIRINKAR); see also February 13, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm611.

Evren KAYAKIRAN of Turkey was sanctioned pursuant to section 1(a)(i) of Executive Order 13608, "Prohibiting Certain Transactions With and Suspending Entry Into the United States of Foreign Sanctions Evaders With Respect to Iran and Syria." 84 Fed. Reg. 4609 (Feb. 15, 2019).

On November 22, 2019, OFAC imposed sanctions on an Iranian official who shut down the internet for the Iranian general population, Mohammad Javad Azari Jahromi, Iran's Minister of Information and Communications Technology. 84 Fed. Reg. 66,054 (Dec. 2, 2019); November 22, 2019 Treasury press release, available at https://home.treasury.gov/news/press-releases/sm836 (designation pursuant to E.O. 13846).

On December 19, 2019, Secretary Pompeo delivered a speech on human rights and the Iranian regime. His remarks are available at https://www.state.gov/human-rights-and-the-iranian-regime/. Excerpts follow from his remarks. See also Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm862 (announcing designations of judges Abdolghassem Salavati and Mohammad Moghisseh pursuant to E.O. 13846 for engaging in censorship and other activities that prohibit, limit, or penalize the exercise of freedom of expression or assembly by citizens of Iran).

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First, I have re-designated Iran as a Country of Particular Concern under the International Religious Freedom Act. The world should know Iran is among the worst violators of basic fundamental religious freedoms.

Second, today the United States Department of Treasury will sanction two Iranian judges: Mohammad Moghisseh, and Abolghassem Salavati.

Among the … heinous acts that Moghisseh … did was to sentence Nasrin Sotoudeh, a human rights lawyer and a women's rights defender, to 33 years in prison and to 148 lashes.

And Salavati sentenced an American citizen, Xiyue Wang, for 10 years in prison on false charges of espionage. We're glad we won Xiyue's release, but he should've never been sentenced or jailed in the first place.

Salavati has sentenced hundreds of political prisoners. … He sentenced journalists and human rights activists to prison—or worse, to death. …

Third, under the Immigration and Nationality Act, we are restricting visas for current or former Iranian officials and individuals responsible for or complicit in the abuse, detention, or killing of peaceful protesters, or for inhibiting their rights to freedom of expression or assembly.

Our action will also restrict visas for these individuals' family members. The materials that are being provided to us by citizens from all across Iran will be invaluable in us using this new authority to put true pressure and to hold accountable those who are denying freedom and justice to the people of Iran.

Thugs killing people's children will not be allowed to send their own children to study in the United States of America.

* * * *

d. Humanitarian mechanism to increase transparency of permissible trade with Iran

On October 25, 2019, the U.S. State and Treasury Departments announced a new mechanism to ensure transparency into humanitarian trade with Iran. The announcement issued concurrently with FinCEN identifying Iran as a jurisdiction of primary money laundering concern, a measure discussed in Chapter 3 of this *Digest*.
Excerpts follow from the October 25, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm804.

* * * *

Treasury and State will establish a process to help ensure that participating governments and financial institutions commit to conducting enhanced due diligence to mitigate the higher risks associated with Iran-related transactions. A stringent framework is crucial given that Iran continues to be the world's largest state sponsor of terrorism and the regime continues to fail to implement key anti-money laundering and countering the financing of terror (AML/CFT) safeguards, as set by the Financial Action Task Force (FATF), the global standard-setting body for combating money laundering and terrorist financing.

"FinCEN's action designating Iran as a jurisdiction of primary money laundering concern underscores the need for enhanced due diligence in a country that has systematically obfuscated its support for terrorism and ignored international anti-money laundering standards. This humanitarian mechanism offers a process for enhanced due diligence to help mitigate the high risk of doing business in a country whose repressive leaders remain intent on diverting resources to fund terrorism," said Sigal Mandelker, Treasury Under Secretary for Terrorism and Financial Intelligence. "Through this new mechanism, no revenue or payment may flow to the Iranian regime. This framework will provide unprecedented transparency to help ensure that humanitarian goods entering Iran actually reach the Iranian people."

"The Iranian regime oversees a vast network of corruption designed to evade sanctions, generate money for terrorists, and enrich Iran's clerics," said Brian Hook, State Department Special Envoy to Iran. "A new humanitarian channel will make it easier for foreign governments, financial institutions, and private companies to engage in legitimate humanitarian trade on behalf of the Iranian people while reducing the risk that money ends up in the wrong hands. The U.S. will continue to stand with the Iranian people."

While the U.S. has consistently maintained broad exceptions and authorizations to support humanitarian transactions with Iran, this new mechanism will assist foreign governments and foreign financial institutions that conduct appropriate enhanced due diligence to establish payment mechanisms for legitimate humanitarian exports.

The humanitarian mechanism will require foreign governments and financial institutions that choose to participate in the mechanism to conduct enhanced due diligence and provide to

Treasury a substantial and unprecedented amount of information, with appropriate disclosure and use restrictions, on a monthly basis, as described in guidance provided by OFAC outlining specific requirements.

This mechanism includes a number of safeguards to prevent any sanctionable dealings with persons on OFAC's List of Specially Designated Nationals and Blocked Persons (SDN List) that have been designated in connection with Iran's support for terrorism or WMD proliferation.

If foreign governments or financial institutions detect potential abuse of this mechanism, pursuant to the requirements of the humanitarian mechanism, they must immediately restrict any suspicious transactions and provide relevant information to Treasury. Provided that financial institutions commit to implement these stringent requirements, the humanitarian mechanism will enable them to seek written confirmation from Treasury and State regarding sanctions compliance.

This mechanism, designed solely for the purpose of commercial exports of humanitarian goods to Iran, can be used by U.S. persons and U.S.-owned or -controlled foreign entities, as well as non-U.S. entities. Of course, U.S. persons and U.S.-owned or -controlled entities must still comply with existing requirements under the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA), as implemented in OFAC's regulations. In line with the United States' long standing policy of allowing for the sale of agricultural commodities, food, medicine, and medical devices to Iran, OFAC will also continue to consider other requests related to humanitarian trade with Iran as appropriate. Treasury encourages interested parties to reach out to OFAC for more detailed consultations.

* * * *

2. Syria

E.O. 13582 is entitled, "Blocking Property of the Government of Syria and Prohibiting Certain Transactions With Respect to Syria." E.O. 13573 of May 18, 2011 is entitled, "Blocking Property of Senior Officials of the Government of Syria."

On June 11, 2019, OFAC designated three individuals and eleven entities pursuant to E.O. 13582 and E.O. 13573 and two entities pursuant to E.O. 13582 only: 1. Samer FOZ; 2. Amer FOZ; and 3. Husen FOZ; 1. AL–MOHAIMEN FOR TRANSPORTING & CONTRACTING; 2. AMAN DAMASCUS JOINT STOCK COMPANY; 3. AMAN HOLDING COMPANY; 4. ASM INTERNATIONAL TRADING, LLC; 5. BS COMPANY OFFSHORE (E.O. 13582 only); 6. FOUR SEASONS DAMASCUS; 7. FOZ FOR TRADING; 8. LANA TV; 9. MAINPHARMA; 10. MENA CRYSTAL SUGAR COMPANY LIMITED; 11. ORIENT CLUB; 12. SILVER PINE; 13. SYNERGY SAL OFFSHORE (E.O. 13582 only). 84 Fed. Reg. 29,281 (June 21, 2019); June 11, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm704 (Oligarch Samer Foz, his relatives and companies, form a network that builds luxury developments on land seized from, or left behind by, Syrians fleeing the brutality of the Assad regime while sharing revenues with Assad).

On December 20, 2019, the President signed into law the Caesar Syria Civilian Protection Act of 2019 ("the Caesar Act"), which, among other things, provides for

sanctions and travel restrictions on those who provide support to members of the Assad regime. See Chapter 17 for the State Department press statement on the Caesar Act.

3. Turkey's actions in Syria

As described in a State Department media note, available at https://www.state.gov/sanctioning-the-government-of-turkey-in-response-to-the-ongoing-military-offensive-in-northeast-syria/, the President responded to Turkey's military offensive in northeast Syria with Executive Order 13894 of October 14, 2019, pressing Turkey to halt its military offensive against northeast Syria and adopt an immediate ceasefire. The media note summarizes the E.O. as follows:

> The Executive Order gives the Department of Treasury and the Department of State, the authority to consider and impose sanctions on individuals, entities, or associates of the Government of Turkey involved in actions that endanger civilians or lead to the further deterioration of peace, security, and stability in northeast Syria. Three senior Turkish officials, the Ministry of Energy, and the Ministry of Defense have been designated for sanctions under these authorities, concurrent with the signing of the Executive Order.

Excerpts follow from E.O. 13894. 84 Fed. Reg. 55,851 (Oct. 17, 2019).

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* * * *

Section 1. (a) All property … of the following persons are blocked …:

(i) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(A) to be responsible for or complicit in, or to have directly or indirectly engaged in, or attempted to engage in, any of the following in or in relation to Syria:

(1) actions or policies that further threaten the peace, security, stability, or territorial integrity of Syria; or (2) the commission of serious human rights abuse;

(B) to be a current or former official of the Government of Turkey;

(C) to be any subdivision, agency, or instrumentality of the Government of Turkey;

* * * *

Sec. 2. (a) The Secretary of State, in consultation with the Secretary of the Treasury and other officials of the U.S. Government as appropriate, is hereby authorized to impose on a foreign person any of the sanctions described in subsections (b) and (c) of this section, upon determining that the person, on or after the date of this order:

(i) is responsible for or complicit in, has directly or indirectly engaged in, or attempted to engage in, or financed, any of the following:

(A) the obstruction, disruption, or prevention of a ceasefire in northern Syria;

(B) the intimidation or prevention of displaced persons from voluntarily returning to their places of residence in Syria;

(C) the forcible repatriation of persons or refugees to Syria; or

(D) the obstruction, disruption, or prevention of efforts to promote a political solution to the conflict in Syria, including:

(1) the convening and conduct of a credible and inclusive Syrian-led constitutional process under the auspices of the United Nations (UN);

(2) the preparation for and conduct of UN-supervised elections, pursuant to the new constitution, that are free and fair and to the highest international standards of transparency and accountability; or

(3) the development of a new Syrian government that is representative and reflects the will of the Syrian people;

(ii) is an adult family member of a person designated under subsection (a)(i) of this section; or

(iii) is responsible for or complicit in, or has directly or indirectly engaged in, or attempted to engage in, the expropriation of property, including real property, for personal gain or political purposes in Syria.

(b) … the sanctions set forth below …:

(i) … procurement [ban] …; or

(ii) … denial of a visa ….

(c) … sanctions set forth below …:

(i) prohibit … making loans … totaling more than $10,000,000 in any 12-month period, …[except for] activities to relieve human suffering …;

(ii) prohibit any transactions in foreign exchange …;

(iii) prohibit any transfers of credit or payments …;

(iv) block all property and interests in property …;

(v) prohibit any United States person from investing …;

(vi) restrict or prohibit imports …; or

(vii) impose on the principal executive officer or officers…the sanctions described in subsections (c)(i)–(c)(vi) of this section, as selected by the Secretary of State.

(d) … except to the extent provided by statutes, or in regulations, orders, directives, or licenses ….

Sec. 3. (a) …authorized to impose on a foreign financial institution the sanctions described in subsection (b) ….

(b) … prohibit the opening, …of a correspondent account or a payable- through account ….

(c) … except to the extent provided by statutes, or in regulations, orders, directives, or licenses ….

Sec. 4. … the entry of such persons into the United States, as immigrants or nonimmigrants, is hereby suspended, except where the Secretary of State determines that the entry of the person into the United States would not be contrary to the interests of the United States, ….

* * * *

On October 23, 2019, OFAC removed from the SDN list those who had been designated pursuant to E.O. 13894 (Hulisi AKAR, Fatih DONMEZ, Suleyman SOYLU, the REPUBLIC OF TURKEY MINISTRY OF NATIONAL DEFENCE, and the REPUBLIC OF TURKEY MINISTRY OF ENERGY AND NATURAL RESOURCES). See https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20191023.aspx. A Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm801, explains that the action followed an agreement by Turkey with the United States on October 17, 2019 that paused military operations, as well as Turkey's adherence to that agreement.

4. Cuba

On June 4, 2019, in conjunction with Commerce Department amendments to the Export Administration Regulations, the Treasury Department announced amendments to the Cuban Assets Control Regulations ("CACR") to further implement the President's foreign policy on Cuba. See Treasury press release, available at https://home.treasury.gov/news/press-releases/sm700. According to the press release, the amendments include restrictions on non-family travel to Cuba as well on the export of passenger and recreational vessels and private and corporate aircraft.

On July 26, 2019, the State Department announced visa restrictions on Cuban officials pursuant to Section 212(a)(3)(C) of the Immigration and Nationality Act ("INA"). The State Department press statement announcing the visa actions, available at https://www.state.gov/visa-actions-against-cuban-officials/, includes the following explanation:

> The Cuban government engages in exploitative and coercive labor practices while it earns money on the backs of its citizens through its overseas medical missions program. To address this labor abuse, the Department has imposed visa restrictions on certain Cuban officials and other individuals responsible for these coercive labor practices under the Immigration and Nationality Act Section 212(a)(3)(C). These practices include working long hours, housing in unsafe areas, and compelling Cuban medical professionals to advance the regime's political agenda. Such visa restrictions could include immediate family members of these individuals.

On September 30, 2019, the State Department issued a further press statement, available at https://www.state.gov/visa-actions-against-cuban-officials-exploiting-cuban-doctors/, regarding visa restrictions under Section 212(a)(3)(C) of the INA on Cuban officials responsible for certain exploitative and coercive labor practices as part of Cuba's overseas medical missions program.

On September 6, 2019, the United States restricted certain transactions to Cuba in order to prevent remittances that would enrich Cuban government members and their families. See September 6, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm770 (OFAC amended the CACR with relation to the provision of remittances and "U-turn" transactions). See also September 6,

2019 State Department media note, available at https://www.state.gov/united-states-restricts-remittances-and-u-turn-transactions-to-cuba/:

> Going forward, U.S. persons are no longer allowed to send family remittances to close relatives of prohibited officials of the Government of Cuba or close relatives of prohibited members of the Cuban Communist Party. U.S. persons will also no longer be allowed to send donative remittances, or remittances regardless of familial relationships, to Cuba.
>
> … [R]emittances to support family members are permitted up to $1,000 per quarter per person, and remittances to private businesses, human rights groups, religious organizations, and other self-employed individuals operating in the non-state sector are authorized with no cap at this time.
>
> The Department of the Treasury also restricted the Cuban regime's access to the U.S. financial system by eliminating authorization for what are commonly known as "U-turn" transactions, funds transfers that originate and terminate outside the U.S. where neither the originator nor beneficiary is a person subject to U.S. jurisdiction.

The Department of State added several entities to the Cuba Restricted List ("CRL") in 2019. See https://www.state.gov/cuba-sanctions/cuba-restricted-list/. The CRL comprises entities and sub-entities that the Department of State has determined are under the control of, or acting for or on behalf of, the Cuban military, intelligence, and security services or personnel with which direct financial transactions would benefit such services or personnel, at the expense of the Cuban people or private enterprise in Cuba. Direct financial transactions with entities or sub-entities on the CRL by persons subject to U.S. jurisdiction are generally prohibited under 31 CFR 515.209. On March 11, 2019, the State Department announced updates to the CRL, effective March 12, 2019. See media note, available at https://www.state.gov/state-department-updates-the-cuba-restricted-list-2/. Further updates to the list were announced in an April 24, 2019 media note, at https://www.state.gov/department-of-state-updates-the-cuba-restricted-list/. On November 15, 2019, in a media note available at https://www.state.gov/state-department-updates-the-cuba-restricted-list-4/, the State Department announced further updates to the Cuba Restricted List.

In November 2019, the Secretary made the Trump Administration's first determination, under Title IV of the LIBERTAD Act, that a particular company is involved with trafficking in property confiscated by the Cuban government to which a U.S. national owns a claim. A Title IV determination requires the imposition of visa and entry restrictions against corporate officers, principals, or shareholders with a controlling interest, along with their spouses, minor children, or agents. The identity of the company cannot be made public because of visa confidentiality restrictions.

See section A.11.c., *infra*, ("*Designations pursuant to Section 7031(c) of the Annual Consolidated Appropriations Act"*) for discussion of designations of Cuban officials for their involvement in gross violations of human rights. The Venezuela section, *infra*, also discusses sanctions on Cuban persons for providing support to the Maduro regime. See Chapter 11.A.3. of this *Digest* for discussion of the suspension of air service between the United States and Cuban international airports other than Havana's

Jose Marti International Airport (to prevent the Cuban regime from profiting from U.S. air travel).

5. Venezuela

a. General background and new executive orders (E.O. 13857 and E.O. 13884)

For information on Venezuela-related sanctions, see https://www.state.gov/venezuela-related-sanctions/ and https://www.treasury.gov/resource-center/sanctions/Programs/pages/venezuela.aspx. See Chapter 9 of this *Digest* for discussion of U.S. recognition of Juan Guaidó as the interim president of Venezuela on January 23, 2019.

On January 10, 2019, the State Department issued a press statement by the Secretary outlining the various actions being taken against the Maduro regime. The press statement is excerpted below and available at https://www.state.gov/actions-against-venezuelas-corrupt-regime/.

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* * * *

The United States condemns Maduro's illegitimate usurpation of power today following the unfree and unfair elections he imposed on the Venezuelan people on May 20, 2018. The United States remains steadfast in its support of the Venezuelan people and will continue to use the full weight of U.S. economic and diplomatic power to press for the restoration of Venezuelan democracy.

Today, we reiterate our support for Venezuela's National Assembly, the only legitimate branch of government duly elected by the Venezuelan people. It is time for Venezuela to begin a transitional process that can restore the constitutional, democratic order by holding free and fair elections that respect the will of the Venezuelan people.

To advance this goal, the United States has taken aggressive action against the Maduro regime and its enablers. Most recently, on January 8, the United States imposed sanctions on seven individuals and 23 entities involved in a corruption scheme to exploit Venezuela's currency exchange practices. By rigging the system in their favor, these individuals and entities stole more than $2.4 billion as the Venezuelan people starved. We applaud the initiative by the new National Assembly leadership to work with the international community to recover these and other stolen funds and to use them to relieve the suffering of Venezuela's people. The United States will continue to play an active role towards this end.

We also have implemented and will continue to impose visa revocations and other restrictions for current and former Venezuelan government officials and their family members believed to be responsible for or complicit in human rights abuses, acts of public corruption, and the undermining of democratic governance. We will not allow them to act without consequence or enjoy their ill-gotten gains in the United States—and urge other countries to act likewise.

It is time for Venezuelan leaders to make a choice. We urge those who support this regime, from every day employees getting by on food subsidies to the Venezuelan security forces sworn to support the constitution, to stop enabling repression and corruption and to work with the National Assembly and its duly elected leader, Juan Guaido, in accordance with your constitution on a peaceful return to democracy. The Venezuelan people and the international community will remember and judge your actions. Now is the time to convince the Maduro dictatorship that the moment has arrived for democracy to return to Venezuela.

* * * *

Executive Order 13692, "Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela," was issued in 2015. See *Digest 2015* at 669-72. Executive Order 13808, entitled, "Imposing Additional Sanctions With Respect to the Situation in Venezuela," was issued in 2017. See *Digest 2017* at 626-27. The President issued three additional executive orders relating to Venezuela in 2018: E.O. 13827 of March 19, 2018, E.O. 13835 of May 21, 2018, and E.O. 13850 of November 1, 2018. See *Digest 2018* at 548-53.

On December 20, 2019, the U.S. Congress enacted the "Venezuela Emergency Relief, Democracy Assistance, and Development Act of 2019" or the "VERDAD Act of 2019," Title I of Division J of H.R. 1865 (Further Consolidated Appropriations Act), Public Law 116-94. Section 133 of the VERDAD Act provides that a person sanctioned under certain sanctions programs shall no longer be subject to such sanctions if the person "recognizes and pledges supports for the Interim President of Venezuela or a subsequent democratically elected government." The specified sanctions relate to the following authorities: the Venezuela Defense of Human Rights and Civil Society Act of 2014 (Public Law 113–278), E.O. 13692 (which implements the 2014 Act, among other things), and E.O. 13850. For background on the 2014 Act, see *Digest 2014* at 50 and *Digest 2015* at 20-21, 670. In addition, section 183 of the VERDAD Act of 2019 amends the Venezuela Defense of Human Rights and Civil Society Act of 2014 by extending the expiration of its sanctions provision from December 31, 2019 to December 31, 2023.

The President issued two new executive orders relating to Venezuela in 2019. On January 25, 2019 (after U.S. recognition of Interim President Guaidó), E.O. 13857 was issued to amend E.O. 13692, E.O. 13808, E.O. 13827, E.O. 13835, and E.O. 13850. 84 Fed. Reg. 509 (Jan. 30, 2019). Excerpts follow from E.O. 13857, "Taking Additional Steps to Address the National Emergency With Respect to Venezuela."

> **Section 1**. (a) Subsection (d) of section 6 of Executive Order 13692, subsection (d) of section 3 of Executive Order 13808, subsection (d) of section 3 of Executive Order 13827, subsection (d) of section 3 of Executive Order 13835, and subsection (d) of section 6 of Executive Order 13850, are hereby amended to read as follows:
>
> "(d) the term 'Government of Venezuela' includes the state and Government of Venezuela, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Venezuela and Petroleos de Venezuela, S.A. (PDVSA), any person owned or controlled, directly or indirectly, by the foregoing, and any person who has acted or purported to act directly or indirectly

for or on behalf of, any of the foregoing, including as a member of the Maduro regime."

On August 5, 2019, the President signed E.O. 13884, blocking all property and interests in property of the Government of Venezuela as well as the property and interests in property of certain other specified persons, as determined by the Secretary of the Treasury, in consultation with the Secretary of State. E.O. 13884 exempts transactions for the conduct of the official business of the U.S. Government, as well as transactions related to the provision of articles such as food, clothing, and medicine intended to be used to relieve human suffering. 84 Fed. Reg. 38,843 (Aug. 7, 2019). OFAC also issued new and revised FAQs; a number of new and amended general licenses; as well as guidance related to the provision of humanitarian assistance and support to the Venezuelan people. See August 6, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm752. See also, *e.g.*, August 6, 2019 State Department press statement, available at https://www.state.gov/the-united-states-imposes-maximum-pressure-on-former-maduro-regime/, which explains that OFAC issued a general license authorizing transactions with Interim President Guaido, the National Assembly, and individuals appointed or designated by Guaido. Excerpts follow from E.O. 13884.

* * * *

Section 1. (a) All property and interests in property of the Government of Venezuela that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

(b) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(i) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any person included on the list of Specially Designated Nationals and Blocked Persons maintained by the Office of Foreign Assets Control whose property and interests in property are blocked pursuant to this order; or

(ii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

(c) The prohibitions in subsections (a)–(b) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

Sec. 2. The unrestricted immigrant and nonimmigrant entry into the United States of aliens determined to meet one or more of the criteria in section 1(b) of this order would be detrimental to the interests of the United States, and entry of such persons into the United States,

as immigrants or non-immigrants, is hereby suspended, except when the Secretary of State determines that the person's entry would not be contrary to the interests of the United States, …

* * * *

b. E.O. 13692

On February 15, 2019, OFAC designated the following individuals pursuant to E.O. 13692, as amended by E.O. 13857, for being current or former officials of the Government of Venezuela: Manuel Ricardo CRISTOPHER FIGUERA, Hildemaro Jose RODRIGUEZ MUCURA, Ivan Rafael HERNANDEZ DALA, Rafael Enrique BASTARDO MENDOZA, and Manuel Salvador QUEVEDO FERNANDEZ. 84 Fed. Reg. 9862 (Mar. 18, 2019); February 15, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm612. See also February 15, 2019 State Department press statement, available at https://www.state.gov/u-s-sanctions-on-venezuelan-individuals-and-entities/, which includes the following about the sanctions:

> Today, the United States took action to continue to hold corrupt officials of the former illegitimate Maduro regime accountable by imposing sanctions on five current or former officials of the illegitimate Maduro regime. The corrupt officials include individuals of the Cuban-sponsored Venezuelan intelligence forces (SEBIN), the military counter-intelligence (DGCIM) unit, and the brutal special actions force (FAES). Additionally, the United States is taking action against the current President of Petroleos de Venezuela, S.A. (PdVSA).

On February 25, 2019, OFAC designated four individuals pursuant to E.O. 13692, as amended by E.O. 13857, for being current or former officials of the Government of Venezuela: Jorge Luis GARCIA CARNEIRO, Ramon Alonso CARRIZALEZ RENGIFO, Rafael Alejandro LACAVA EVANGELISTA, and Omar Jose PRIETO FERNANDEZ. 84 Fed. Reg. 9863 (Mar. 18, 2019); February 25, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm616. See also February 25, 2019 State Department press statement, available at https://www.state.gov/the-united-states-sanctions-governors-of-venezuelan-states-aligned-with-maduro/, which describes the individuals as

> four governors aligned with the illegitimate Maduro regime who prevented desperately needed international humanitarian assistance from entering Venezuela and/or engaged in corruption to the detriment of the Venezuelan people, in some cases involving human rights violations. Sanctions were imposed on the governors of the states of Zulia: Omar Prieto, Carabobo: Rafael Lacava, Apure: Ramon Carrizalez, and Vargas: Jorge Garcia Carneiro.

On March 1, 2019, OFAC designated six individuals pursuant to E.O. 13692, as amended by E.O. 13857, for being a current or former official of the Government of Venezuela: Alberto Mirtiliano BERMUDEZ VALDERREY, Richard Jesus LOPEZ VARGAS, Jesus Maria MANTILLA OLIVEROS, Jose Leonardo NORONO TORRES,

Jose Miguel DOMINGUEZ RAMIREZ, and Cristhiam Abelardo MORALES ZAMBRANO. 84 Fed. Reg. 10,896 (Mar. 22, 2019); March 1, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm619. See also March 1, 2019 State Department media note, available at https://www.state.gov/the-united-states-sanctions-illegitimate-maduro-regime-security-officials-associated-with-violence-and-obstruction-of-international-humanitarian-assistance/, which provides the following about the designations:

> Today, the United States took action against six security officials of the illegitimate Maduro regime associated with obstruction of the entry of international humanitarian aid into Venezuela or violence against those who attempted to deliver this assistance.
>
> Sanctions were imposed on Richard Jesus Lopez Vargas, Commanding General of the Venezuelan National Guard, Jesus Maria Mantilla Oliveros, Commander of Strategic Integral Defense Region Guayana, Alberto Mirtiliano Bermudez Valderrey, Division General for the Integral Defense Zone in Bolivar State, Jose Leonardo Norono Torres, Division General and Commander for the Integral Defense Zone in Tachira State, Jose Miguel Dominguez Ramirez, Chief Commissioner of the FAES (police special forces) in Tachira, and Cristhiam Abelardo Morales Zambrano, National Police Director.

On April 17, 2019, OFAC designated Iliana Josefa RUZZA TERAN pursuant to E.O. 13692, as amended by E.O. 13857, for being a current or former official of the Government of Venezuela. 84 Fed. Reg. 23,161 (May 21, 2019); April 17, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm661. On April 26, 2019, and as further announced in a State Department media note, available at https://www.state.gov/the-united-states-sanctions-maduro-aligned-individuals/, OFAC designated two individuals aligned with the former Maduro regime pursuant to E.O. 13962, as amended by E.O. 13857, for being a current or former official of the Government of Venezuela: Jorge Alberto Arreaza Montserrat (Maduro-appointed minister of foreign affairs) and Carol Bealexis Padilla de Arretureta (a judge associated with the March 21 detainment of Interim President Juan Guaido's Chief of Staff Roberto Marrero). 84 Fed. Reg. 23,164 (May 21, 2019); April 26, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm670.

On May 7, 2019, OFAC removed Manuel Ricardo CRISTOPHER FIGUERA from the SDN List, to which he had been added on February 15, 2019. 84 Fed. Reg. 23,161 (May 21, 2019). See also Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm684, which explains that Cristopher, former director of Venezuela's National Intelligence Service ("SEBIN"), "broke ranks with the Maduro regime and rallied to the support of the Venezuelan constitution and the National Assembly."

On June 27, 2019, OFAC designated the following two individuals under E.O 13692 as amended by E.O. 13857 for being current or former officials of the Government of Venezuela: Luis Alfredo MOTTA DOMINGUEZ and Eustiquio Jose LUGO GOMEZ. 84 Fed. Reg. 32,011 (July 3, 2019); June 27, 2019 Treasury Department press release,

available at https://home.treasury.gov/news/press-releases/sm718; see also June 27, 2019 State Department media note, available at https://www.state.gov/the-united-states-takes-action-against-corrupt-maduro-regime-officials/, which explains that Motta and Lugo "have been involved in rampant corruption, as determined by a Department of Justice investigation." The media note further states:

> As the former Minister of Popular Power for Electric Power and former President of CORPOELEC (Motta) and the current Deputy Minister of Finance, Investment and Strategic Alliances for the Ministry of Popular Power for Electric Power (Lugo), their corruption directly contributed to the deterioration and failure of Venezuela's electrical system.

On June 28, OFAC designated Nicolas Ernesto MADURO GUERRA pursuant to E.O. 13692 as amended by E.O. 13857 for being a current or former official of the Government of Venezuela. 84 Fed. Reg. 32,252 (July 5, 2019); June 28, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm719; see also June 28, 2019 State Department media note, available at https://www.state.gov/the-united-states-sanctions-nicolas-maduro-guerra/, regarding the designation of Maduro Guerra (Maduro's son), including the following:

> Maduro Guerra is a member of the illegitimate National Constituent Assembly, a body established by his father to undermine the democratically-elected National Assembly and entrench a brutal regime. In 2014, Maduro Guerra was also appointed by his father to head the Corps of Inspectors of the Presidency.

On July 19, 2019, OFAC designated Hannover Esteban GUERRERO MIJARES, Rafael Ramon BLANCO MARRERO, Rafael Antonio FRANCO QUINTERO, and Alexander Enrique GRANKO ARTEAGA pursuant to E.O. 13692, as amended by E.O. 13857, for being current or former officials of the Government of Venezuela. 84 Fed. Reg. 37,007 (July 30, 2019); see also July 19, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm738; and see July 19, 2019 State Department media note, available at https://www.state.gov/the-united-states-sanctions-maduro-aligned-officials-of-venezuelas-military-counterintelligence-agency, which includes the following:

> On July 19, the United States sanctioned four officials of the Maduro-aligned General Directorate of Military Counterintelligence, known as DGCIM, pursuant to E.O. 13692, as amended, for being current or former Maduro-aligned officials. They are Division General Rafael Ramon Blanco Marrero, Colonel Hannover Esteban Guerrero Mijare, Major Alexander Enrique Granko Arteaga, and Colonel Rafael Antonio Franco Quintero.
>
> Nicolas Maduro and his associates continue their involvement in human rights abuses and promote those who carry out these abuses, in spite of the findings and recommendations of the UN's Office of the High Commissioner for Human Rights (OHCHR) July 5 report. For example, Blanco was promoted to the

rank of Division General just six days after Venezuelan Navy Captain Acosta's alleged torture and death while in the custody of Maduro's security forces.

On December 9, 2019, OFAC designated two individuals pursuant to E.O. 13692, as amended by E.O. 13857, for being current or former officials of the Government of Venezuela: Gustavo Adolfo Vizcaino Gil and Juan Carlos Dugarte Padron. 84 Fed. Reg. 69,456 (Dec. 18, 2019). See also State Department media note, available at https://www.state.gov/the-united-states-takes-action-against-maduro-aligned-individuals/. As explained in the media note, the two individuals used their official positions to enrich themselves.

c. Visa restrictions

Many of the Venezuela-related U.S. sanctions authorities include visa restrictions in addition to economic measures. Occasionally, visa restrictions are also imposed independently. In a March 1, 2019 press statement, available at https://www.state.gov/the-united-states-revokes-u-s-entry-of-maduro-aligned-individuals-and-family/, the State Department announced visa restrictions on individuals aligned with Maduro, and their family members. According to the press statement, the Department revoked visas of 49 individuals on February 28, 2019. U.S. Special Representative for Venezuela Elliott Abrams provided a briefing on Venezuela on March 1, 2019, which is available at https://www.state.gov/briefing-on-venezuela/, and excerpted below.

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* * * *

First, there was a session of the UN Security Council yesterday on Venezuela. The United States presented a resolution that got the requisite nine votes for passage but was then vetoed by Russia and China. The Russians put in a resolution which got four votes, which I would call pathetic, and I think the results in the council demonstrate that there is very broad international support for democracy in Venezuela and for the National Assembly and Interim President Guaido.

Secondly, an announcement. The United States has imposed new visa restrictions on individuals responsible for undermining Venezuela's democracy. We are applying this policy to numerous Maduro-aligned officials and their families. Maduro supporters that abuse or violate human rights, steal from the Venezuelan people, or undermine Venezuela's democracy are not welcome in the United States. Neither are their family members who enjoy a privileged lifestyle at the expense of the liberty and prosperity of millions of Venezuelans. The United States will continue to take appropriate action against Maduro and the corrupt actors and human rights violators and abusers who surround him.

The United States urges all nations to step up economic pressure on Maduro and his corrupt associates as well as restrict visas for his inner circle. Now is the time to act in support of democracy and in response to the desperate needs of the Venezuelan people. That's first.

Second, Treasury today announced additional sanctions. The United States also took action against six security officials of the illegitimate Maduro regime, individuals associated with the obstruction of the entry of international humanitarian aid into Venezuela or violence

against those who attempted to deliver the assistance. Sanctions were imposed on Richard Jesus Lopez, commanding general of the Venezuelan National Guard; Jesus Maria Mantilla, commander of the Strategic Integral Defense Region Guayana; Alberto Mirtiliano Bermudez, division general for the Integral Defense Zone in Bolivar State; Jose Leonardo Norono, division general and commander for the Integral Defense Zone in Tachira State; Jose Miguel Dominguez, chief commissioner of the FAES, the special forces in Tachira; and Cristhiam Abelardo Morales, the national police director.

* * * *

d. E.O. 13850

On January 8, 2019, OFAC designated seven individuals pursuant to E.O. 13850: Claudia Patricia DIAZ GUILLEN, Raul GORRIN BELISARIO, Maria Alexandra PERDOMO ROSALES, Gustavo Adolfo PERDOMO ROSALES, Mayela Antonina TARASCIO–PEREZ, Adrian Jose VELASQUEZ FIGUEROA, and Leonardo GONZALEZ DELLAN. 84 Fed. Reg. 2946 (Feb. 8, 2019); January 8, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm583. All seven were designated pursuant to section 1(a)(ii) of E.O. 13850 for "being responsible for or complicit in, or having directly or indirectly engaged in, any transaction or series of transactions involving deceptive practices or corruption and the Government of Venezuela or projects or programs administered by the Government of Venezuela, or for being an immediate adult family member of such a person." *Id.* At the same time, OFAC designated 23 entities and one aircraft linked to the designated individuals. *Id*. On January 28, 2019, OFAC designated PETROLEOS DE VENEZUELA, S.A. pursuant to E.O. 13850, as amended by E.O. 13857, for operating in the oil sector of the Venezuelan economy. 84 Fed. Reg. 3282 (Feb. 11, 2019); January 28, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm594. The Treasury Department made the determination on the same date that the oil sector is subject to EO 13850 sanctions: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/vz_sector_determination_oil_20190128.pdf. See also January 28, 2019 State Department press statement, available at https://www.state.gov/sanctions-against-pdvsa-and-venezuela-oil-sector/, which explains:

> Maduro and his cronies have used state-owned PDVSA to control, manipulate, and steal from the Venezuelan people for too long, destroying it in the process.
>
> Today's action will prevent Maduro and other corrupt actors from further enriching themselves at the expense of the long-suffering Venezuelan people. It will also preserve the core pillar of Venezuela's national assets for the people and a democratically elected government.

On March 11, 2019, OFAC designated EVROFINANCE MOSNARBANK under E.O. 13850, as amended by E.O. 13857, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, Petroleos de Venezuela S.A. 84 Fed. Reg. 10,895 (Mar. 22, 2019); March 11, 2019 Treasury Department press release, available at

https://home.treasury.gov/news/press-releases/sm622. See also March 11, 2019 State Department media note, available at https://www.state.gov/the-united-states-tightens-sanctions-on-venezuela-by-targeting-russia-based-bank/, which includes the following information about the Moscow-based bank, jointly owned by Russian and Venezuelan state-owned companies:

> While the illegitimate Maduro regime looks for illicit channels like Evrofinance Mosnarbank to facilitate financial support to state-owned oil company PDVSA, which it then pockets for personal gain, the Venezuelan people are starving and sitting in the dark as their electrical system fails.

On March 19, 2019, OFAC designated the individual, Adrian Antonio PERDOMO MATA, and the entity, MINERVEN pursuant to E.O. 13850, as amended by E.O. 13857, for operating in the gold sector of the Venezuelan economy. 84 Fed. Reg. 23,162 (May 21, 2019); March 19, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm631. See also March 19, 2019 State Department media note, available at https://www.state.gov/sanctions-against-venezuelan-gold-sector/, which includes the following about the sanctions:

> Today, the United States is designating the Venezuelan state-owned gold-sector company, MINERVEN, and its president, Adrian Antonio Perdomo Mata, for operating in this sector.
>
> Maduro and his illicit network are misusing Venezuela's gold-mining operations as another way to steal from the Venezuelan people after having mismanaged and plundered Venezuela's crumbling oil industry.

At the same time, OFAC removed from the SDN List two individuals who had been designated previously under E.O. 13850: Maria Alexandra PERDOMO ROSALES and Mayela Antonina TARASCIO–PEREZ. 84 Fed. Reg. 23,162 (May 21, 2019). Also at that time, OFAC updated the SDN List for entities which had been designated pursuant to E.O. 13850. *Id.*

On March 22, 2019, OFAC designated several banks pursuant to E.O. 13850, as amended: BANCO DE DESARROLLO ECONOMICO Y SOCIAL DE VENEZUELA, BANCO BANDES URUGUAY S.A., BANCO BICENTENARIO DEL PUEBLO, DE LA CLASE OBRERA, MUJER Y COMUNAS, BANCO UNIVERSAL C.A., BANCO DE VENEZUELA SA BANCO UNIVERSAL, and BANCO PRODEM SA. 84 Fed. Reg. 23,165 (May 21, 2019); March 22, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm636. Treasury also determined that E.O. 13850 applies to Venezuela's financial sector. Treasury Department release, available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/vz_sector_determination_financial_20190322.pdf.

On April 5, 2019, OFAC designated two entities (and identified vessels linked to the previously-designated Petroleos de Venezuela) pursuant to E.O. 13850 for operating in the oil sector of the Venezuelan economy: BALLITO BAY SHIPPING INCORPORATED, and PROPER IN MANAGEMENT INCORPORATED. 84 Fed. Reg. 24,597 (May 28, 2019); April 5, 2019 Treasury Department press release, available

at https://home.treasury.gov/news/press-releases/sm643. See also April 5, 2019 State Department media note, available at https://www.state.gov/the-united-states-sanctions-companies-enabling-shipment-of-venezuelan-oil-to-cuba/, which includes the following:

> Today, the United States sanctioned two companies, Ballito Bay Shipping Inc. and ProPer in Management Inc., operating in Venezuela's oil sector and the vessel Despina Andrianna used to transport oil to Cuba. Additional vessels, in which Venezuela's state-owned oil company PDVSA has interests, are being identified as blocked property, pursuant to Executive Order 13850. These actions target entities and vessels that have been enabling the former Maduro regime to continue [to] undermine the prosperity and democracy that Venezuelans deserve.

On April 12, 2019, OFAC designated four entities (and identified related vessels as their blocked property) pursuant to E.O. 13850, as amended by E.O. 13857, for operating in the oil sector of the Venezuelan economy: LIMA SHIPPING CORPORATION, LARGE RANGE LIMITED, PB TANKERS S.P.A., and JENNIFER NAVIGATION LIMITED. 84 Fed. Reg. 23,163 (May 21, 2019); April 12, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm653. See also April 12, 2019 State Department media note, available at https://www.state.gov/the-united-states-takes-action-to-end-cubas-malign-influence-on-venezuela/, which includes the following information about the designations:

> Today, the United States sanctioned four companies for operating in the oil sector of the Venezuelan economy and identified nine vessels as blocked property, pursuant to Executive Order 13850. These actions are a follow-on to the designations announced on April 5, which targeted entities and vessels known to be involved in the transportation of crude oil from Venezuela to Cuba.

On April 17, 2019, OFAC designated BANCO CENTRAL DE VENEZUELA pursuant to E.O. 13850, as amended by E.O. 13857, for operating in the financial sector of the Venezuelan economy. 84 Fed. Reg. 23,161 (May 21, 2019); April 17, 2019 press release, available at https://home.treasury.gov/news/press-releases/sm661.

On May 9, 2019, Treasury made the determination that the defense and security sector of the Venezuelan economy is subject to E.O. 13850, as amended by E.O. 13857. See https://www.treasury.gov/resource-center/sanctions/Programs/Documents/vz_sector_determination_defense_20190509.pdf. On May 10, 2019, a State Department media note, available at https://www.state.gov/the-united-states-sanctions-venezuelas-defense-and-security-sector/, reiterated the announcement. The same day, OFAC designated two companies operating in the oil sector of the Venezuelan economy (Monsoon Navigation Corporation and Serenity Maritime Limited), identified as blocked property two vessels that transported oil from Venezuela to Cuba. 84 Fed. Reg. 23,161 (May 21, 2019); see also May 10, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm685.

On July 3, 2019, OFAC designated the entity Cubametales under E.O. 13850, as amended by E.O. 13857, for operating in the oil sector of the Venezuelan economy. 84

Fed. Reg. 33,811 (July 15, 2019). On July 3, 2019, OFAC determined that the entity PB Tankers S.P.A. no longer warranted designation under E.O. 13850 and removed that entity from the SDN List, unblocking all property and interests in property that had been blocked as a result of PB Tankers' designation. *Id*; and see July 3, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm722. See also July 3, 2019 State Department media note, available at https://www.state.gov/the-united-states-curtails-cuban-support-for-illegitimate-former-maduro-regime/ (sanctions removed on oil shipping company PB Tankers after it took steps to ensure its vessels were not being used to support the Maduro regime in Venezuela and took additional steps to increase scrutiny of its business operations to prevent future sanctionable activity). The media note provides further information on the designation of Cubametales, the Cuban state-run company and primary facilitator of oil imports from Venezuela, for operating in the oil sector of the Venezuelan economy, in light of its continued importation of oil from Venezuela:

> The services and goods Cuba provides Venezuela continue to fuel the corruption of Maduro and his cronies and help maintain their influence over the Venezuelan people. These actions serve to squeeze the lifeline provided by Cuba that preserves Nicolas Maduro's influence. Every drop of Venezuelan oil shipped to Cuba is traded for additional security and intelligence officers and other personnel, which further robs and impoverishes a once rich nation, denies Venezuelan sovereignty, and prolongs the suffering of the Venezuelan people.

On July 11, 2019, OFAC designated the GENERAL DIRECTORATE OF MILITARY COUNTERINTELLIGENCE ("DGCIM") pursuant to E.O. 13850, as amended by E.O. 13857, for operating in the defense and security sector of the Venezuelan economy. 84 Fed. Reg. 34,254 (July 17, 2019); see July 11, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm727.

On July 25, 2019, OFAC designated the following pursuant to E.O. 13850, as amended by E.O. 13857: 10 individuals—Alex Nain SAAB MORAN, Isham Ali SAAB CERTAIN, Shadi Nain SAAB CERTAIN, Alvaro Enrique PULIDO VARGAS, Emmanuel Enrique RUBIO GONZALEZ, Yoswal Alexander GAVIDIA FLORES, Walter Jacob GAVIDIA FLORES, Yosser Daniel GAVIDIA FLORES, Mariana Andrea STAUDINGER LEMOINE, Jose Gregorio VIELMA MORA—and 13 entities—ASASI FOOD FZE, GROUP GRAND LIMITED, GROUP GRAND LIMITED GENERAL TRADING, SILVER BAY PARTNERS FZE, C I FONDO GLOBAL DE ALIMENTOS LTDA, EMMR & CIA. S.A.S., GLOBAL STRUCTURE, S.A., GROUP GRAND LIMITED, S.A. DE C.V., MULTITEX INTERNATIONAL TRADING, S.A., MULBERRY PROJE YATIRIM ANONIM SIRKETI, SEAFIRE FOUNDATION, SUN PROPERTIES LLC, DE, CLIO MANAGEMENT CORP. 84 Fed. Reg. 38,102 (Aug. 5, 2019). These individuals and entities were respectively designated for being responsible for or complicit in, or having directly or indirectly engaged in, any transaction or series of transactions involving deceptive practices or corruption and the Government of Venezuela or projects or programs administered by the Government of Venezuela, or for being an immediate adult family member of such a person; for operating in the gold sector of the Venezuelan economy; for being a current or former official of the

Government of Venezuela; or for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the above-named blocked individuals. *Id*; see also July 25, 2019 Department of the Treasury press release, available at https://home.treasury.gov/news/press-releases/sm741; and see July 25, 2019 State Department press statement, available at https://www.state.gov/the-united-states-takes-action-against-corruption-network-of-maduro-aligned-associates/, in which the designations are described as follows:

> On July 25, the United States sanctioned five individuals involved in a complex network of bribery and money laundering that has been stealing from the people of Venezuela for years, as well as an additional five individuals and 13 entities connected to these corrupt actors. Among the individuals involved were Maduro's three stepsons (Walter, Yosser and Yoswal), and Colombian businessman, Alex Saab, the orchestrator of the corruption network, and sons of First Lady Cilia Flores.
>
> Using a social welfare program that many Venezuelans are forced to depend on for their survival, Maduro and his cronies turned the program into a political weapon and self-enriching mechanism. As noted in the UN Office of the High Commissioner and Human Rights July 5 report, the former Maduro regime's misallocation of resources and corruption have contributed to the economic and humanitarian crisis in Venezuela. While Maduro's stepsons and other criminal associates used a food allocation program to steal hundreds of millions of dollars, many Venezuelans eat once or at most twice per day, with few proteins and vitamins.

On September 17, 2019, OFAC designated three individuals—David Nicolas RUBIO GONZALEZ, Amir Luis SAAB MORAN, and Luis Alberto SAAB MORAN—and sixteen entities— SAAB CERTAIN & COMPANIA S. EN C., CORPORACION ACS TRADING S.A.S., DIMACO TECHNOLOGY, S.A., GLOBAL DE TEXTILES ANDINO S.A.S, FUNDACION VENEDIG, INVERSIONES RODIME S.A., SAAFARTEX ZONA FRANCA SAS, VENEDIG CAPITAL S.A.S., AGRO XPO S.A.S., ALAMO TRADING S.A., ANTIQUA DEL CARIBE S.A.S., AVANTI GLOBAL GROUP S.A.S., GLOBAL ENERGY COMPANY S.A.S., GRUPPO DOMANO S.R.L., MANARA S.A.S., and TECHNO ENERGY, S.A.—pursuant to E.O. 13850, as amended by E.O. 13857. 84 Fed. Reg. 56,281 (Oct. 21, 2019). The individuals were designated for being responsible for or complicit in, or having directly or indirectly engaged in, any transaction or series of transactions involving deceptive practices or corruption and the Government of Venezuela or projects or programs administered by the Government of Venezuela, or for being an immediate adult family member of such a person; and the entities were designated for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, blocked persons. *Id*; September 17, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm778; see also September 17, 2019 State Department press statement, available at https://www.state.gov/united-states-takes-action-on-vast-corruption-network-in-venezuela/, which provides the following further explanation of the designations:

> On September 17, the United States designated three individuals and 16 entities connected with Nicolás Maduro's associate Alex Saab and his business partner Alvaro Pulido. This action increases pressure on Saab and Pulido, who were designated on July 25, 2019, for their looting of Venezuela's food subsidy program.

On September 24, 2019, OFAC designated CAROIL TRANSPORT MARINE LTD, TOVASE DEVELOPMENT CORP, TROCANA WORLD INC., and BLUELANE OVERSEAS SA, pursuant to E.O. 13850, as amended by E.O. 13857, for operating in the oil sector of the Venezuelan economy. 84 Fed. Reg. 51,225 (Sep 27, 2019). OFAC identified as blocked property associated vessels at the same time. *Id.* Also, OFAC removed from the SDN List two entities (and associated vessels and an aircraft) which had been identified pursuant to E.O. 13850: LIMA SHIPPING CORPORATION and SERENITY MARITIME LIMITED. *Id.*; see Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm784; see also September 24, 2019 State Department press statement, available at https://www.state.gov/united-states-takes-action-against-entities-and-vessels-operating-in-venezuelas-oil-sector/, which explains the September 24, 2019 sanctions:

> This action further targets Venezuela's oil sector and the mechanisms used to transport oil to Nicolás Maduro's Cuban benefactors, who continue to prop up the former regime. These sanctions are a follow-on to the designations and identifications announced on April 5 and 12 that targeted entities and vessels known to be involved in the transportation of crude oil from Venezuela to Cuba.

On November 4, 2019, OFAC removed the following entity previously designated under E.O. 13850 from the SDN List: MONSOON NAVIGATION CORPORATION (and an associated vessel). 84 Fed. Reg. 60,146 (Nov. 7, 2019).

On November 26, 2019, OFAC designated Corporacion Panamericana S.A. under E.O. 13850, as amended by E.O. 13857, for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Cubametales, an entity designated on July 3, 2019. 84 Fed. Reg. 66,278 (Dec. 3, 2019). See Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm837.

e. E.O. 13884

On November 5, 2019, as reiterated in a State Department press statement, OFAC announced sanctions under E.O. 13884 on five members of the former Maduro regime, including members of the Venezuelan military, Bolivarian National Guard, intelligence service, and the illegitimate Constituent National Assembly who are "associated with corruption, human rights abuses, acts of intimidation, and violence." See State Department press statement available at https://www.state.gov/the-united-states-takes-action-against-former-maduro-regime-officials-and-strengthens-international-efforts/; Treasury Department press release available at https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20191105.aspx. The designated individuals are: Nestor Neptali BLANCO HURTADO; Carlos Alberto CALDERON CHIRINOS; Pedro Miguel CARRENO ESCOBAR; Remigio CEBALLOS ICHASO; Jose Adelino ORNELAS FERREIRA.

On December 3, 2019, OFAC identified as blocked property six PDVSA-owned vessels pursuant to E.O. 13884, and identified an additional vessel as blocked property of Caroil Transport Marine Ltd., which was designated on September 24, 2019. The State Department described these designations as actions against the movement of Venezuelan oil to Cuba in a press statement available at https://www.state.gov/the-united-states-takes-action-against-the-movement-of-venezuelan-oil-to-cuba/

6. Democratic People's Republic of Korea

a. General

In a March 7, 2019 press briefing, a senior State Department official summarized ongoing discussions between United States government officials and their North Korean counterparts, including a summit between the President and Kim Jong-un, regarding denuclearization. The senior official confirmed in that briefing, available at https://www.state.gov/senior-state-department-official-on-north-korea/, that sanctions on North Korea remain in place.

b. Nonproliferation

(1) UN sanctions

On March 12, 2019, the UN Panel of Experts established pursuant to resolution 1874 (2009) released its annual report. The Panel of Experts also released a midterm report in August 2019. The United States welcomed the annual report in a State Department press statement, available at https://www.state.gov/united-states-welcomes-the-un-panel-of-experts-annual-report-on-the-d-p-r-k/. The press statement says:

> The report provides timely, relevant, and impartial analysis that helps governments around the world to take decisive action and demonstrates the need for continued vigilance against entities involved in D.P.R.K. sanctions evasion activity. The United States takes allegations of UN sanctions violations seriously, and all Member States are expected to fully implement UN Security Council resolutions. International unity in implementing these sanctions continues to hamper the D.P.R.K.'s ability to further its illegal weapons of mass destruction programs and sends the message that the D.P.R.K. will be economically and diplomatically isolated until it denuclearizes.

On March 22, 2019, the United States submitted its report on operative paragraph 8 of Security Council resolution 2397 (2017), regarding the obligation to repatriate DPRK nationals earning income overseas, subject to limited exceptions. The report, available at https://www.un.org/securitycouncil/sanctions/1718/implementation-reports, includes the following:

> All nationals of the Democratic People's Republic of Korea seeking to enter the United States for employment purposes are required to apply for a visa in

advance. The United States has examined its visa records and determined that no national of the Democratic People's Republic of Korea has been issued a work-authorized visa covered under the present report and valid on 22 December 2017 or later.

In addition, since 22 December 2017, there have been no nationals of the Democratic People's Republic of Korea present in the United States who: (a) were granted work-authorized visas prior to 22 December 2017 but stayed later than that date; (b) switched visa categories after entering the United States on a visa that was not work-authorized; (c) were paroled in without a visa but later acquired work-authorized status; or (d) would fall under any other category that would qualify for repatriation under paragraph 8 of Security Council resolution 2397 (2017).

Accordingly, the United States has no repatriation obligation under paragraph 8 of Security Council resolution 2397 (2017). Its national authorities will continue to ensure that the United States remains in compliance with paragraph 8 of the resolution throughout 2019.

(2) U.S. sanctions

See *Digest 2015* at 645 for background on Executive Order 13687, "Imposing Additional Sanctions With Respect To North Korea." On July 29, 2019, OFAC designated Su Il KIM pursuant to E.O. 13687 for being an official of the Workers' Party of Korea ("WPK"). 84 Fed. Reg. 37,711 (Aug. 1, 2019). See also July 29, 2019 Department of the Treasury press release, available at https://home.treasury.gov/news/press-releases/sm742, including the following further information about Kim's activities:

> OFAC designated Kim Su Il, a trading company official who works on behalf of the [Munitions Industry Department, or] MID in Vietnam, pursuant to E.O. 13687 for being an official of the WPK. As of early 2019, Kim Su Il was responsible for exporting anthracite coal, titanium ore concentrate, and other North Korean domestic products; importing and exporting various other goods, including raw materials, to and from North Korea; and ship chartering. This trade activity earned foreign currency for the North Korean regime. Kim Su Il is also responsible for exporting Vietnamese products to China, North Korea, and other countries. Kim Su Il was assigned to Ho Chi Minh City, Vietnam in 2016 to perform economic, trading, mining, and shipping activities associated with the MID's business activities.

See *Digest 2016* at 646 for background on Executive Order 13722, "Blocking Property of the Government of North Korea and the Workers' Party of Korea, and Prohibiting Certain Transactions With Respect to North Korea." On March 21, 2019, OFAC designated Dalian Haibo International Freight Co., Ltd. pursuant to E.O. 13722 for providing goods and services to or in support of the U.S.-designated Paeksol Trading Corporation. 84 Fed. Reg. 12,036 (Mar. 29, 2019); March 21, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm632. On September 13, 2019, OFAC designated three entities pursuant to E.O.

13722 as agencies, instrumentalities, or controlled entities of the Government of North Korea: ANDARIEL, BLUENOROFF and LAZARUS GROUP. 84 Fed. Reg. 52,589 (Oct. 2, 2019); see also September 13, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm774 (describing the designated entities as "three North Korean state-sponsored malicious cyber groups responsible for North Korea's malicious cyber activity on critical infrastructure," and "controlled by U.S.- and …UN-designated RGB [Reconnaissance General Bureau], which is North Korea's primary intelligence bureau").

On March 21, 2019, OFAC designated Liaoning Danxing International Forwarding Co., Ltd. pursuant to E.O. 13810 for operating in the transportation industry in North Korea. March 21, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm632. On August 30, 2019, OFAC designated Mei Hsiang CHEN, Wang Ken HUANG, Jui Pang Shipping Co Ltd, Jui Zong Ship Management Co Ltd, and Jui Cheng Shipping Company Limited, pursuant to E.O. 13810 for having engaged in at least one significant importation from or exportation to North Korea of any goods, services, or technology. 84 Fed. Reg. 46,784 (Sep. 5, 2019); see also August 30, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm762.

On June 25, 2019, OFAC published the designation of LIMITED LIABILITY COMPANY NON-BANK CREDIT ORGANIZATION RUSSIAN FINANCIAL SOCIETY pursuant to E.O. 13382. 84 Fed. Reg. 29,935 (June 25, 2019). A June 19, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm712, describes some of the activities of Russian Financial Society that triggered the designation:

> …Russian Financial Society provided bank accounts for OFAC-designated Dandong Zhongsheng and to a North Korean chief representative of Korea Zinc Industrial Group, which was also designated for operating in the mining industry in the North Korean economy and for having sold, supplied, or transferred zinc from North Korea, where revenue or goods received may benefit the Government of North Korea.
>
> Since at least 2017 and continuing through 2018, Russian Financial Society has opened multiple bank accounts for Dandong Zhongsheng. These actions have enabled North Korea to circumvent U.S. and UN sanctions to gain access to the global financial system in order to generate revenue for the Kim regime's nuclear program.

7. Russia

a. Chemical and Biological Weapons Control and Warfare Elimination Act Sanctions

As discussed in *Digest 2018* at 566-70, the United States imposed sanctions on Russia in 2018 pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 ("CBW Act") for its use of a "novichok" nerve agent in an attempt to

assassinate Sergei Skripal and his daughter Yulia Skripal in the United Kingdom on March 4, 2018. The United States announced a second round of sanctions based on the same incident in an August 2, 2019 State Department press statement, available at https://www.state.gov/imposition-of-a-second-round-of-sanctions-on-russia-under-the-chemical-and-biological-weapons-control-and-warfare-elimination-act/. As summarized in the press statement:

> This second round will include:
> 1. U.S. opposition to the extension of any loan or financial or technical assistance to Russia by international financial institutions, such as the World Bank or International Monetary Fund;
> 2. A prohibition on U.S. banks from participating in the primary market for non-ruble denominated Russian sovereign debt and lending non-ruble denominated funds to the Russian government; and
> 3. The addition of export licensing restrictions on Department of Commerce-controlled goods and technology.

The Federal Register notice of the additional CBW sanctions on Russia includes the following summary of the action:

> On August 6, 2018, a determination was made that the Russian government used chemical weapons in violation of international law or lethal chemical weapons against its own nationals. … Section 307(B) of the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (CBW Act), requires a decision within three months of August 6, 2018 regarding whether Russia has met certain conditions described in the law. Additional sanctions on Russia are required if these conditions are not met. The Secretary of State decided on November 2, 2018 that Russia had not met the CBW Act's conditions and decided to impose additional sanctions on Russia on March 29, 2019.

84 Fed. Reg. 44,671 (Aug. 6, 2019).

The further CBW Act sanctions on Russia were based on E.O. 13883 of August 1, 2019, entitled "Administration of Proliferation Sanctions and Amendment of Executive Order 12851." 84 Fed. Reg. 38,113 (Aug. 5, 2019). OFAC issued a Russia-related Directive ("CBW Act Directive") under E.O. 13883, effective August 26, 2019, to implement the second round sanctions measures. 84 Fed. Reg. 48,704 (Sep. 16, 2019); see also Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm750.

Excerpts follow from E.O. 13883.

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* * * *

Section 1. (a) When the President, or the Secretary of State pursuant to authority delegated by the President and in accordance with the terms of such delegation, pursuant to section 307(b)(1) of the CBW Act, selects for imposition on a country one or more of the sanctions set forth below and in section 307(b)(2) of that Act, the Secretary of the Treasury, in consultation with the Secretary of State, shall take the following actions, when necessary, to implement such sanctions:

(i) oppose, in accordance with section 701 of the International Financial Institutions Act (22 U.S.C. 262d), the extension of any loan or financial or technical assistance to that country by international financial institutions; and

(ii) prohibit any United States bank from making any loan or providing any credit to the government of that country, except for loans or credits for the purpose of purchasing food or other agricultural commodities or products.

* * * *

b. Sanctions in response to Russia's actions in Ukraine

For background on E.O. 13660, "Blocking Property of Certain Persons Contributing to the Situation in Ukraine," see *Digest 2014* at 646. For background on E.O. 13662 and Directives 1, 2, and 4, see *Digest 2014* at 647-49. For background on E.O. 13685, "Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to the Crimea Region of Ukraine," see *Digest 2014* at 651-52. For background on E.O. 13661, "Blocking Property of Additional Persons Contributing to the Situation in Ukraine," see *Digest 2014* at 646-47. The Countering America's Adversaries Through Sanctions Act ("CAATSA") was enacted in 2017 in part to respond to Russia's malign behavior with respect to the crisis in eastern Ukraine, cyber intrusions and attacks, and human rights abuses. See *Digest 2017* at 656-64.

On January 27, 2019, OFAC removed from the SDN List the following entities, which had been designated pursuant to E.O. 13661 and E.O. 13662: EN+ GROUP PLC, UC RUSAL PLC ("Rusal"), and JSC EUROSIBENERGO. 84 Fed. Reg. 1274 (Feb. 1, 2019). As explained in a January 27, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm592, the companies agreed to reduce Oleg Deripaska's direct and indirect shareholding stake and severed his control. Sanctions on Deripaska remain in place.

On March 15, 2019, OFAC designated six individuals and eight entities pursuant to E.O. 13660, E.O. 13661, E.O. 13662, or E.O. 13685. 84 Fed. Reg. 11,164 (Mar. 25, 2019). The individuals are: Gennadiy MEDVEDEV, Aleksey Alekseevich NAYDENKO, Ruslan ROMASHKIN, Andrey SHEIN, Sergey STANKEVICH, Vladimir Yurievich VYSOTSKY. *Id*. The entities are: AO KONTSERN OKEANPRIBOR, AO ZAVOD FIOLENT, GUP RK KTB SUDOKOMPOZIT, LLC NOVYE PROEKTY, LLC SK CONSOL-STROI LTD, PAO ZVEZDA, YAROSLAVSKY SHIPBUILDING PLANT, and ZELENODOLSK SHIPYARD PLANT NAMED AFTER A.M. GORKY. *Id.* See also March 15, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm629, which includes the following:

OFAC today sanctioned four Russian officials who were involved in the Kerch Strait attack. OFAC designated Gennadiy Medvedev, the Deputy Director of the Border Guard Service of Russia's Federal Security Service; Sergey Stankevich, the Head of the Border Directorate of Russia's Federal Security Service; and Andrey Shein, the Deputy Head of the Border Directorate and Head of the Coast Guard Unit of Russia's Federal Security Service. Medvedev and Stankevich directly controlled and organized the attack against the Ukrainian ships and their crew, while Shein participated in the operation against the seized Ukrainian ships and crew.

OFAC also designated Ruslan Romashkin, the Head of the Service Command Point of the Federal Security Service of the Russian Federation for the Republic of Crimea and Sevastopol.

…

Today's action also targets six Russian defense firms with operations in Crimea, several of which misappropriated Ukrainian state assets to provide services to the Russian military. Four of these entities are being designated pursuant to E.O. 13662 for operating in the defense and related materiel sector of the Russian Federation economy, and two entities are being designated pursuant to E.O. 13685 for operating in the Crimea region of Ukraine.

…

OFAC also designated the following two entities pursuant to E.O. 13685, due to their activities in Crimea.

LLC SK Consol-Stroi LTD is being designated for operating in the Crimea region of Ukraine. LLC SK Consol-Stroi LTD, a limited liability company registered in the city of Simferopol, Crimea, is one of Crimea's largest construction companies. LLC SK Consol-Stroi LTD is engaged in the construction of residential and commercial real estate in cities throughout the Crimea region including, among others, Feodosia, Kerch, Yalta, Simferopol, Sevastopol, and Yepatoria.

LLC Novye Proekty is being designated for operating in the Crimea region of Ukraine. In 2016, Russian authorities awarded the private company Novye Proekty an oil and gas exploration license for the Crimean Black Sea shelf. The Crimean shelf is believed to be rich in hydrocarbons and authorities in Ukraine have reported that Ukraine lost about 80 percent of its oil and gas deposits in the Black Sea due to Russia's purported annexation of Crimea. Novye Proekty's license permits geological studies, prospecting, and the extraction of raw hydrocarbon materials from the Black Sea's Glubokaya block. Prior to Russia's purported annexation of Crimea the Glubokaya block was estimated to hold reserves of 8.3 million tons of crude and 1.4 billion cubic meters of natural gas.

…

Aleksey Alekseevich Naydenko is the Deputy Chair of the Central Election Commission of the so-called Donetsk People's Republic. …

Vladimir Yurievich Vysotsky is the Secretary of Central Election Commission of the so-called Donetsk People's Republic. …

On March 15, 2019, the State Department issued a press statement announcing coordinated sanctions by the United States, the EU, and Canada in response to Russia's continued aggression against Ukraine. The press statement, available at https://www.state.gov/transatlantic-community-imposes-sanctions-on-russia/, identifies the individuals being sanctioned as those who "orchestrated the unjustified November 25 attack on three Ukrainian naval vessels near the Kerch Strait." In addition, U.S. sanctions were imposed on six Russian defense firms, including shipbuilding companies; two individuals involved in the November sham "elections" in Russia-controlled eastern Ukraine; and two Russian energy and construction companies operating in Crimea. *Id.*

On September 26, 2019, OFAC designated three individuals, one entity, and five vessels pursuant to E.O. 13685. 84 Fed. Reg. 54,946 (Oct. 11, 2019). The individuals designated are: Ilya LOGINOV, Ivan OKOROKOV, and Karen STEPANYAN. The entity is
MARITIME ASSISTANCE LLC. *Id.*; see Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm785.

On December 20, 2019, the President signed into law the Protecting Europe's Energy Security Act of 2019 (Pub. L. 116-92) ("PEESA"). This law requires the imposition of sanctions with respect to the provision of certain vessels for the construction of certain Russian energy export pipelines, and in particular the Nord Stream 2 pipeline. Section 7503(a)(1) requires a report by the Secretary of State, in consultation with the Secretary of the Treasury, which lists:

> (A) vessels that engaged in pipe-laying at depths of 100 feet or more below sea level for the construction of the Nord Stream 2 pipeline project, the TurkStream pipeline project, or any project that is a successor to either such project; and
>
> (B) foreign persons that the Secretary of State, in consultation with the Secretary of the Treasury, determines have knowingly -- (i) sold, leased or provided those vessels for the construction of such a project; or (ii) facilitated deceptive or structured transactions to provide those vessels for the construction of such a project.

The first report is due no later than 60 days after the date of enactment, with subsequent reports to be submitted every 90 days thereafter. The legislation mandates financial and visa sanctions on persons listed in 7503(a)(1)(B) unless an exception applies, a waiver is issued, or, in the case of the first report, the wind-down provision in 7503(d) was satisfied. As explained in the December 27, 2019 State Department fact sheet on PEESA and U.S. opposition to Nord Stream 2, available at https://www.state.gov/fact-sheet-on-u-s-opposition-to-nord-stream-2/, "Nord Stream 2 is a tool Russia is using to support its continued aggression against Ukraine. … Nord Stream 2 would enable Russia to bypass Ukraine for gas transit to Europe."

8. Nonproliferation

a. Country-specific sanctions

See each country listed above for sanctions related to proliferation activities.

b. Iran, North Korea, and Syria Nonproliferation Act ("INKSNA")

On May 14, 2019 the U.S. Government applied the measures authorized in Section 3 of the Iran, North Korea, and Syria Nonproliferation Act (Pub. L. 109–353) ("INKSNA") against several foreign individuals and entities (and their successors, sub-units, or subsidiaries) identified in the report submitted pursuant to Section 2(a) of the Act. 84 Fed. Reg. 23,627 (May 22, 2019). INKSNA applies to foreign entities and individuals for the transfer to or acquisition from Iran since January 1, 1999; the transfer to or acquisition from Syria since January 1, 2005; or the transfer to or acquisition from North Korea since January 1, 2006, of goods, services, or technology controlled under multilateral control lists (Missile Technology Control Regime, Australia Group, Chemical Weapons Convention, Nuclear Suppliers Group, Wassenaar Arrangement) or otherwise having the potential to make a material contribution to the development of weapons of mass destruction (WMD) or cruise or ballistic missile systems. *Id*.

The list of those sanctioned on May 14, 2019 follows: Abascience Tech Co., Ltd. (China); Emily Liu (Chinese individual); Hope Wish Technologies Incorporated (China); Jiangsu Tianyuan Metal Powder Co Ltd (China); Li Fangwei (Chinese individual); Raybeam Optronics Co., Ltd (China); Ruan Runling (Chinese individual); Shanghai North Begins (China); Sinotech (Dalian) Carbon and Graphite Corporation (SCGC) (China); Sun Creative Zhejiang Technologies Inc (China); T-Rubber Co. Ltd (China); Wuhan Sanjiang Import and Export Co Ltd (China); Yenben Yansong Zaojiu Co Ltd (China); Defense Industries Organization (Iran); Gatchina Surface-to-Air Missile (SAM) Training Center (Russia); Instrument Design Bureau (KBP) Tula (Russia); Moscow Machine Building Plant Avangard (MMZ Avangard) (Russia); Army Supply Bureau (ASB) (Syria); Lebanese Hizballah (Syria); Megatrade (Syria); Syrian Air Force (Syria); and Syrian Scientific Studies and Research Center (SSCR) (Syria).

The measures imposed on these persons are a U.S. Government procurement ban; a ban on U.S. Government assistance; a ban on U.S. Government sales of defense and munitions items; and a prohibition on export licenses. *Id*. The measures remain in force for two years. *Id.*

9. Terrorism

a. UN and other coordinated multilateral action

In large part, the United States implements its counterterrorism obligations under UN Security Council resolutions concerning ISIL, al-Qaida and Afghanistan sanctions, as well as its obligations under UN Security Council resolutions concerning counterterrorism, through Executive Order 13224 of September 24, 2001. Among the resolutions for which the United States has addressed domestic compliance through E.O. 13224 designations are Resolutions 1267 (1999), 1373 (2001), 1988 (2011), 1989 (2011), 2253 (2015), and 2255 (2015). Executive Order 13224 imposes financial sanctions on persons who have been designated in the annex to the order; persons designated by the Secretary of State for having committed or for posing a significant risk of committing acts of terrorism; and persons designated by the Secretary of the Treasury for acting for

or on behalf of, or providing material support for, or being otherwise associated with, persons designated under the order. See 66 Fed. Reg. 49,079 (Sept. 25, 2001); see also *Digest 2001* at 881–93 and *Digest 2007* at 155–58.

On May 1, 2019, the State Department issued a press statement, available at https://www.state.gov/united-nations-1267-sanctions-committee-designation-of-masood-azhar/, welcoming the addition of Jaish-e-Mohammed ("JEM") leader Masood Azhar to the UN's 1267 ISIL and al-Qaida Sanctions List. The press statement goes on to say:

> JEM has been responsible for numerous terrorist attacks and is a serious threat to regional stability and peace in South Asia. JEM was designated by the United States as a Foreign Terrorist Organization and Specially Designated Global Terrorist (SDGT) in 2001 and has been listed by the UN since 2001. The United States also designated Azhar as an SDGT in 2010. As JEM's founder and leader, Azhar clearly met the criteria for designation by the UN. This listing requires all UN member states to implement an asset freeze, a travel ban, and an arms embargo against Azhar. We expect all countries to uphold these obligations.

On May 15, 2019, the State Department issued a press statement, available at https://www.state.gov/united-nations-1267-sanctions-committee-designation-of-isis-khorasan/, welcoming the UN 1267 Sanctions Committee's designation of ISIS-Khorasan, an ISIS affiliate operating primarily in Afghanistan. The press statement includes the following:

> …The United States previously designated ISIS-K as a Specially Designated Global Terrorist under Executive Order 13224 in September 2015, and as a Foreign Terrorist Organization under Section 219 of the Immigration and Nationality Act in January 2016. ISIS-K is the first ISIS affiliate to be designated by the UN.
>
> ISIS-K is responsible for dozens of attacks and killing hundreds of innocent civilians. This UN designation obligates all member states to implement a travel ban, arms embargo, and asset freeze on ISIS-K, actions that will cut the group off from the resources it needs to continue its terrorist activities.

In addition to Azhar and ISIS-K, the UN 1267 Sanctions Committee added several other designations to the ISIL and Al-Qaida sanctions list in 2019, all of whom had also been designated by the United States: Hamza Usama Muhammad bin Laden (February 28); Tariq Gidar Group (TGG) (March 22); Bah Ag Moussa (August 14); and Ali Maychou (August 14).

b. U.S. targeted financial sanctions

(1) New Executive Order

On September 9, 2019, the President signed E.O. 13886, "Modernizing Sanctions to Combat Terrorism." 84 Fed. Reg. 48041 (Sep. 12, 2019). A September 10, 2019 State Department media note, available at https://www.state.gov/terrorist-designations-under-amended-executive-order-to-modernize-sanctions-to-combat-terrorism/, explains that the new E.O. significantly updates designation authorities and enables the Department to more effectively sanction certain types of targets. The media note also lists the September 10, 2019 State Department and Treasury Department designations under E.O. 13224, as amended by E.O. 13886:

> Hurras al-Din, an al-Qa'ida-affiliated group in Syria, as a Specially Designated Global Terrorist (SDGT). The Department has also designated as SDGTs 12 leaders of previously designated groups, including Hizballah, HAMAS, Palestinian Islamic Jihad, ISIS, ISIS-Philippines, ISIS-West Africa, and Tehrik-e Taliban Pakistan. In addition to these actions, the Department of the Treasury has designated 15 terrorists affiliated with ISIS, ISIS-Philippines, ISIS-Khorasan, al-Qa'ida, HAMAS, and Iran's Islamic Revolutionary Guard Corps-Qods Force under the same authority.

See also September 10, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm772 (explaining how E.O. 13886 enhances E.O. 13224, including "new designation criteria … to more efficiently target leaders or officials of terrorists groups as well as individuals who participate in terrorist training").

Excerpts follow from E.O. 13886.

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* * * *

Section 1. Section 1 of Executive Order 13224 is hereby amended to read as follows:

"**Section 1**. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) persons listed in the Annex to this order;

(ii) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Attorney General, and the Secretary of Homeland Security:

(A) to have committed or have attempted to commit, to pose a significant risk of committing, or to have participated in training to commit acts of terrorism that threaten the security of United States nationals or the national security, foreign policy, or economy of the United States; or

(B) to be a leader of an entity:

(1) listed in the Annex to this order; or

(2) whose property and interests in property are blocked pursuant to a determination by the Secretary of State pursuant to this order;

(iii) persons determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Secretary of Homeland Security, and the Attorney General:

(A) to be owned, controlled, or directed by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order;

(B) to own or control, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order;

(C) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, an act of terrorism as defined in section 3(d) of this order, or any person whose property and interests in property are blocked pursuant to this order;

(D) to have participated in training related to terrorism provided by any person whose property and interests in property are blocked pursuant to this order;

(E) to be a leader or official of an entity whose property and interests in property are blocked pursuant to: (1) a determination by the Secretary of the Treasury pursuant to this order; or (2) subsection (a)(iv) of this section; or (F) to have attempted or conspired to engage in any of the activities described in subsections (a)(iii)(A) through (E) of this section;

(iv) persons whose property and interests in property were blocked pursuant to Executive Order 12947, as amended, on or after January 23, 1995, and remained blocked immediately prior to the effective date of this order.

(b) The Secretary of the Treasury is hereby authorized to prohibit the opening, and prohibit or impose strict conditions on the maintaining, in the United States, of a correspondent account or payable-through account of any foreign financial institution that the Secretary of the Treasury, in consultation with the Secretary of State, has determined, on or after the effective date of this order, has knowingly conducted or facilitated any significant transaction on behalf of any person whose property and interests in property are blocked pursuant to this order.

(c) The prohibitions in subsections (a) and (b) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

* * * *

(2) Department of State

(a) State Department designations

In 2019, the Department of State announced the designation of numerous entities and individuals (including their known aliases) pursuant to E.O. 13224 and E.O. 13224 as amended by E.O. 13886. For an up-to-date list of State Department terrorism designations, see https://www.state.gov/terrorist-designations-and-state-sponsors-of-terrorism/.

Akram ‘Abbas al-Kabi and the organization he leads, Harakat al-Nujaba (“HAN”),

were designated by the State Department pursuant to E.O. 13224 on February 28, 2019. 84 Fed. Reg. 9585 (Mar. 15, 2019). In a March 5, 2019 media note, available at https://www.state.gov/state-department-terrorist-designation-of-harakat-al-nujaba-han-and-akram-abbas-al-kabi/, the State Department provided the following information on the designations of HAN and Akram 'Abbas al-Kabi:

> Established in 2013 by al-Kabi, HAN is an Iran-backed Iraqi militia funded by but not under the control of the Iraqi government. HAN has openly pledged its loyalties to Iran and Iranian Supreme Leader Ayatollah Khamenei. Al-Kabi has publicly claimed that he would follow any order, including overthrowing the Iraqi government or fighting alongside the Houthis in Yemen, if Ayatollah Khamenei declared it to be a religious duty. Al-Kabi also claimed that Iran supports HAN both militarily and logistically, and stressed HAN's close ties with IRGC-QF Commander Qassem Soleimani and Hizballah Secretary-General Hassan Nasrallah, both SDGTs. The Department of the Treasury designated al-Kabi in 2008 under E.O. 13438 for planning and conducting multiple attacks against Coalition forces, including mortar and rocket launches into the International Zone.

The State Department designated Hizballah operative Husain Ali Hazzima under E.O. 13224 on March 6, 2019. 84 Fed. Reg. 31,654 (July 2, 2019). The State Department also designated Ali Maychou on July 2, 2019. 84 Fed. Reg. 35,176 (July 22, 2019); see also July 16, 2019 media note, available at https://www.state.gov/terrorist-designation-of-ali-maychou/. And the Department also designated the Balochistan Liberation Army (BLA) under E.O. 13224 on July 2, 2019. 84 Fed. Reg. 31,654 (July 2, 2019); see also July 2, 2019 media note, available at https://www.state.gov/terrorist-designations-of-balochistan-liberation-army-and-husain-ali-hazzima-and-amendments-to-the-terrorist-designations-of-jundallah/. The media note provides the following information about the designations:

- Husain Ali Hazzima is the Chief of Hizballah Unit 200. Hizballah was designated as an FTO in 1997 and as an SDGT in 2001. Unit 200 is the Intelligence Unit of Hizballah, and it analyzes and assesses information collected by Hizballah military units.
- BLA is an armed separatist group that targets security forces and civilians, mainly in ethnic Baloch areas of Pakistan. BLA has carried out several terrorist attacks in the past year, including a suicide attack in August 2018 that targeted Chinese engineers in Balochistan, a November 2018 attack on the Chinese consulate in Karachi, and a May 2019 attack against a luxury hotel in Gwadar, Balochistan.

The State Department designated Ali Karaki, Muhammad Haydar, and Baha' Abu al-'Ata pursuant to E.O. 13224 on September 10, 2019. 84 Fed. Reg. 49,372 (Sep. 19, 2019). Marwan Issa, Ibrahim 'Aqil, and Hurras al-Din were also designated on

September 10, 2019. 84 Fed. Reg. 49, 371 (Sep. 19, 2019). The following additional designations under E.O. 13224 were also made on September 10, 2019: Hajji Taysir, Muhammad al-Hindi, Fu'ad Shukr, and Faruq al-Suri. 84 Fed. Reg. 49,373 (Sep. 19, 2019). Hatib Hajan Sawadjaan was also designated under E.O. 13224 on September 10, 2019. 84 Fed. Reg. 49,370 (Sep. 19, 2019). And Abu Abdullah ibn Umar al-Barnawi and Noor Wali were likewise designated on September 10, 2019. 84 Fed. Reg. 49,374 (Sep. 19, 2019). See also September 10, 2019 media note (cited *supra* for announcing new E.O. 13886, and available at https://www.state.gov/terrorist-designations-under-amended-executive-order-to-modernize-sanctions-to-combat-terrorism/), which provides further background on those designated on September 10:

- **Noor Wali**: Noor Wali, also known as Mufti Noor Wali Mehsud, was named the leader of Tehrik-e Taliban Pakistan (TTP) in June 2018 following the death of former TTP leader Mullah Fazlullah. Under Noor Wali's leadership, TTP has claimed responsibility for numerous deadly terrorist attacks across Pakistan.
- **Marwan Issa**: Marwan Issa is the deputy commander of the Izz Al-Din Al-Qassam Brigades, the operational arm of HAMAS.
- **Muhammad al-Hindi**: Muhammad al-Hindi is the Deputy Secretary General of the Palestinian Islamic Jihad.
- **Baha' Abu al-'Ata**: Baha' Abu al-'Ata, a member of the Palestinian Islamic Jihad's Higher Military Council, is a commander of the Gaza and North Battalion in the Al-Quds Brigade.
- **Ali Karaki**: Ali Karaki, is a senior leader within Hizballah's Jihad Council. He led Mu'awaniyeh 105 (Southern Command) and was responsible for military operations in southern Lebanon. Southern Command was divided into five geographic fronts (Mihwar), each consisting of a group of villages in a geographically contiguous strip.
- **Muhammad Haydar**: Muhammad Haydar is a senior leader within Hizballah's Jihad Council. Haydar was the Chief of Bureau 113, and ran Hizballah networks operating outside of Lebanon and appointed leaders of various units. He was very close to deceased senior Hizballah official Imad Mughniyah. In 2004, Haydar was elected to the Lebanese Parliament.
- **Fu'ad Shukr**: Fu'ad Shukr, a senior Hizballah Jihad Council member, oversaw Hizballah's specialized weapons units in Syria, including its missile and rocket unit. He is a senior military advisor to Hizballah Secretary General Hasan Nasrallah and played a central role in the planning and execution of the October 23, 1983 U.S. Marine Corps Barracks Bombing in Beirut, Lebanon, which killed 241 U.S. service personnel.
- **Ibrahim 'Aqil**: Ibrahim 'Aqil, a senior Hizballah Jihad Council member, is Hizballah's military operations commander.
- **Hajji Taysir**: Hajji Taysir is an ISIS senior leader and reports to Abu Bakr al-Baghdadi. As the ISIS Wali of Iraq and former amir of improvised explosive devices, Hajji Taysir likely ordered IED attacks in the region. He was considered a booby-trap expert while working in ISIS' booby-trap headquarters in 2016.
- **Abu Abdullah ibn Umar al-Barnawi**: Abu Abdullah ibn Umar al-Barnawi, Amir of ISIS-West Africa, was previously active in Boko Haram.

- **Hatib Hajan Sawadjaan**: Hatib Hajan Sawadjaan is the amir of ISIS-Philippines and is the mastermind behind the January 27, 2019 Jolo City cathedral bombing that killed 23 and wounded 109.
- **Hurras al-Din**: Hurras al-Din is an al-Qa'ida-affiliated jihadist group that emerged in Syria in early 2018 after several factions broke away from Hayat Tahrir al-Sham.
- **Faruq al-Suri**: Syrian national Faruq al-Suri, also known as Abu Humam al-Shami, is the leader of Hurras al-Din and a former al-Nusra Front military commander in Syria.

The Department of State designated Amadou Kouffa under E.O. 13224. 84 Fed. Reg. 66,955 (Dec. 6, 2019). A November 7, 2019 State Department media note, available at https://www.state.gov/u-s-department-of-state-terrorist-designation-of-amadou-kouffa/, provides background on the designation:

> Amadou Kouffa is a senior member in Jama'at Nusrat al-Islam wal-Muslimin (JNIM), an al-Qa'ida affiliate active in the Sahel region of Africa, which the Department of State designated as a Foreign Terrorist Organization and SDGT in September 2018. JNIM was formed in March 2017 and is led by Iyad ag Ghali, a designated SDGT.
>
> JNIM has claimed responsibility for numerous attacks and kidnappings since March 2017, killing more than 500 civilians. These include the June 2017 attack at a resort frequented by Westerners outside of Bamako, Mali; several deadly attacks on Malian troops; and the large-scale coordinated attacks in Ouagadougou, Burkina Faso, on March 2, 2018. Earlier this year, Kouffa led an attack against the Malian army in which more than 20 soldiers were killed.

(b) State Department amendments

Two designations by the State Department under E.O. 13224 were amended in 2019. The designation of the Islamic State of Iraq and Syria ("ISIS") was amended to add additional aliases (Amaq News Agency, Al Hayat Media Center, and others). 84 Fed. Reg. 10,882 (Mar. 22, 2019). The designation of Jundallah was amended to reflect its new primary name, Jaysh al-Adi, and additional aliases. 84 Fed. Reg. 31,655 (July 2, 2019); see also July 2, 2019 media note, available at https://www.state.gov/terrorist-designations-of-balochistan-liberation-army-and-husain-ali-hazzima-and-amendments-to-the-terrorist-designations-of-jundallah/.

(3) OFAC

OFAC designated numerous individuals (including their known aliases) and entities pursuant to Executive Order 13224 during 2019. The individuals and entities designated by OFAC are typically owned or controlled by, act for or on behalf of, or provide support for or services to, individuals or entities the United States has designated as terrorist

organizations pursuant to the order.

OFAC designated thirteen individuals and nineteen entities pursuant to E.O. 13224 in the first quarter of 2019. See January 24, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm590 (four entities: FATEMIYOUN DIVISION, FLIGHT TRAVEL LLC, QESHM FARS AIR and ZAYNABIYOUN BRIGADE); 84 Fed. Reg. 4901 (Feb. 19, 2019) (one entity, NEW HORIZON ORGANIZATION, and four individuals—Hamed GHASHGHAVI, Gholamreza MONTAZAMI, Nader Talebzadeh ORDOUBADI, and Zeinab Mehanna TALEBZADEH) (February 13, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm611); March 26, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm639 (describing designated persons as "a network of Iran, UAE, and Turkey-based front companies, that have transferred over a billion dollars and euros to the Islamic Revolutionary Guard Corps (IRGC) and Iran's Ministry of Defense and Armed Forces Logistics (MODAFL);" nine individuals—Mohammad Reza ALE ALI, Alireza ATABAKI, Reza Sakan DASTGIRI, Ayatollah EBRAHIMI, Iman Sedaghat GALESHKALAMI, Ali Shams MULAVI, Suleyman SAKAN, Asadollah SEIFI, Mohammad VAKILI—and fourteen entities—ANSAR BANK BROKERAGE COMPANY, ANSAR EXCHANGE, ANSAR INFORMATION TECHNOLOGY COMPANY, ATLAS DOVIZ TICARETI A.S., ATLAS EXCHANGE, GOLDEN COMMODITIES LLC, HITAL EXCHANGE, IRANIAN ATLAS COMPANY, LEBRA MOON GENERAL TRADING LLC, NARIA GENERAL TRADING LLC, SAKAN EXCHANGE, SAKAN GENERAL TRADING, THE BEST LEADER GENERAL TRADING LLC, ZAGROS PARDIS KISH).**

OFAC designated 23 individuals and five entities in the second quarter of 2019. See 84 Fed. Reg. 16,567 (Apr. 19, 2019) (Mohammad Ibrahim BAZZI); 84 Fed. Reg. 16,567 (Apr. 19, 2019) (two individuals—Eddie ALEONG and Emraan ALI); 84 Fed. Reg. 16,568 (Apr. 19, 2019) (seven individuals—Mushtaq Talib Zughayr AL-RAWI, Umar Talib Zughayr AL-RAWI, Walid Talib Zughayr AL-RAWI, Muhannad Mushtaq Talib Zghayir Karhout AL-RAWI, Abd-al-Rahman 'Ali Husayn al-Ahmad AL-RAWI, Muhammad Abd-al-Qadir Mutni Assaf AL-RAWI, Halima Adan ALI—and one entity, AL-ARD AL-JADIDAH MONEY EXCHANGE COMPANY) (see April 15, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm657, describing those designated as part of the "Rawi Network, a key ISIS financial facilitation group based out of Iraq"); 84 Fed. Reg. 22,223 (May 16, 2019) (two individuals—Hassan TABAJA and Wael BAZZI; and three entities—BSQRD LIMITED, OFFISCOOP NV, and VOLTRA TRANSCOR ENERGY BVBA)*** (April 24, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm668); 84 Fed. Reg. 28,395 (June 18, 2019) (one entity—SOUTH WEALTH RESOURCES COMPANY—and two individuals—Makki Kazim 'ABD AL-HAMID AL-ASADI and Mohammed Hussein SALIH AL HASANI) (June 12, 2019 Treasury Department press release, available at

** Editor's note: also as part of the actions against this network, OFAC amended the previous designations of Ansar Bank and MODAFL under other authorities to include their designation pursuant to E.O. 13224.

*** Editor's note: OFAC also updated the listing of a previously designated entity, with a new name and address information: ENERGY ENGINEERS PROCUREMENT AND CONSTRUCTION (previously GLOBAL TRADING GROUP NV).

https://home.treasury.gov/news/press-releases/sm706); 84 Fed. Reg. 31,141 (June 28, 2019) (eight individuals: Amir Ali HAJIZADEH, Ali Reza TANGSIRI, Abbas GHOLAMSHAHI, Ramezan ZIRAHI, Yadollah BADIN, Mansur RAVANKAR, Ali OZMA'I, Mohammad PAKPOUR) (June 24, 2019 Treasury Department press release, available at https://home.treasury.gov/index.php/news/press-releases/sm716); 84 Fed. Reg. 35,180 (July 22, 2019) (one individual, Bah Ag MOUSSA) (the July 16, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm730, explains that Moussa was designated for acting for or on behalf of Jama'at Nusrat al-Islam wal-Muslimin ("JNIM"), a west African terrorist group designated in September 2018, and JNIM leader Iyad ag Ghali).

OFAC designated 44 entities and 48 individuals in the third quarter of 2019. See 84 Fed. Reg. 33,811 (July 15, 2019) (three individuals linked to Hizballah: Muhammad Hasan RA'D, Wafiq SAFA, Amin SHERRI) (see also July 9, 2019 State Department media note announcing these designations, available at https://www.state.gov/statement-on-sanctioning-of-three-senior-hizballah-officials/ and July 9, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm724); 84 Fed. Reg. 37,004 (July 30, 2019) (one individual, Salman Raouf SALMAN) (see also Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm737); 84 Fed. Reg. 39,394 (Aug. 9, 2019) (one individual, Fadi Hussein SERHAN); 84 Fed. Reg. 46,782 (Sep. 5, 2019) (four entities linked to Hizballah: JAMMAL TRUST BANK S.A.L., TRUST INSURANCE S.A.L., TRUST INSURANCE SERVICES S.A.L, TRUST LIFE INSURANCE COMPANY S.A.L.); 84 Fed. Reg. 46,783 (Sep. 5, 2019) (four individuals linked to Hamas: Muhammad SARUR, Kamal Abdelrahman Aref AWAD, Fawaz Mahmud Ali NASSER, Muhammad Kamal AL–AYY; see also August 29, 2019 State Department press statement, available at https://www.state.gov/on-sanctioning-of-four-financial-facilitators-for-hamas/, regarding "four financial facilitators responsible for moving tens of millions of dollars between Iran's Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF) and Hamas's Izz-Al-Din Al-Qassam Brigades in Gaza;" and see Department of Treasury press release on these designations, available at https://home.treasury.gov/news/press-releases/sm761); Treasury Department September 4, 2019 press release, available at https://home.treasury.gov/news/press-releases/sm767 (designating 16 entities—AFRICO 1 OFF-SHORE SAL, ALUMIX, BUSHRA SHIP MANAGEMENT PRIVATE LIMITED, FIVE ENERGY OIL TRADING, FOURTEEN STAR SHIPPING MANAGEMENT, HAMRAHAN PISHRO TEJARAT TRADING COMPANY, HOKOUL SAL OFFSHORE, KHADIJA SHIP MANAGEMENT PRIVATE LIMITED, KISH P AND I CLUB, MEHDI GROUP, MEHDI OFFSHORE AND SHIP MANAGEMENT PTE. LTD., NAGHAM AL HAYAT LTD., PENTA OCEAN SHIP MANAGEMENT AND OPERATION LLC, TALAQI GROUP, TAWAFUK LTD, VANIYA SHIP MANAGEMENT PRIVATE LIMITED—and 10 individuals—Mohammadreza Ali AKBARI, Shamsollah ASADI, Mahmud ASHTARI, Auj BHARDWAJ, Morteza QASEMI, Zafar Anis Ishteyaq HUSSAIN, Ali Ghadeer MEHDI, Alizaheer Mohammad MEHDI, Ali QASIR, and Rostem QASEMI (previously designated pursuant to E.O. 13382)—forming a shipping network directed by and providing support for the Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF) and its terrorist proxy Hizballah) (see also September 4, 2019 State Department media note, available at

https://www.state.gov/sanctioning-of-vast-irgc-qf-petroleum-shipping-network/, regarding the same network); 84 Fed. Reg. 48,994 (Sep. 17, 2019) (19 individuals—Abu ABBAS, Ramadan ABDALLAH, Mousa Mohammed ABU MARZOOK, Shaykh Umar Abd AL RAHMAN, Dr. Ayman AL ZAWAHIRI, Abu Hafs AL-MASRI, Abbud AL-ZUMAR, Abd Al Aziz AWDA, Usama bin Muhammad bin Awad BIN LADIN, Shaykh Muhammad Husayn FADLALLAH, George HABBASH, Nayif HAWATMA, Mohammad Shawqi ISLAMBOULI, Ahmad JABRIL, Rifa'i Ahmad Taha MUSA, Talal Muhammad Rashid NAJI, Hasan NASRALLAH, Subhi TUFAYLI, Sheik Ahmed Ismail YASSIN—and 14 entities— AL QA'IDA, AL-AQSA ISLAMIC BANK, AL-AQSA MARTYRS BRIGADE, BEIT EL-MAL HOLDINGS, DEMOCRATIC FRONT FOR THE LIBERATION OF PALESTINE—HAWATMEH FACTION, GAMA'A AL-ISLAMIYYA, HAMAS, HIZBALLAH, HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, KAHANE CHAI, PALESTINE ISLAMIC JIHAD— SHAQAQI FACTION, PALESTINE LIBERATION FRONT—ABU ABBAS FACTION, POPULAR FRONT FOR THE LIBERATION OF PALESTINE, POPULAR FRONT FOR THE LIBERATION OF PALESTINE—GENERAL COMMAND); 84 Fed. Reg. 48,996 (Sep. 17, 2019) (nine individuals—Mohamed Ahmed Elsayed Ahmed IBRAHIM, Muhammad Sa'id IZADI, Zaher JABARIN, Marwan Mahdi Salah AL–RAWI, Ismael TASH, Mohamad AMEEN, Muhammad Ali Sayid AHMAD, Almaida Marani SALVIN, Muhamad Ali AL–HEBO—and six entities linked to ISIL—AL HARAM FOREIGN EXCHANGE CO. LTD, SAKSOUK COMPANY FOR EXCHANGE AND MONEY TRANSFER, REDIN EXCHANGE, SMART ITHALAT IHRACAT DIS TICARET LIMITED SIRKETI, AL–HEBO JEWELRY COMPANY, and AL–KHALIDI EXCHANGE); 84 Fed. Reg. 50,884 (Sep. 26, 2019) (three Iranian entities: BANK MARKAZI JOMHOURI ISLAMI IRAN (the CENTRAL BANK OF IRAN), NATIONAL DEVELOPMENT FUND OF IRAN, and ETEMAD TEJARATE PARS CO) (see Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm780). The September 20, 2019 State Department press statement regarding these designations is available at https://www.state.gov/u-s-sanctions-irans-central-bank-national-development-fund-and-etemad-tejarat-pars/, regarding certain designations:

> In a failed attempt to disrupt the global economy, the Islamic Republic of Iran attacked the Kingdom of Saudi Arabia. This act of aggression was sophisticated in its planning and brazen in its execution. Regardless of transparent attempts to shift blame, the evidence points to Iran—and only Iran. As a result, President Trump instructed his administration to substantially increase the already-historic sanctions on the world's leading state sponsor of terrorism. Today, we have followed through on his direction.
>
> The United States has sanctioned Iran's Central Bank and its National Development Fund, as well as Etemad Tejarat Pars, an Iran-based company, which has been found to conceal financial transfers for military purchases. These entities support the regime's terrorism and regional aggression by financing the Islamic Revolutionary Guard Corps, a designated Foreign Terrorist Organization, its Qods Force, and Hizballah, the Iranian regime's chief proxy force.

Also on August 29, 2019, the State Department issued a statement, available at

https://www.state.gov/sanctioning-of-jammal-trust-bank/, regarding the E.O. 13224 sanctions on Lebanon-based Jammal Trust Bank SAL for supporting Hizballah's illicit financial and banking activities. On August 30, 2019, the State Department issued a press statement, available at https://www.state.gov/united-states-sanctions-irgc-qods-force-oil-network/, on the E.O. 13224 designation of ship captain Kumar Akhilesh for acting for or on behalf of the IRGC-Qods Force and blocking of the vessel. OFAC designated Akhilesh and identified the Adrian Darya 1, "an oil tanker transporting 2.1 million barrels of Iranian crude oil ultimately benefitting Iran's Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF)." August 30, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm765.

OFAC designated eight individuals and 28 entities pursuant to E.O. 13224 in the fourth quarter of 2019: 84 Fed. Reg. 55,379 (Oct. 16, 2019) (one entity, BAHMAN GROUP); 84 Fed. Reg. 65,216 (Nov. 26, 2019) and Treasury press release, available at https://home.treasury.gov/news/press-releases/sm831 (four individuals—Sayed Habib Ahmad KHAN, Rohullah WAKIL, Ismail BAYALTUN, and Ahmet BAYALTUN—and five entities—SAHLOUL MONEY EXCHANGE COMPANY, AL SULTAN MONEY TRANSFER COMPANY, NEJAAT SOCIAL WELFARE ORGANIZATION, TAWASUL COMPANY, and ACL ITHALAT IHRACAT); Treasury press release, available at https://home.treasury.gov/index.php/news/press-releases/sm853 (one individual—Abdolhossein KHEDRI—and five entities—GATEWICK LLC, GOMEI AIR SERVICES CO., LTD., JAHAN DESTINATIONS TRAVEL AND TOURISM LLC, KHEDRI JAHAN DARYA CO, , and MARITIME SILK ROAD LLC); 84 Fed. Reg. 70,266 (Dec. 20, 2019) (three individuals—Nazem Said AHMAD, Saleh ASSI, and Tony SAAB—and seventeen entities—ARAMOUN 1506 SAL, BEIRUT DIAM SAL, BEIRUT GEM SAL, BEIRUT TRADE SAL, BLUE STAR DIAMOND SAL—OFFSHORE, DAMOUR 850 SAL, DEBBIYE 143 SAL, GEBAA 2480 SAL, MONTECARLO BEACH SAL, NOUMAYRIYE 1057 SAL, NOUR HOLDING SAL, AL YUMUN REAL ESTATE COMPANY SAL, INTER ALIMENT SAL OFF-SHORE, MINOCONGO, PAIN VICTOIRE, SALASKO OFFSHORE S.A.L., and TRANS GAZELLE); see also December 13, 2019 Treasury Department press release, available at https://home.treasury.gov/index.php/news/press-releases/sm856, and December 13, 2019 State Department press statement, available at https://www.state.gov/u-s-designates-lebanese-businessmen-who-have-supported-hizballah/. The State Department press release regarding designations of "two prominent Lebanese businessmen whose illicit financial activities, including money laundering and tax evasion, have provided financial support for Hizballah," also includes the following:

> Nazem Ahmad and Saleh Assi's years of illegitimate business activity to gather and funnel illicit proceeds to Hizballah demonstrate yet again that Hizballah is concerned first and foremost with funding itself and disregards the interests of Lebanon and the Lebanese people. Ahmad and Assi have concealed their illicit revenue from the Lebanese government through means including money laundering, trafficking in conflict diamonds, and tax evasion. They have thereby deprived Lebanon of much-needed tax revenue to ensure there was more money for Hizballah and themselves.

> …The designations of Ahmad and Assi, their associate Tony Saab, and their affiliated companies are one tool the United States has deployed to disrupt Hizballah's financial facilitation networks and increase pressure on the group. We will continue to bring pressure on Hizballah and those who support it until Hizballah abandons its terrorist activity.

c. Annual certification regarding cooperation in U.S. antiterrorism efforts

See Chapter 3 for discussion of the Secretary of State's 2019 determination regarding countries not cooperating fully with U.S. antiterrorism efforts.

10. Cyber Activity and Election Interference

a. Malicious Cyber-Enabled Activities

For background on E.O. 13694 of April 1, 2015, ''Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities," see *Digest 2015* at 677-78.

As discussed *infra*, on September 30, 2019, OFAC designated several individuals and entities pursuant to E.O. 13848 (election interference), some of whom were also designated pursuant to E.O. 13694: AUTOLEX TRANSPORT LTD., BERATEX GROUP LIMITED, and LINBURG INDUSTRIES LTD. 84 Fed. Reg. 53,241 (Oct. 4, 2019).

On December 5, 2019, OFAC designated seventeen individuals—Carlos ALVARES, Aleksei BASHLIKOV, Gulsara BURKHONOVA, David GUBERMAN, Georgios MANIDIS, Azamat SAFAROV, Tatiana SHEVCHUK, Ruslan ZAMULKO, Denis Igorevich GUSEV, Andrey PLOTNITSKIY, Dmitriy Alekseyevich SLOBODSKOY, Kirill Alekseyevich SLOBODSKOY, Dmitriy Konstantinovich SMIRNOV, Ivan Dmitriyevich TUCHKOV, Igor Olegovich TURASHEV, Maksim Viktorovich YAKUBETS, and Artem Viktorovich YAKUBETS—and seven entities—EVIL CORP, BIZNES-STOLITSA, OOO, OPTIMA, OOO, TREID-INVEST, OOO, TSAO, OOO, VERTIKAL, OOO, and YUNIKOM, OOO—pursuant to E.O. 13694. 84 Fed. Reg. 67,772 (Dec. 11, 2019). See also December 5, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm845.

b. Election Interference

On September 12, 2018, the President issued E.O. 13848, "Imposing Certain Sanctions in the Event of Foreign Interference in a United States Election." 83 Fed. Reg. 46,843 (Sep. 14, 2018). Among other things, the order requires an assessment of and a report about any election interference and mandates and authorizes certain sanctions in light of the assessment and report.

On September 30, 2019, OFAC designated the following individuals and entities linked to INTERNET RESEARCH AGENCY pursuant to E.O. 13848 (along with certain aircraft and a vessel not listed herein): seven individuals—Dzheykhun Nasimi Ogly

ASLANOV, Mikhail Leonidovich BURCHIK, Denis Igorevich KUZMIN, Igor Vladimirovich NESTEROV, Vadim Vladimirovich PODKOPAEV, Yevgeniy Viktorovich PRIGOZHIN, Vladimir Dmitriyevich VENKOV—and four entities—AUTOLEX TRANSPORT LTD. (also designated pursuant to E.O. 13694 for cyber activities and E.O. 13661 regarding the situation in Ukraine), BERATEX GROUP LIMITED (also designated pursuant to E.O. 13694 and E.O. 13661), LINBURG INDUSTRIES LTD. (also designated pursuant to E.O. 13694 and E.O. 13661), and INTERNET RESEARCH AGENCY LLC. 84 Fed. Reg. 53,241 (Oct. 4, 2019); Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm787; see also September 30, 2019 State Department press statement, available at https://www.state.gov/u-s-targets-russian-actors-involved-in-efforts-to-influence-u-s-elections/, which includes the following:

> Today, the United States continues to take action in response to Russian attempts to influence U.S. democratic processes by imposing sanctions on four entities and seven individuals associated with the Internet Research Agency and its financier, Yevgeniy Prigozhin. This action increases pressure on Prigozhin by targeting his luxury assets, including three aircraft and a vessel.

11. The Russia Magnitsky and Global Magnitsky Sanctions Programs and Other Measures Aimed at Corruption and Human Rights Violations

a. The Russia Magnitsky Act

On May 16, 2019, OFAC designated the following pursuant to the Magnitsky Act: five Individuals—Ruslan GEREMEYEV, Gennady Vyacheslavovich KARLOV, Sergey Leonidovich KOSSIEV, Elena Anatolievna TRIKULYA, Abuzayed VISMURADOV—and one entity, TEREK SPECIAL RAPID RESPONSE TEAM. 84 Fed. Reg. 27,190 (June 11, 2019). A May 16, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm691, provides information on those designated:

> Today, OFAC designated Elena Anatolievna Trikulya (Trikulya) for having participated in efforts to conceal the legal liability for the detention, abuse, or death of Sergei Magnitsky. As an investigator with the Investigative Committee, Trikulya ignored evidence and signed the denial of a petition to initiate a criminal inquiry into those responsible for Magnitsky's unlawful detention and death. Trikulya's actions demonstrate her participation in efforts to prevent the pursuit of justice for those involved in Magnitsky's detention, abuse, or death.
>
> OFAC also designated Gennady Vyacheslavovich Karlov (Karlov) for having participated in efforts to conceal the legal liability for the detention, abuse, or death of Sergei Magnitsky. As the Deputy Section Chief of the Investigative Committee of the Ministry of Internal Affairs, Karlov made false or misleading claims about Magnitsky's detention and abuse, which in turn provided a justification for Magnitsky's detention. Karlov also oversaw aspects of Magnitsky's detention, including a decision not to respond to complaints made by

Magnitsky about his deteriorating health, a decision to transfer Magnitsky to a different prison facility one week prior to a scheduled surgery, and the denial of Magnitsky's requests to allow a visit by his relatives.

Today, OFAC also designated Abuzayed Vismuradov (Vismuradov) for being responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals seeking to expose illegal activity carried out by officials of the Government of the Russian Federation, or to obtain, exercise, defend, or promote internationally recognized human rights and freedoms, such as the freedoms of religion, expression, association, and assembly, and the rights to a fair trial and democratic elections, in Russia. As the commander of the Terek Special Rapid Response Team in the Chechen Republic, Vismuradov was in charge of an operation that illegally detained and tortured individuals on the basis of their actual or perceived LGBTI status.

OFAC also designated the Terek Special Rapid Response Team for being responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals seeking to expose illegal activity carried out by officials of the Government of the Russian Federation, or to obtain, exercise, defend, or promote internationally recognized human rights and freedoms, such as the freedoms of religion, expression, association, and assembly, and the rights to a fair trial and democratic elections, in Russia. Fighters of the Terek Special Response Team detained and tortured persons they believed to be LGBTI, sometimes after the individuals were lured to meetings using social media.

Sergey Leonidovich Kossiev (Kossiev) is also being designated by OFAC for being responsible for extrajudicial killing, torture, or other gross violations of internationally recognized human rights committed against individuals seeking to obtain, exercise, defend, or promote internationally recognized human rights and freedoms, such as the freedoms of religion, expression, association, and assembly, and the rights to a fair trial and democratic elections, in Russia. As the head of the Corrective Colony 7 (IK-7) penal colony in the Republic of Karelia, Kossiev oversaw and participated in the beatings and abuse of prisoners. Kossiev oversaw and participated in the beatings and abuse of prisoners, and attempted to conceal the evidence of such abuse.

Finally, OFAC is designating Ruslan Geremeyev (Geremeyev) for acting as an agent of or on behalf of Head of Chechen Republic Ramzan Kadyrov in a matter relating to extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals seeking to obtain, exercise, defend, or promote internationally recognized human rights and freedoms, such as the freedoms of religion, expression, association, and assembly, and the rights to a fair trial and democratic election in Russia. OFAC designated Ramzan Kadyrov pursuant to the Magnitsky Act on December 20, 2017. Geremeyev is a former deputy commander of the Sever Battalion in Chechnya, which is considered part of Kadyrov's personal guard. Russian investigators twice tried to bring charges against Geremeyev as the possible organizer of Boris

> Nemtsov's murder, but were blocked by the head of the Investigations Committee.

b. The Global Magnitsky Sanctions Program

On December 23, 2016, the Global Magnitsky Human Rights Accountability Act (Pub. L. 114–328, Subtitle F) (the "Global Magnitsky Act" or ''Act'') was enacted, authorizing the President to impose financial sanctions and visa restrictions on foreign persons in response to certain human rights violations and acts of corruption. The administration is required by the Act to submit a report on implementation of the Act and efforts to encourage other governments to enact similar sanctions. On December 20, 2017, the President issued E.O. 13818, "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption." 82 Fed. Reg. 60,839 (Dec. 26, 2017). E .O. 13818 implements and builds upon the Global Magnitsky Act. See *Digest 2017* at 669-71 for background on E.O. 13818.

On May 17, 2019, OFAC designated the following pursuant to the Global Magnitsky program and E.O. 13818: four individuals (Ana Lilia LOPEZ TORRES, Roberto SANDOVAL CASTANEDA, Lidy Alejandra SANDOVAL LOPEZ, and Pablo Roberto SANDOVAL LOPEZ) and four entities (BODECARNE, IYARI, L–INMO, and VALOR Y PRINCIPIO DE DAR). 84 Fed. Reg. 23,635 (May 22, 2019); May 17, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm692.

On July 18 2019, OFAC designated the following four individuals pursuant to the Global Magnitsky program and E.O. 13818: Rayan AL-KILDANI, Waad QADO, Nawfal Hammadi AL-SULTAN, Ahmad Abdullah AL-JUBOURI. 84 Fed. Reg. 35,452 (July 23, 2019). See also Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm735, which provides information on the designated individuals:

> Al-Kildani is the leader of the 50th Brigade militia. In May 2018, a video circulated among Iraqi human rights civil society organizations in which al-Kildani cut off the ear of a handcuffed detainee.
>
> The 50th Brigade is reportedly the primary impediment to the return of internally displaced persons to the Ninewa Plain. … accused … of intimidation, extortion, and harassment of women.
>
> Qado is the leader of the 30th Brigade militia. The 30th Brigade has extracted money from the population around Bartalla, in the Ninewa Plain, through extortion, illegal arrests, and kidnappings. The 30th Brigade has frequently detained people without warrants, or with fraudulent warrants, and has charged arbitrary customs fees at its checkpoints. Members of the local population allege that the 30th Brigade has been responsible for egregious offenses including physical intimidation, extortion, robbery, kidnapping, and rape.
>
> Al-Sultan is a former governor of Ninewa Province, Iraq. Following a ferry accident in Ninewa's capital, Mosul, that killed nearly 100 people, Iraq's parliament removed al-Sultan from office. The ferry, loaded to five times its capacity, had been carrying families to an island on the Tigris River when it

> sank. Iraqi authorities have issued an arrest warrant for the former governor, who fled shortly after the accident.
>
> Al-Sultan has faced allegations of widespread corruption since 1994. He was removed from his first post as mayor because of corruption and a conviction on smuggling charges. In 2017, the United Nations Development Program suspended reconstruction projects after multiple allegations of al-Sultan siphoning off United Nations funds.
>
> Al-Jubouri, also known as Abu Mazin, is a former governor of Salah al-Din, Iraq, and current Member of Parliament who has engaged in corruption. Al-Jubouri was removed as governor and sentenced to prison in July 2017 upon conviction for misusing authority and federal funds and appropriating land for personal use. Al-Jubouri has since been released. Al-Jubouri has been known to protect his personal interests by accommodating Iran-backed proxies that operate outside of state control.

On September 13, 2019, OFAC designated Kale KAYIHURA pursuant to E.O. 13818 for involvement in both serious human rights abuse and corruption. 84 Fed. Reg. 58,456 (Oct. 31, 2019); see also September 13, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm775, which explains that the OFAC action was in conjunction with the State Department's Section 7031(c) designation of Kayihura, discussed *infra*. The Treasury Department press release describes Kayihura as follows:

> As the [Inspector General of Police (IGP) of the Ugandan Police Force (UPF)], Kayihura led individuals from the UPF's Flying Squad Unit, which has engaged in the inhumane treatment of detainees at the Nalufenya Special Investigations Center (NSIC). Flying Squad Unit members reportedly used sticks and rifle butts to abuse NSIC detainees, and officers at NSIC are accused of having beaten one of the detainees with blunt instruments to the point that he lost consciousness. Detainees also reported that after being subjected to the abuse they were offered significant sums of money if they confessed to their involvement in a crime.
>
> In addition, Kayihura has engaged in numerous acts of corruption, including using bribery to strengthen his political position within the Government of Uganda, stealing funds intended for official Ugandan government business, and using another government employee to smuggle illicit goods, including drugs, gold, and wildlife, out of Uganda.

On October 10, 2019, OFAC sanctioned four individuals for corruption in South Africa pursuant to E.O. 13818: Salim ESSA, Ajay GUPTA, Atul GUPTA, and Rajesh GUPTA. 84 Fed. Reg. 58,456 (Oct. 31, 2019); Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm789; see also State Department press statement, available at https://www.state.gov/global-magnitsky-sanctions-against-corruption-network-in-south-africa/. The State Department press statement includes the following:

> We commend the critical role played by South Africa's civil society activists, whistleblowers, and investigative journalists to shine the spotlight on the Gupta network's elicitation of criminal abuse of public office and other acts of corruption, which have deterred investment and impeded South Africa's economic growth. The United States strongly supports ongoing efforts by the Government of South Africa, including its independent judiciary, judicial commissions of inquiry, and law enforcement agencies, to investigate and prosecute alleged instances of corruption. Successfully prosecuting and deterring corruption is essential to building a future of accountable government that fosters economic growth and opportunity for all of South Africa's citizens.

On October 11, 2019, OFAC designated two individuals and six entities pursuant to E.O. 13818 for involvement in corruption in South Sudan: Ashraf Seed Ahmed AL-CARDINAL and Kur AJING ATER; AL CARDINAL INVESTMENTS CO. LTD, ALCARDINAL GENERAL TRADING LIMITED, ALCARDINAL GENERAL TRADING LLC, ALCARDINAL PETROLEUM COMPANY LIMITED, NILETEL, and LOU TRADING AND INVESTMENT COMPANY LIMITED. 84 Fed. Reg. 58,457 (Oct. 31, 2019); see also State Department press statement, available at https://www.state.gov/treasury-sanctions-individuals-for-corruption-in-south-sudan/ and Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm790.

In a December 6, 2019 press statement, available at https://www.state.gov/on-sanctioning-those-involved-in-killing-protestors-and-corruption-in-iraq/, the State Department announced OFAC sanctions on four Iraqis pursuant to E.O. 13818 due to their involvement in serious human rights abuse and corruption. Those designated are: Iranian-backed militia leaders Qais AL-KHAZALI, Laith AL-KHAZALI, and Husayn Falih 'Aziz AL-LAMI, and Iraqi politician Khamis Farhan al-Khanjar AL-ISSAWI. See December 6, 2019 Treasury Department press release at https://home.treasury.gov/news/press-releases/sm847.

On December 6, 2019, the State Department held a special briefing with Assistant Secretary of State for Near Eastern Affairs David Schenker on designations of Iraqis pursuant to the Global Magnitsky program. The briefing is transcribed at https://www.state.gov/assistant-secretary-for-near-eastern-affairs-david-schenker-on-iraqi-global-magnitsky-designations/, and excerpted below.

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Today the United States is sanctioning three Iraqis for their involvement in the brutal crackdown on peaceful protesters in Iraq, and a fourth for corruption and bribery.

Treasury designated Qais al-Khazali, Laith al-Khazali, Husayn Falih 'Aziz al-Lami, pursuant to Executive Order 13818 for their involvement in serious human rights abuses in Iraq. Additionally, OFAC designated politician Khamis Farhan al-Khanjar al-Issawi for bribing government officials and engaging in widespread corruption at the expense of the Iraqi people.

According to the UN, over 400 Iraqis have been killed while protesting for better governance and a brighter future. For several months, the Iraqi people have led a patriotic quest for genuine reform and transparency in government. They have gone to the streets to raise their voices for a just government with leaders who will put Iraq's national interests first.

Frankly, without that commitment from Iraq's political leaders, it makes little difference who they designate as prime minister. As I said last week, Iraqis are fed up with economic stagnation, endemic corruption, and mismanagement. They want better from their leaders, and they want accountability.

Iraqis are also demanding their country back. Three of today's designees—al-Lami, Qais al-Khazali and Laith al-Khazali—were directed by Iranian regime when they or the armed groups they lead committed serious human rights abuses. Iraqis have paid a steep and bloody price for the malign influence of Iranian regime. Tehran claims it is exporting "revolution". It is increasingly clear to us and the people of the region, however, that the theocracy's top export is corruption and repression.

As for Khamis al-Khanjar, he's wielded significant political influence through the bribery of Iraqi political figures. The Iraqi people are protesting corruption of this very sort.

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In a December 10, 2019 press statement, the Department of State reviewed the Global Magnitsky designations made during 2019. The press statement is available at https://www.state.gov/united-states-takes-action-against-corruption-and-serious-human-rights-abuse/ and excerpted below.

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This week and last, the United States announced 72 sanctions designations under the Global Magnitsky sanctions program. These actions target serious human rights abuse and corruption on a global scale, demonstrating the United States' action to pursue tangible and significant consequences for those who undermine the rule of law, disregard internationally accepted human rights standards, and threaten the stability of international political and economic systems.

As the world recognizes International Anticorruption Day on December 9 and International Human Rights Day on December 10, the United States is doing its part to promote accountability by remaining committed to the American ideals underpinning Global Magnitsky. In 2019 alone, the United States has designated 97 individuals and entities under this program, which complement other tools and authorities the United States uses to impose economic and visa restrictions on malign actors. We will continue to leverage these tools to disrupt and deter human rights abuse and corruption around the globe in 2020 and beyond.

The United States also applauds our international partners for their commitment to these same ideals. We congratulate the European Union on its decision yesterday to pursue the development of an EU Human Rights Sanctions regime. These tools isolate, deter, and promote accountability for states, leaders, individuals, and entities whose actions run contrary to global values of respect for human rights and combatting corruption.

Finally, we also commend the courageous work of civil society and journalists, who play an important role in exposing human rights abuse and corruption and in holding public officials accountable. Together, we must strive to ensure those who have committed such acts are cut off from the benefits of access to our financial systems and our shores.

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Also on December 10, 2019, the State Department released a media note announcing a tranche of Global Magnitsky designations, which is available at https://www.state.gov/global-magnitsky-program-designations-for-corruption-and-serious-human-rights-abuse/, and excerpted below. See also Treasury Department press releases, available at https://home.treasury.gov/index.php/news/press-releases/sm849 and https://home.treasury.gov/news/press-releases/sm852.

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On International Anticorruption Day and International Human Rights Day, the United States reiterates its commitment to combat corruption and to promote and protect human rights globally. The Department of the Treasury's Office of Foreign Assets Control designated 68 individuals and entities pursuant to Executive Order (E.O.) 13818, which builds upon and implements the Global Magnitsky Human Rights Accountability Act, targeting corrupt individuals and perpetrators of serious human rights abuse.

Designations of the following individuals and entities under E.O. 13818 relate to corruption in Cambodia, Latvia, and Serbia:

TRY PHEAP—built a large-scale illegal logging network that relies on the collusion of Cambodian officials. In one instance, Try Pheap paid Cambodian National Park officials to keep his operations secret from the international community. …[E]leven Cambodia-registered entities owned or controlled by Try Pheap were also designated for corruption: […]

KUN KIM—a former senior General in the Royal Cambodian Armed Forces (RCAF), who has reaped significant financial benefit from his relationship with a People's Republic of China (PRC) state-owned entity. Kim used RCAF soldiers to intimidate, demolish, and clear out land sought by the PRC-owned entity. Three members of Kun Kim's family and five entities owned or controlled by these individuals were concurrently designated for corruption: […]

AIVARS LEMBERGS—the Mayor of Ventspils, Latvia, and an oligarch accused of money laundering, bribery, and abuse of office. The following four Latvia-based entities owned or controlled by Aivars Lembergs were also designated: […][***]

The following nine individuals and seven associated entities were designated for acting or purporting to act for or on behalf of Slobodan Tesic, a previously designated arms dealer.

GORAN ANDRIC—a close associate of Slobodan Tesic who facilitated arms deals on behalf of designated entities. An entity owned, controlled by, that acted on behalf of, or

[***] Editor's note: On December 18, 2019, OFAC removed sanctions imposed on the Ventspils Freeport Authority after the Latvian government passed legislation removing it from the control of oligarch Aivar Lembergs. See Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm860.

purported to have acted on behalf of Goran Andric and/or Slobodan Tesic was concurrently designated: **Velcom Trade D.O.O. Beograd**

ESAD KAPIDZIC—an associate of Slobodan Tesic who received and moved money on his behalf. Two entities owned, controlled by, that acted on behalf of, or are purported to have acted on behalf of Esad Kapidsic and/or Slobodan Tesic were concurrently designated: […]

NEBOJSA SARENAC—nephew and close associate of Slobodan Tesic who serves as managing director of previously designated entities associated with the Slobodan Tesic as well as of an entity concurrently designated: **Melvale Corporation D.O.O. Beograd**

ZORAN PETROVIC—managing director and principal of previously designated entity that has negotiated on Slobodan Tesic's behalf.

NIKOLA BRKIC—a principal and legal representative of a previously designated entity involved in Slobodan Tesic's arms network.

MILAN SUBOTIC—owner, managing director, and representative of the following Serbia-based entity concurrently designated for facilitating Slobodan Tesic's arms deals: **Vectura Trans DOO**

ZELIMIR PETROVIC—owner, managing director, and representative of … Serbia-based [**Araneks DOO]** concurrently designated for facilitating Slobodan Tesic's arms deals…

SRETEN CVJETKOVIC—part owner and legal representative of a previously designated entity involved in Slobodan Tesic's arms network.

LJUBO MARICIC—director of and former representative of previously designated entities involved in Slobodan Tesic's arms network.

In addition, three separate entities were designated for acting or purporting to act for or on behalf of Slobodan Tesic, a previously designated arms dealer. […]

Designations of the following individuals and entities under E.O. 13818 relate to serious human rights abuse in Burma, Pakistan, Slovakia, Libya, the Democratic Republic of Congo, and South Sudan:

MIN AUNG HLAING—Commander-in-Chief of the Burmese security forces, members of which have committed serious human rights abuse under his command.

SOE WIN—Deputy Commander-in-Chief of the Burmese security forces, members of which have committed serious human rights abuse during his tenure.

THAN OO—a leader of the 99th Light Infantry Division (Burma), an entity whose members have engaged in serious human rights abuse under his command.

AUNG AUNG—a leader of the 33rd Light Infantry Division (Burma), an entity whose members have engaged in serious human rights abuse under his command.

These designations do not affect Burmese military-owned or operated enterprises.

RAO ANWAR KHAN—former Senior Superintendent of Police in District Malir, Pakistan, responsible for serious human rights abuse, including alleged involvement in over 400 extra-judicial killings, including the murder of Naqeebullah Mehsood.

MARIAN KOCNER—a prominent Slovak businessman charged with ordering the murder of investigative journalist Jan Kuciak and his fiancée, Martina Kusnirova. Marian Kocner is accused of hiring former Slovak Intelligence Service members to surveil Kuciak ahead of the murder. Kuciak's investigative journalism exposed how Kocner earned millions of Euros through fraudulent tax returns and corrupt dealings and highlighted connections to the police and prosecutors. The following six entities owned or controlled by Marian Kocner were concurrently designated: […]

MAHMUD AL-WARFALLI—a commander of the al-Saiqa Brigade (Libya). Since 2016, al-Warfalli has carried out or ordered the killings of 43 unarmed detainees in eight separate incidents.

The following individuals are being designated for being the leader of the Allied Democratic Forces (ADF) of the Democratic Republic of Congo ["DRC"] or for materially assisting the ADF through recruitment, logistics, administration, financing, intelligence, and operations coordination. The ADF was designated in 2014 as an armed group active in DRC responsible for targeting children in situations of armed conflict, including through killing, rape, abduction, and forced displacement impacting the Great Lakes region.

MUSA BALUKU—leader of the ADF, an entity that has engaged in, or whose members have engaged in, serious human rights abuse.

In addition, five commanders of the ADF who have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of the ADF, an entity that has engaged in, or whose members have engaged in, serious human rights abuse were designated: **AMIGO KIBIRIGE**, **MUHAMMED LUMISA**, **ELIAS SEGUJJA**, **KAYIIRA MUHAMMAD**, **AMISI KASADHA**

The following members of the security forces of the Government of South Sudan designated for their role in serious human rights abuse including abuse carried out against prominent political and civil society actors whose views did not accord with those of the ruling regime. Government security force actions such as these, which have narrowed political space in South Sudan, are a significant impediment to full implementation of the nation's peace process. The U.S. decision to designate these individuals reflects our determination to promote accountability of all those impeding South Sudan's peace process. We urge regional and international partners to take similar action so as to send a clear signal that further delays in South Sudan's peace process are unacceptable to the international community.

ABUD STEPHEN THIONGKOL—commander of the South Sudan detention facility where a member of the Sudan People's Liberation Movement – In Opposition (SPLM-IO) and a human rights lawyer were held before being killed.

MALUAL DHAL MUORWEL—responsible for or complicit in, or directly or indirectly engaged in the killings of a member of the SPLM-IO and a human rights lawyer and has been identified as the commander of forces who detained and assaulted three international monitors in December of 2018.

MICHAEL KUAJIEN—responsible for or complicit in, or directly or indirectly engaged in the kidnapping of a member of the SPLM-IO and a human rights lawyer.

JOHN TOP LAM—responsible for or complicit in, or directly or indirectly engaged in the kidnapping of a member of the SPLM-IO and a human rights lawyer.

ANGELO KUOT GARANG—responsible for or complicit in, or directly or indirectly engaged in the killings of a member of the SPLM-IO and a human rights lawyer, as well as the killings of other individuals.

* * * *

Secretary Pompeo also remarked on the Global Magnitsky sanctions imposed on December 10, International Human Rights Day, in his December 11, 2019 remarks to the press. His remarks are available at

https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-3/, and include the following:

> Since Monday, the U.S. Government has designated an additional 68 individuals and entities in nine countries for corruption and human rights abuses using the Global Magnitsky Act. As you'll recall, that act authorized the United States Government to call out corruption, human rights offenders, freeze their assets, ban them from entering our great country. The 68 individuals and entities sanctioned this week hail from Burma, from Cambodia, from the Democratic Republic of the Congo, from Latvia, Libya, Pakistan, Serbia, Slovakia, and South Sudan.
>
> The human rights abuses that we are attempting to stop include extrajudicial killings, mass executions of unarmed detainees, the murder of an investigative journalist, and the use of rape, murder, and abductions as weapons of war. Notably, we sanctioned four Burmese military leaders responsible for rape, executions, and systemic violence against the innocent Rohingya villagers and other religious and ethnic minorities. We are the first and only country to take public action against the commander-in-chief of the Burmese military forces, Min Aung Hlaing, and his deputy. We call on others to do the same.

c. Designations under Section 7031(c) of the Annual Consolidated Appropriations Act

The Department of State acts pursuant to Section 7031(c) of the Department of State's annual appropriations act (the original provision having been enacted in the Fiscal Year 2008 appropriations act and continued and expanded in subsequent appropriations acts) to designate those involved in gross violations of human rights ("GVHRs") or significant corruption, and their immediate family members. Officials and their immediate family members designated under Section 7031(c) are ineligible for entry into the United States. The following summarizes public designations by the Secretary of State in 2019 pursuant to 7031(c).

On February 22, 2019, the State Department announced the designation under Section 7031(c) of several individuals from the Democratic Republic of Congo ("D.R.C.") for their involvement in significant corruption related to the electoral process in the country. See media note, available at https://www.state.gov/public-designation-of-and-visa-restrictions-placed-on-multiple-officials-of-the-democratic-republic-of-the-congo-due-to-involvement-in-significant-corruption-human-rights-violations-or-abuses-or-u/. The following individuals were designated: Mr. Corneille Nangaa, President of the D.R.C. National Independent Electoral Commission ("CENI"); Mr. Norbert Basengezi Katintima, Vice President of CENI; Mr. Marcellin Mukolo Basengezi, Advisor to the President of CENI; Mr. Aubin Minaku Ndjalandjoko, President of the D.R.C.'s National Assembly; and Mr. Benoit Lwamba Bindu, President of the D.R.C.'s Constitutional Court. The Secretary of State also imposed visa restrictions on election officials as well as military and government officials believed to be responsible for, complicit in, or to have engaged in human rights violations or abuses or undermining of the democratic process in the D.R.C.

On March 25, 2019, the State Department announced in a media note, available at https://www.state.gov/public-designation-due-to-involvement-in-significant-corruption-of-former-guatemalan-official-blanca-aida-stalling-davila/, the Section 7031(c)

designation (due to involvement in significant corruption) of former Guatemalan official Blanca Aida Stalling Davila. The Secretary of State also designated her adult sons Julio Alejandro Molina Stalling and Otto Fernando Molina Stalling.

On April 8, 2019, the Department announced in a media note, available at https://www.state.gov/public-designation-of-sixteen-saudi-individuals-under-section-7031c-of-the-fy-2018-department-of-state-foreign-operations-and-related-programs-appropriations-act/, the Section 7031(c) designations of sixteen Saudi individuals for their involvement in the murder of Jamal Khashoggi. Those designated are Saud al-Qahtani, Maher Mutreb, Salah Tubaigy, Meshal Albostani, Naif Alarifi, Mohammed Alzahrani, Mansour Abahussain, Khalid Alotaibi, Abdulaziz Alhawsawi, Waleed Alsehri, Thaar Alharbi, Fahad Albalawi, Badr Alotaibi, Mustafa Almadani, Saif Alqahtani, Turki Alsehri.

On April 25, 2019, the State Department announced in a media note, available at https://www.state.gov/public-designation-due-to-gross-violations-of-human-rights-of-muslim-khuchiev-the-chairman-of-the-government-of-the-chechen-republic-of-the-russian-federation/, the Section 7031(c) designation of Chairman of the Government of the Chechen Republic Muslim Khuchiev, due to his involvement in GVHRs. The Department also designated his spouse, Sapiyat Shabazova.

On July 3, 2019, the State Department announced in a media note, available at https://www.state.gov/public-designation-due-to-involvement-in-significant-corruption-of-malawian-official-uladi-basikolo-mussa/, the Section 7031(c) designation of Uladi Basikolo Mussa, the Malawian Special Advisor on Parliamentary Affairs and former Malawian Minister of Home Affairs, due to his involvement in significant corruption. The Secretary of State also designated Mr. Mussa's spouse, Cecillia Mussa.

On July 16, 2019, the State Department announced in a press statement, available at https://www.state.gov/public-designation-due-to-gross-violations-of-human-rights-of-burmese-military-officials/, the Section 7031(c) designation of the following Burmese individuals and their immediate family members for their involvement in GVHRs in northern Rakhine State, during the ethnic cleansing of Rohingya: Commander-in-Chief Min Aung Hlaing, Deputy Commander-in-Chief Soe Win, Brigadier General Than Oo, Brigadier General Aung Aung. The press statement also includes the following:

> One egregious example of the continued and severe lack of accountability for the military and its senior leadership was the recent disclosure that Commander-in-Chief Min Aung Hlaing ordered the release of the soldiers convicted of the extrajudicial killings at Inn Din during the ethnic cleansing of Rohingya. The Commander-in-Chief released these criminals after only months in prison, while the journalists who told the world about the killings in Inn Din were jailed for more than 500 days.

On August 1, 2019, the State Department announced in a press statement, available at https://www.state.gov/public-designation-of-anselem-nhamo-sanyatwe-under-section-7031c-of-the-fy-2019-department-of-state-foreign-operations-and-related-programs-appropriations-act/, that it was designating Anselem Nhamo Sanyatwe under Section 7031(c) for involvement in GVHRs. The press statement provides the following information on the designation:

> The Secretary of State is publicly designating Anselem Nhamo Sanyatwe, former Commander of the Zimbabwe National Army's Presidential Guard Brigade and current Ambassador Designate of Zimbabwe to Tanzania, …due to his involvement in gross violations of human rights. … The Department has credible information that Anselem Nhamo Sanyatwe was involved in the violent crackdown against unarmed Zimbabweans during post-election protests on August 1, 2018 that resulted in six civilian deaths.
>
> The law also requires the Secretary of State to publicly or privately designate such officials and immediate family members. In addition to the designation of Anselem Nhamo Sanyatwe, the Department is also publicly designating his spouse, Chido Machona.

On August 2, 2019, in a press statement available at https://www.state.gov/the-united-states-publicly-designates-venezuelas-rafael-enrique-bastardo-mendoza-and-ivan-rafael-hernandez-dala-for-gross-violations-of-human-rights/, the State Department announced designations of Venezuela's Rafael Enrique Bastardo Mendoza and Ivan Rafael Hernandez Dala pursuant to Section 7031(c) for involvement in GVHRs. The press statement explains further:

> The security and intelligence organizations led by Bastardo and Hernandez have been implicated for their human rights violations and abuses and the repression of civil society and the democratic opposition. These acts were documented extensively in the July 5, 2019 report by the United Nations High Commissioner for Human Rights, as well as credible reports by other human rights organizations. The United Nations High Commissioner for Human Rights report noted at least 7,523 extrajudicial killings documented by a Venezuelan non-governmental organization.
>
> In accordance with the law, in addition to the designation of Bastardo and Hernandez, I am publicly designating Bastardo's spouse, Jeisy Catherine Leal Andarcia, and Hernandez's spouse, Luzbel Carolina Colmenares Morales, as well as the minor children of both officials.

On August 14, 2019, the Department announced in a press statement, available at https://www.state.gov/public-designation-of-sudans-salah-gosh-under-section-7031c/, the Section 7031(c) designation of Salah Abdalla Mohamed Mohamed Salih, known as Salah Gosh, the former director general of Sudan's National Intelligence and Security Services, due to his involvement in GVHRs. The press statement specifies that Salah Gosh was involved in torture. The Department also designated his spouse, Awatif Ahmed Seed Ahmed Mohamed, and daughter, Shima Salah Abdallah Mohamed.

On September 5, 2019, in a media note available at https://www.state.gov/public-designation-due-to-involvement-in-significant-corruption-of-romanias-liviu-nicolae-dragnea/, the State Department announced the designation under Section 7031(c) of Liviu Nicolae Dragnea, a former government official in Romania, due to his involvement in significant corruption. Mr. Dragnea's two children, Valentin Ştefan Dragnea and Maria Alexandra Dragnea, were also designated.

On September 10, 2019, in a press statement available at https://www.state.gov/public-designation-due-to-involvement-in-gross-violations-of-human-rights-of-vladimir-yermolayev-and-stepan-tkach-officials-of-the-investigative-committee-in-the-russian-federation/, the State Department announced the designations of Vladimir Yermolayev and Stepan Tkach, officials of the Investigative Committee in the Russian Federation, for their involvement in GVHRs, pursuant to Section 7031(c). The press statement elaborates:

> The Department has credible information that Yermolayev and Tkach were involved in torture and/or cruel, inhuman, or degrading treatment or punishment of Jehovah's Witnesses in Surgut, Russia. On February 15, 2019, officers of the Surgut Investigative Committee, led by Yermolayev and Tkach, subjected at least seven Jehovah's Witnesses to suffocation, electric shocks, and severe beatings during interrogation at the Committee's headquarters. This brutality stands in marked contrast to the peaceful practices of the Jehovah's Witnesses who have been criminally prosecuted for their religious beliefs in Russia since a 2017 Supreme Court decision affirming their wrongful designation as an "extremist organization."

On September 13, 2019, the Department designated Kale Kayihura and his family members under Section 7031(c) for involvement in GVHRs. The State Department press statement on the designation, available at https://www.state.gov/public-designation-due-to-gross-violations-of-human-rights-of-kale-kayihura-of-uganda/, identifies Kayihura as, "the former Inspector General of the Uganda Police Force and its commanding officer from 2005-2018." The statement goes on to say that, "Kayihura was involved in torture and/or cruel, inhuman, or degrading treatment or punishment, through command responsibility of the Flying Squad, a specialized unit of the Uganda Police Force that reported directly to Kayihura." The Treasury Department concurrently designated Kayihura under E.O. 13818. Immediate family members subject to designation include his spouse, Angela Umurisa Gabuka, his daughter, Tesi Uwibambe, and his son, Kale Rudahigwa.

On September 26, 2019, the Department designated Raul Modesto Castro Ruz, the First Secretary of the Central Committee of the Cuban Communist Party and First Secretary of the Cuban Revolutionary Armed Forces, under Section 7031(c), due to his involvement in GVHRs. See State Department press statement, available at https://www.state.gov/public-designation-of-raul-castro-due-to-involvement-in-gross-violations-of-human-rights/. The Department also designated his children, Alejandro Castro Espin, Deborah Castro Espin, Mariela Castro Espin, and Nilsa Castro Espin. The press statement further explains:

> As First Secretary of the Cuban Communist Party, Raul Castro oversees a system that arbitrarily detains thousands of Cubans and currently holds more than 100 political prisoners. As First Secretary of Cuba's Armed Forces, Castro is responsible for Cuba's actions to prop up the former Maduro regime in Venezuela through violence, intimidation, and repression. In concert with Maduro's military and intelligence officers, members of the Cuban security forces have been

> involved in gross human rights violations and abuses in Venezuela, including torture. Castro is complicit in undermining Venezuela's democracy and triggering the hemisphere's largest humanitarian crisis, forcing 15 percent of the Venezuelan population to flee the country and precipitating a food shortage and health crisis of unprecedented scale in this region.

On October 25, 2019 the Department designated Owen Ncube under Section 7031(c) due to his involvement in GVHRs in his capacity as Zimbabwe's Minister of State for National Security. See press statement, available at https://www.state.gov/public-designation-of-owen-ncube-due-to-involvement-in-gross-violations-of-human-rights-under-section-7031c-of-the-fy-2019-department-of-state-foreign-operations-and-related-programs-appropriati/. The press statement includes the following:

> We are deeply troubled by the Zimbabwean government's use of state-sanctioned violence against peaceful protestors, and civil society, as well as against labor leaders and members of the opposition leaders in Zimbabwe. We urge the government to stop the violence, investigate, and hold accountable officials responsible for human rights violations and abuses in Zimbabwe.

On November 16, 2019, the State Department designated Julio Cesar Gandarilla Bermejo, Minister of Cuba's Ministry of the Interior (MININT), under Section 7031(c), due to his involvement in GVHRs. See press statement, available at https://www.state.gov/public-designation-of-julio-cesar-gandarilla-bermejo-under-section-7031c-of-the-fy-2019-department-of-state-foreign-operations-list/. The Department also designated his children, Julio Cesar Gandarilla Sarmiento and Alejandro Gandarilla Sarmiento. The press statement includes the following:

> In addition to the GVHRs in Venezuela that serve as basis for this designation, Cuba's Ministry of the Interior is responsible for arbitrarily arresting and detaining thousands of Cuban citizens and unlawfully incarcerating more than 100 political prisoners in Cuba. Ministry officials have overseen the torture of political dissidents, detainees, and prisoners, as well as the murder of some of these individuals by police and security forces. Gandarilla Bermejo is complicit in arbitrarily or unlawfully surveilling these groups, whether they be citizens or visitors.

On November 18, 2019, the State Department designated former Kenyan Attorney General Amos Sitswila Wako under Section 7031(c) for involvement in significant corruption. See press statement, available at https://www.state.gov/public-designation-due-to-involvement-in-significant-corruption-of-kenyas-former-attorney-general-amos-sitswila-wako/. The Department also designated Wako's wife, Flora Ngaira, and son, Julius Wako.

On December 3, 2019, the State Department designated former Guatemalan Minister of Communications, Infrastructure, and Housing Alejandro Sinibaldi under Section 7031(c) due to his involvement in significant corruption. See press statement,

available at https://www.state.gov/public-designation-due-to-involvement-in-significant-corruption-of-former-guatemalan-minister-alejandro-sinibaldi/. The Department also designated his spouse, Maria Jose Saravia Mendoza, his son Alejandro Sinibaldi Saravia, and his two minor children.

On December 10, 2019, the State Department designated two former Paraguayan officials under Section 7031(c) due to their involvement in significant corruption: former president of Paraguay's judicial disciplinary board and senator, Oscar Gonzalez Daher, and former Attorney General, Javier Diaz Veron. See media note, available at https://www.state.gov/public-designation-due-to-involvement-in-significant-corruption-of-two-former-paraguayan-officials-oscar-gonzalez-daher-and-javier-diaz-veron/. The Department also designated the following members of Mr. Daher's immediate family: Nelida Chaves de Gonzalez, Oscar Ruben Gonzalez Chaves, and Maria Gonzalez Chaves; and the following members of Mr. Veron's immediate family: Maria Selva Morinigo, Yeruti Diaz Morinigo, Manuel Diaz Morinigo, Alejandro Diaz Morinigo, and Mr. Veron's minor child.

Also on December 10, 2019, the Department designated Cambodian official Kun Kim and Latvian official Aivars Lembergs under Section 7031(c) due to their involvement in significant corruption. See media note, available at https://www.state.gov/public-designations-due-to-significant-corruption-of-latvian-and-cambodian-officials/. The Department also designated Kun Kim's spouse King Chandy and children Kim Phara and Kim Sophary and Aivars Lembergs's wife, Kristine Lembergs, and children Anrijs Lembergs and Liga Lembergs.

On December 20, 2019, the Department designated Honduran Congressman Oscar Ramon Najera (and his son, Oscar Roberto Najera Lopez) pursuant to Section 7031(c). See press statement, available at https://www.state.gov/public-designation-due-to-involvement-in-significant-corruption-of-honduran-congressman-oscar-ramon-najera/. The press statement provides the following on Mr. Najera:

> In his official capacity, Mr. Najera engaged in and benefitted from public corruption related to the Honduran drug trafficking organization Los Cachiros. In May 2013, the United States identified Los Cachiros as a significant foreign narcotics trafficking group pursuant to the Kingpin Act.

12. Targeted Visa Restrictions and Sanctions Relating to Threats to Democratic Process and Restoration of Peace, Security, and Stability

a. China (relating to Xinjiang)

In an October 8, 2019 press statement from Secretary Pompeo, available at https://www.state.gov/u-s-department-of-state-imposes-visa-restrictions-on-chinese-officials-for-repression-in-xinjiang/, the State Department announced visa restrictions on Chinese officials involved in the repression of minority groups in Xinjiang. Excerpts follow from the press statement.

> The Chinese government has instituted a highly repressive campaign against Uighurs, ethnic Kazakhs, Kyrgyz, and other members of Muslim minority groups

> in the Xinjiang Uighur Autonomous Region (Xinjiang) that includes mass detentions in internment camps; pervasive, high-tech surveillance; draconian controls on expressions of cultural and religious identities; and coercion of individuals to return from abroad to an often perilous fate in China. Today, I am announcing:
>
> - Visa restrictions on Chinese government and Communist Party officials who are believed to be responsible for, or complicit in, the detention or abuse of Uighurs, Kazakhs, or other members of Muslim minority groups in Xinjiang, China. Family members of such persons may also be subject to these restrictions.
> - These visa restrictions complement yesterday's announcement by the Department of Commerce regarding the imposition of export restrictions on U.S. products exported to 28 entities, including elements of the Public Security Bureau and commercial companies in Xinjiang, involved in China's campaign of surveillance, detention, and repression.
>
> The United States calls on the People's Republic of China to immediately end its campaign of repression in Xinjiang, release all those arbitrarily detained, and cease efforts to coerce members of Chinese Muslim minority groups residing abroad to return to China to face an uncertain fate. The protection of human rights is of fundamental importance, and all countries must respect their human rights obligations and commitments. The United States will continue to review its authorities to respond to these abuses.

On October 9, 2019, the Department of Commerce added 28 entities located in China to the Entity List (entities acting contrary to the national security or foreign policy interests of the United States), also in response to the repression of minority groups in Xinjiang. 84 Fed. Reg. 54,002 (Oct. 9, 2019). The consequences for entities on the Entity List include a license requirement for all items subject to the EAR and a license review policy of case-by-case review for certain Export Control Classification Numbers as well as a presumption of denial for other items subject to the Export Administration Regulations ("EAR"). The Federal Register notice includes the following:

> Pursuant to § 744.11(b) of the EAR, the [End-User Review Committee, or] ERC determined that the Xinjiang Uighur Autonomous Region (XUAR) People's Government Public Security Bureau, eighteen of its subordinate municipal and county public security bureaus and one other subordinate institute are engaging in activities contrary to the foreign policy interests of the United States, and eight additional entities are enabling activities contrary to the foreign policy interests of the United States. Specifically, these entities have been implicated in human rights violations and abuses in the implementation of China's campaign of repression, mass arbitrary detention, and high-technology surveillance against Uighurs, Kazakhs, and other members of Muslim minority groups in the XUAR.

b. Nicaragua

On November 27, 2018, the President issued E.O. 13851, "Blocking Property of Certain Persons Contributing to the Situation in Nicaragua." In an April 17, 2019 media note,

available at https://www.state.gov/additional-financial-sanctions-against-nicaragua/, the State Department announced additional sanctions pursuant to E.O. 13851:

> The United States has sanctioned Laureano Ortega and Banco Corporativo SA (Bancorp), pursuant to Executive Order 13851…
>
> Laureano Ortega, son of President Daniel Ortega and Vice President Rosario Murillo, is a key enabler of the Ortega regime's corruption. On the regime's behalf, he has sought international financial support and foreign investment. In doing so, he has placed the interests of his family and his personal fortune ahead of the interests of the Nicaraguan people by engaging in corrupt business deals. Bancorp has served as the personal slush fund for the Ortega family and the instrument for corrupt deals with Nicolas Maduro and his former regime in Venezuela.

See also 84 Fed. Reg. 22,937 (May 20, 2019) (designations of Ortega and Bancorp); April 17, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm662.

On June 21, 2019, OFAC designated four individuals pursuant to E.O. 13851. 84 Fed. Reg. 34,049 (July 16, 2019) (Gustavo Eduardo PORRAS CORTES (also designated pursuant to the Nicaragua Human Rights and Anticorruption Act of 2018 (NHRAA), Public Law 15–335); Orlando Jose CASTILLO CASTILLO; Sonia CASTRO GONZALEZ (also designated pursuant to NHRAA); and Oscar Salvador MOJICA OBREGON). See June 21, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm715.

In Public Notice 10838, dated July 6, 2019, the Department of State certified pursuant to Section 6(A) of the Nicaragua Human Rights and Anticorruption Act of 2018 that the Government of Nicaragua is not taking effective steps to:

- Strengthen the rule of law and democratic governance, including the independence of the judicial system and electoral council;
- combat corruption, including by investigating and prosecuting cases of public corruption;
- protect civil and political rights, including the rights of freedom of the press, speech, and association, for all people of Nicaragua, including political opposition parties, journalists, trade unionists, human rights defenders, indigenous peoples, and other civil society activists;
- investigate and hold accountable officials of the Government of Nicaragua and other persons responsible for the killings of individuals associated with the protests in Nicaragua that began on April 18, 2018; and
- hold free and fair elections overseen by credible domestic and international observers.

84 Fed. Reg. 37,380 (July 31, 2019).

On November 7, 2019, OFAC designated three Nicaraguan government officials under E.O. 13851 for their role in human rights abuse, election fraud, and corruption in Nicaragua: Ramon Antonio Avellan Medal, Lumberto Ignacio Campbell Hooker, and Roberto Jose Lopez Gomez. November 7, 2019 Treasury press release, available at https://home.treasury.gov/news/press-releases/sm828. OFAC simultaneously designated Ramon Antonio Avellan Medal for human rights abuse pursuant to the Nicaragua Human Rights and Anticorruption Act of 2018 ("NHRAA"). *Id*. On November 8, 2019, the State Department issued a press statement about the recent Nicaragua-related sanctions, available at https://www.state.gov/further-financial-sanctions-to-address-human-rights-abuses-and-corruption-in-nicaragua/. The press statement explains:

> The United States has sanctioned key regime officials Roberto Jose Lopez Gomez, Ramon Antonio Avellan Medal, and Lumberto Ignacio Campbell Hooker pursuant to Executive Order 13851 ("Blocking Property of Certain Persons Contributing to the Situation in Nicaragua"). With this action, their U.S. assets are blocked and U.S. persons are generally prohibited from engaging in transactions with Lopez, Avellan, and Campbell. Avellan was concurrently designated under the Nicaragua Human Rights and Anti-Corruption Act of 2018.
>
> Avellan is Deputy Director General of the Nicaraguan National Police (NNP) and has been instrumental in maintaining Ortega's control of the police and his parapolice counterparts, essential tools of the regime's repression. The NNP conducts arbitrary arrests, extrajudicial executions, and disappearances of anti-government protesters. This campaign of repression by the NNP and parapolice under Avellan's command has led to scores of deaths and hundreds more injured. Campbell is the Acting President of the Supreme Electoral Council and responsible for electoral manipulation in Ortega's favor, ensuring Ortega and his allies prevail in elections through fraudulent means. Lopez is a retired Army officer and Director of the Nicaraguan Social Security Institute (INSS). He orchestrated President Ortega's use of public retirement funds to reward loyalists and defraud Nicaraguans, in addition to employing INSS enforcement mechanisms to target political opponents.

On December 12, 2019, OFAC sanctioned the son of President Ortega for money laundering and supporting corruption, along with companies used by members of the Ortega family to enrich themselves. See Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm854. The State Department also issued a press statement announcing OFAC's December 12 E.O. 13851 designations, which is available at https://www.state.gov/the-united-states-takes-action-against-the-ortega-regime-in-nicaragua/, and includes the following:

> Today, the United States announces new financial sanctions against Daniel Ortega's son Rafael Ortega and three Nicaraguan companies. …
>
> Today's action, prohibits U.S. persons from conducting transactions with Rafael Ortega, Inversiones Zanzibar, Servicio De Proteccion Y Vigilancia, and DNP. Rafael Ortega is a key money manager for the Ortega family, working alongside the previously sanctioned Vice President of Nicaragua and First Lady

> Rosario Murillo. Rafael Ortega uses at least two companies under his control, Inversiones Zanzibar, S.A and Servicio De Proteccion Y Vigilancia, S.A., to generate profits, launder money, and gain preferential access to markets for the Ortega regime. He uses Inversiones Zanzibar to obscure the transfer of profits from Distribuidor Nicaraguense de Petroleo, also designated today, and as a front company to procure fuel stations in an attempt to obscure DNP's ownership of such fuel stations. Servicio De Proteccion Y Vigilancia is a security firm which has received millions in Nicaraguan government contracts. DNP is a chain of gas stations controlled by the Ortega family. DNP was purchased with public money and then transferred to the Ortega family, and it benefits from non-competitive contracts with government institutions.

c. Nigeria

In a July 23, 2019 press statement, the State Department announced visa restrictions on Nigerians believed to be responsible for, or complicit in, undermining the democratic process. The press statement is available at https://www.state.gov/imposing-visa-restrictions-on-nigerians-responsible-for-undermining-the-democratic-process/.

d. Mali

On July 26, 2019, the President issued Executive Order 13882, "Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Mali." 84 Fed. Reg. 37,055 (July 30, 2019). The action responds to:

> repeated violations of ceasefire arrangements made pursuant to the 2015 Agreement on Peace and Reconciliation in Mali; the expansion of terrorist activities into southern and central Mali; the intensification of drug trafficking and trafficking in persons, human rights abuses, and hostage-taking; and the intensification of attacks against civilians, the Malian defense and security forces, the United Nations Multi-dimensional Integrated Stabilizations Mission in Mali (MINUSMA), and international security presences…

Sections 1 and 2 of the E.O. are excerpted below.

* * * *

Section 1. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(i) to be responsible for or complicit in, or to have directly or indirectly engaged in, any of the following in or in relation to Mali:

(A) actions or policies that threaten the peace, security, or stability of Mali;

(B) actions or policies that undermine democratic processes or institutions in Mali;

(C) a hostile act in violation of, or an act that obstructs, including by prolonged delay, or threatens the implementation of, the 2015 Agreement on Peace and Reconciliation in Mali;

(D) planning, directing, sponsoring, or conducting attacks against local, regional, or state institutions, the Malian defense and security forces, any international security presences, MINUSMA peacekeepers, other United Nations or associated personnel, or any other peacekeeping operations;

(E) obstructing the delivery or distribution of, or access to, humanitarian assistance;

(F) planning, directing, or committing an act that violates international humanitarian law or that constitutes a serious human rights abuse or violation, including an act involving the targeting of civilians through the commission of an act of violence, abduction or enforced disappearance, forced displacement, or an attack on a school, hospital, religious site, or location where civilians are seeking refuge;

(G) the use or recruitment of children by armed groups or armed forces in the context of the armed conflict in Mali;

(H) the illicit production or trafficking of narcotics or their precursors originating or transiting through Mali;

(I) trafficking in persons, smuggling migrants, or trafficking or smuggling arms or illicitly acquired cultural property; or

(J) any transaction or series of transactions involving bribery or other corruption, such as the misappropriation of Malian public assets or expropriation of private assets for personal gain or political purposes;

(ii) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, any person whose property and interests in property are blocked pursuant to this order; or

(iii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order. (b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order.

Sec. 2. The unrestricted immigrant and nonimmigrant entry into the United States of aliens determined to meet one or more of the criteria in section 1 of this order would be detrimental to the interests of the United States, and the entry of such persons into the United States, as immigrants or nonimmigrants, is hereby suspended, except where the Secretary of State determines that the person's entry is in the national interest of the United States, including when the Secretary so determines based on a recommendation of the Attorney General, that the person's entry would further important United States law enforcement objectives. Such persons shall be treated as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions).

* * * *

A July 26, 2019, State Department press statement, available at https://www.state.gov/the-white-house-announces-actions-to-combat-violence-in-mali/, provides the following on the new order relating to Mali:

> The UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) has faced more violence and danger than any other peacekeeping mission in UN history. We commend the difficult work these peacekeepers and their partners do in the region. The signatory parties to the 2015 peace accord—both government and armed group—have made distressingly little headway in implementing key components of the accord that could move Mali toward broader peace and tackle many of the grievances that push Malian citizens toward violence.
>
> The President's executive order will freeze assets and suspend travel for individuals or entities that seek to undermine the peace, security, or stability of Mali. The United States will continue to work with its partners and the UN's Mali Sanctions Committee to identify those who seek to capitalize on instability or maintain the status quo rather than work towards peace, and make them subject to the full effect of sanctions.

On December 20, 2019, the United States sanctioned five individuals pursuant to E.O. 13882. See State Department press statement, available at https://www.state.gov/united-states-sanctions-five-malian-individuals/. The press statement says that the sanctions are "in line with UN Security Council Resolution 2484 (2019)," and target "individuals threatening the peace, security, and stability in Mali, as well as an individual obstructing humanitarian assistance." Those sanctioned are identified in the OFAC press release, available at https://home.treasury.gov/news/press-releases/sm866:

> **HOUKA HOUKA AG ALHOUSSEINI**
>
> Houka Houka Ag Alhousseini (Houka Houka) was designated for being responsible for, or complicit in, or having directly or indirectly engaged in, actions or policies that threaten the peace, security, or stability of Mali.
>
> Houka Houka is an active fighter for Jama'at Nusrat al-Islam wal-Muslimin (JNIM), a designated Foreign Terrorist Organization (FTO). Houka Houka has been responsible for tax collection activities to raise funds for Al-Qa'ida in the Islamic Maghreb (AQIM) operations in Mali. AQIM is also a designated FTO. Houka Houka has extended his authority by using the fear that AQIM instigates in the Timbuktu region through targeted assassinations and complex attacks against Malian and international defense and security forces.
>
> **MAHRI SIDI AMAR BEN DAHA**
>
> Mahri Sidi Amar Ben Daha (Ben Daha) was designated for being responsible for, or complicit in, or having directly or indirectly engaged in, actions or policies that threaten the peace, security, or stability of Mali.
>
> Ben Daha operates transportation companies in eastern Mali that launder narcotics trafficking money and deliver supplies to jihadists. Ben Daha has used profits from illicit narcotics trafficking to purchase commercial bus and trucking companies. From November 14 to 18, 2018, Ben Daha instructed dozens of combatants to blockade the venue for regional consultations in Gao in coordination with Mohamed Ould Mataly, effectively blocking discussion on key provisions of the 2015 Agreement on Peace and Reconciliation related to reform of the territorial structure of northern Mali.

MOHAMED OULD MATALY

Mohamed Ould Mataly (Ould Mataly) was designated for being responsible for, or complicit in, or having directly or indirectly engaged in, actions or policies that threaten the peace, security, or stability of Mali.

In November 2018, Ould Mataly coordinated with his close associate Mahri Sidi Amar Ben Daha to instruct dozens of combatants to blockade the venue for regional consultations in Gao, blocking discussion on key provisions of the Agreement. In July 2016, Ould Mataly was one of the instigators of demonstrations hostile to the implementation of the Agreement.

MOHAMED BEN AHMED MAHRI

Mohamed Ben Ahmed Mahri (Ben Ahmed Mahri) was designated for being responsible for, or complicit in, or having directly or indirectly engaged in, actions or policies that threaten the peace, security, or stability of Mali.

Ben Ahmed Mahri has funded terrorist armed groups through his drug trafficking, notably Al-Murabitun, which merged with other terrorist groups to form JNIM, with control over routes that cross northern Mali from Mauritania, Burkina Faso, and Niger. Ben Ahmed Mahri uses convoys led by UN-sanctioned individual Ahmoudou Ag Asriw to traffic drugs. These trafficking convoys frequently generate clashes with competitors associated with other armed groups.

AHMED AG ALBACHAR

Ahmed Ag Albachar (Ag Albachar) was designated for being responsible for, or complicit in, or having directly or indirectly engaged in, obstructing the delivery or distribution of, or access to, humanitarian assistance, in relation to Mali.

Ag Albachar, the self-proclaimed president of a humanitarian commission, has intimidated and extorted aid organizations in Mali's Kidal region, severely hindering their work. Ag Albachar has controlled which humanitarian projects take place, as well as the projects' location, timing, and who implements them. Ag Albachar has also usurped a significant share of humanitarian aid in the Kidal region by imposing illegitimate constraints on humanitarian actors under the threat of violence.

e. South Sudan

In a December 12, 2019 press statement, Secretary Pompeo announced visa restrictions on South Sudan peace process spoilers. The press statement, available at https://www.state.gov/visa-restrictions-on-south-sudan-peace-process-spoilers/, includes the following:

> The people of South Sudan have suffered enough while their leaders delay the implementation of a sustainable peace. The South Sudanese deserve leaders who are committed to building consensus and willing to compromise for the greater good. As the United States re-evaluates its bilateral relationship with the Government of South Sudan, the Department of State will implement visa restrictions under Immigration and Nationality Act Section 212(a)(3)(C) against those who undermine or impede the peace process in South Sudan. Individuals

> who have directly or indirectly impeded peace including: violating a ceasefire or cessation of hostilities agreement; violating the UN arms embargo; engaging in corruption that fuels the conflict; suppressing freedoms of expression, association, peaceful assembly, or other abuses or violations; or by failing to abide by signed peace agreements may be subject to visa restrictions. Such visa restrictions could include immediate family members of these individuals.

On December 16, 2019, OFAC designated two senior South Sudanese officials pursuant to E.O. 13664: Minister of Cabinet Affairs Martin Elia Lomuro and Minister of Defense and Veteran Affairs Kuol Manyang Juuk. See Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm857. The press release explains:

> Minister of Cabinet Affairs Martin Elia Lomuro has been responsible for actively recruiting and organizing local militias to conduct attacks against opposition forces in South Sudan; and, Minister of Defense and Veteran Affairs Kuol Manyang Juuk has failed to remove military forces from the battlefield as agreed, fomented violence with rival tribes, and oversaw the training of tribal militias to prepare for the possibility of renewed violence. These ministers perpetuated the conflict to cement the political status quo, fueling South Sudan's war economy.

f. Democratic Republic of the Congo

On March 21, 2019, Corneille Yobeluo NANGAA, Norbert Basengezi KATINTIMA, and Marcellin BASENGEZI were designated pursuant to E.O. 13671, for being responsible for or complicit in, or having engaged in, directly or indirectly, actions or policies that undermine democratic processes or institutions in the Democratic Republic of the Congo. 84 Fed. Reg. 30,804 (June 27, 2019); March 21, 2019 Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm633. See *supra* regarding their designations by the State Department under Section 7031(c). On August 15, 2019, OFAC designated Francois OLENGA pursuant to E.O. 13671 on the same grounds. 84 Fed. Reg. 43,259 (Aug. 20, 2019).

13. Transnational Crime

Executive Order 13581, "Blocking Property of Transnational Criminal Organizations," was signed in 2011. On March 15, 2019, the President signed Executive Order 13863, "Taking Additional Steps to Address the National Emergency With Respect to Significant Transnational Criminal Organizations." 84 Fed. Reg. 10,255 (Mar. 19, 2019). E.O. 13863 amends E.O. 13581 by providing the following definition:

> (e) the term "significant transnational criminal organization" means a group of persons that includes one or more foreign persons; that engages in or facilitates an ongoing pattern of serious criminal activity involving the jurisdictions of at least

two foreign states, or one foreign state and the United States; and that threatens the national security, foreign policy, or economy of the United States.

B. EXPORT CONTROLS

1. Additions to Entity List: Huawei

Effective May 16, 2019, the U.S. Department of Commerce, Bureau of Industry and Security ("BIS"), added Huawei Technologies Co., Ltd. ("Huawei") and 68 of its non-U.S. affiliates to the Entity List. 84 Fed. Reg. 22,961 (May 21, 2019). The additions were predicated on the determination "there is reasonable cause to believe that Huawei has been involved in activities contrary to the national security or foreign policy interests of the United States," and that the Huawei affiliates "pose a significant risk of involvement in activities contrary to the national security or foreign policy interests of the United States." *Id.* The Export Administration Regulations ("EAR") impose additional license requirements on, and limit the availability of most license exceptions for exports, reexports, and transfers (in-country) to, those on the Entity List. *Id.* The Federal Register notice provides the following on the determination:

> To illustrate, Huawei has been indicted in the U.S. District Court for the Eastern District of New York on 13 counts of violating U.S. law (Superseding Indictment), including violations of the International Emergency Economic Powers Act (IEEPA), by knowingly and willfully causing the export, reexport, sale and supply, directly and indirectly, of goods, technology and services (banking and other financial services) from the United States to Iran and the government of Iran without obtaining a license from the Department of Treasury's Office of Foreign Assets Control (OFAC), as required by OFAC's Iranian Transactions and Sanctions Regulations (31 CFR part 560), and conspiracy to violate IEEPA by knowingly and willfully conspiring to cause the export, reexport, sale and supply, directly and indirectly, of goods, technology and services (banking and other financial services) from the United States to Iran and the government of Iran without obtaining a license from OFAC as required by OFAC's Iranian Transactions and Sanctions Regulations (31 CFR part 560). The Superseding Indictment also alleges that Huawei and an Iranian-based affiliate, working with others, knowingly and willfully conspired to impair, impede, obstruct, and defeat, through deceitful and dishonest means, the lawful government operations of OFAC.
>
> Further, Huawei's affiliates present a significant risk of acting on Huawei's behalf to engage in such activities … . Without the imposition of a license requirement as to these affiliated companies, there is reasonable cause to believe that Huawei would seek to use these entities to evade the restrictions imposed by its addition to the Entity List. As set forth in the Superseding Indictment filed in the Eastern District of New York, Huawei participated along with certain affiliates in the alleged criminal violations of U.S. law, including one or more non-U.S. affiliates. The Superseding Indictment also alleges that Huawei and affiliates acting on Huawei's behalf engaged in a series of deceptive and

> obstructive acts designed to evade U.S. law and to avoid detection by U.S. law enforcement.

Commerce issued (and extended) a Temporary General License ("TGL") allowing certain involvement in transactions with Huawei and its affiliates. See press releases, available at https://www.commerce.gov/news/press-releases/2019/05/department-commerce-issues-limited-exemptions-huawei-products, https://www.commerce.gov/news/press-releases/2019/08/department-commerce-adds-dozens-new-huawei-affiliates-entity-list-and, and https://www.commerce.gov/news/press-releases/2019/11/us-department-commerce-extends-huawei-temporary-general-license.

Effective August 19, 2019, BIS added 46 more Huawei affiliates to the Entity List. 84 Fed. Reg. 43,493 (Aug. 21, 2019).

2. Debarments

On June 6, 2019, the State Department published notice of the statutory debarment of 23 individuals and entities for violating the Arms Export Control Act ("AECA"). 84 Fed. Reg. 26,500 (June 6, 2019); see also State Department media note, available at https://www.state.gov/u-s-department-of-state-debars-23-persons-for-violating-or-conspiring-to-violate-the-arms-export-control-act/.

3. Consent Agreements

a. Darling Industries

In a February 28, 2019 media note, available at https://www.state.gov/u-s-department-of-state-concludes-400000-settlement-of-alleged-export-violations-by-darling-industries-inc/, the State Department announced the conclusion of an administrative settlement with Darling Industries, Inc. ("Darling") of Tucson, AZ, resolving alleged violations of the AECA and the International Traffic in Arms Regulations ("ITAR"). The media note explains further:

> The Department of State and Darling have reached an agreement pursuant to ITAR § 128.11 to address alleged unauthorized exports of defense articles, including technical data; the unauthorized furnishing of defense services; and failure to appoint a qualified Empowered Official. …
>
> Under the terms of the eighteen (18) month Consent Agreement, Darling will pay a civil penalty of $400,000. The Department has agreed to suspend $200,000 of this amount on the condition that the funds have or will be used for Department-approved Consent Agreement remedial compliance measures. Also, Darling must conduct an external audit to assess and improve its compliance program during the Consent Agreement term.
>
> Darling voluntarily disclosed to the Department the alleged AECA and ITAR violations, which are resolved under this settlement. Darling also acknowledged the serious nature of the alleged violations, cooperated with the

> Department's review, and instituted a number of compliance program improvements during the course of the Department's review. For these reasons, the Department has determined that it is not appropriate to administratively debar Darling at this time.

b. L3Harris Technologies, Inc.

In a September 23, 2019 media note, available at https://www.state.gov/u-s-department-of-state-concludes-13-million-settlement-of-alleged-export-violations-by-l3harris-technologies-inc/, the State Department announced the conclusion of an administrative settlement with L3Harris Technologies, Inc. (L3Harris) of Melbourne, Florida, to resolve alleged violations of the AECA and the ITAR. The media note explains further:

> Under the terms of the 36-month Consent Agreement, L3Harris will pay a civil penalty of $13 million. The Department has agreed to suspend $6.5 million of this amount on the condition that the funds have or will be used for Department-approved Consent Agreement remedial compliance measures. In addition, an external Special Compliance Officer will be engaged by L3Harris to oversee the Consent Agreement, which will also require the company to conduct two external audits of its compliance program during the Agreement term as well as implement additional compliance measures.

c. AeroVironment

On November 20, 2019, the State Department announced in a media note, available at https://www.state.gov/u-s-department-of-state-concludes-1000000-settlement-of-alleged-export-violations-by-aerovironment-inc/, that it had concluded an administrative settlement with AeroVironment, Inc. (AV) of Simi Valley, California, relating to the AECA and ITAR. Information about the settlement as provided in the media note follows:

> The Department of State and AV have reached an agreement pursuant to ITAR § 128.11 to address alleged unauthorized exports of defense articles, including technical data; the failure to properly maintain records involving ITAR-controlled transactions; and violations of the provisos, terms, and conditions of export authorizations. …
>
> Under the terms of the twenty-four (24) month Consent Agreement, AV will pay a civil penalty of $1,000,000. The Department has agreed to suspend $500,000 of this amount on the condition that the funds have or will be used for Department-approved Consent Agreement remedial compliance measures. AV must also hire an outside Special Compliance Officer (SCO) for a term of one year and conduct an external audit to assess and improve its compliance program during the Consent Agreement term.
>
> AV voluntarily disclosed to the Department the alleged AECA and ITAR violations, which are resolved under this settlement. AV also acknowledged the serious nature of the alleged violations, cooperated with the Department's review,

and instituted a number of compliance program improvements during the course of the Department's review. For these reasons, the Department has determined that it is not appropriate to administratively debar AV at this time.

4. Litigation

a. Stagg v. Department of State

As discussed in *Digest 2016* at 677-79, plaintiff in *Stagg* lost a motion seeking to enjoin enforcement of provisions of the ITAR licensing scheme that would require a license for dissemination of information that is in the public domain but was previously made public without a license. The Court of Appeals affirmed the district court's denial of the preliminary injunction. In 2019, the case was decided by the district court on cross motions for summary judgment. In a January 30, 2019 decision, the district court held that the challenged ITAR provisions do not violate the First or Fifth Amendment of the U.S. Constitution and granted the State Department's motion for summary judgment. *Stagg v. Dept. of State*, 354 F.Supp.3d 448 (S.D.N.Y. 2019). On April 25, 2019, the court denied plaintiff's motion for reconsideration. Plaintiff has appealed the district court's decision.

b. Washington v. Department of State

In 2016, the Fifth Circuit upheld State Department enforcement of AECA and ITAR restrictions on the posting of CAD files for 3D printing of various weapons on the website of Defense Distributed. For background on the litigation in *Defense Distributed*, see *Digest 2015* at 680-84 and *Digest 2016* at 668-75. The State Department subsequently reached a settlement with Defense Distributed and other parties to the prior litigation, allowing the publication on the Internet of the CAD files for the automated production of 3D-printed weapons. Several states then sued in federal court in the State of Washington, claiming the federal government action was *ultra vires* and in violation of the Administrative Procedure Act ("APA") and the Tenth Amendment to the U.S. Constitution. On November 12, 2019, the U.S. District Court for the Western District of Washington issued a decision, finding that the removal of the restrictions on publication of the CAD files was arbitrary and capricious and rejecting the U.S. government position that the court lacked jurisdiction to consider such challenges to this type of agency regulatory determination. *Washington v. United States Dep't of State*, 420 F. Supp. 3d 1130 (W.D. Wash. 2019. Defense Distributed has appealed the district court's November 12, 2019 decision.[*]

[*] Editor's note: The U.S. government did not appeal the district court's decision. On January 23, 2020, agency rulemaking reassigned the relevant items to be subject to Department of Commerce regulation, 85 Fed. Reg 3819, prompting a new legal challenge by the State of Washington in federal district court in the Western District of Washington. The United States has appealed from the Western District of Washington's grant of a preliminary injunction against enforcement of certain aspects of the January 23, 2020 rulemaking. *Washington v. U.S. State Department*, 20-cv-111 (W.D. Wash 2020). *Digest 2020* will discuss further developments.

c. Thorne v. Department of State

• In *Thorne* et al. *v. Department of State*, et al., No. 2:19cv1982 (D. Nev. Dec. 23, 2019), plaintiff Thorne challenged the State Department's denial of his licenses for the permanent export of firearms and ammunition to South African entities (also plaintiffs)—including the agency classification of one of the entities as an "unreliable recipient" of U.S.-origin defense articles that were transferred to unauthorized end users. The court found that the government's denial of licenses and reliability determination in this case are not subject to judicial reconsideration under the APA and are absolutely committed to the agency's judgment in furtherance of national security and foreign policy (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) and 22 C.F.R. § 128.1).

Cross References

U.S. Passports Invalid for Travel to North Korea, **Ch. 1.A.5.**
Suspension of Entry related to Venezuela, **Ch. 1.B.4.b.**
Suspension of Entry of Senior Officials of the Government of Iran **Ch. 1.B.4.c.**
Denial of Visas to PLO and Palestinian Authority Officials, **Ch. 1.B.4.d.**
U.S. actions against terrorist groups, **Ch. 3.B.1.c.**
FinCEN re Iran as money laundering concern, **Ch. 3.B.4.**
UN Investigative Team for Accountability of Da'esh/ISIL ("UNITAD"), **Ch. 3.C.3.a.**
ICJ re Iran, **Ch. 7.B.1.**
Inter-American Treaty of Reciprocal Assistance (Venezuela sanctions), **Ch. 7.D.1.**
OAS actions on Venezuela, **Ch. 7.D.2.a.**
Cuba Claims, **Ch. 8.D.**
Recognition of Juan Guaido as interim president of Venezuela, **Ch. 9.A.2.**
Cuba, **Ch. 9.A.7.**
Ukraine, **Ch. 9.B.1.**
Restrictions on Air Service to Cuba, **Ch. 11.A.3.**
Turkey agreement to ceasefire in Northeast Syria, **Ch. 17.B.2.**
Caesar Syria Civilian Protection Act of 2019, **Ch. 17.C.2.**
Action in self-defense against Iranian UAS, **Ch. 18.A.2.**
Iran's attempted space launches, **Ch. 19.B.4.a.**
OPCW adds Novichok to CWC Annex on Chemicals, **Ch. 19.D.1.b.**
Chemical weapons in Syria, **Ch. 19.D.2.**

CHAPTER 17

International Conflict Resolution and Avoidance

A. MIDDLE EAST PEACE PROCESS

See Chapter 9 for discussion of the merger of the U.S. Consulate General in Jerusalem into the U.S. Embassy to Israel and U.S. recognition of the Golan Heights as part of Israel. On November 18, 2019, Secretary of State Michael R. Pompeo announced a change in the U.S. view regarding the establishment of Israeli civilian settlements in the West Bank. Secretary Pompeo's remarks are excerpted below and available at https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press/. For Secretary Kerry's December 2016 statement on Israeli settlements, see *Digest 2016* at 694-702.

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U.S. public statements on settlement activities in the West Bank have been inconsistent over decades. In 1978, the Carter administration categorically concluded that Israel's establishment of civilian settlements was inconsistent with international law. However, in 1981, President Reagan disagreed with that conclusion and stated that he didn't believe that the settlements were inherently illegal.

Subsequent administrations recognized that unrestrained settlement activity could be an obstacle to peace, but they wisely and prudently recognized that dwelling on legal positions didn't advance peace. However, in December 2016, at the very end of the previous administration, Secretary Kerry changed decades of this careful, bipartisan approach by publicly reaffirming the supposed illegality of settlements.

After carefully studying all sides of the legal debate, this administration agrees with President Reagan. The establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law.

I want to emphasize several important considerations.

First, … we recognize that—as Israeli courts have—the legal conclusions relating to individual settlements must depend on an assessment of specific facts and circumstances on the ground. Therefore, the United States Government is expressing no view on the legal status of any individual settlement.

The Israeli legal system affords an opportunity to challenge settlement activity and assess humanitarian considerations connected to it. Israeli courts have confirmed the legality of certain settlement activities and ha[ve] concluded that others cannot be legally sustained.

Second, we are not addressing or prejudging the ultimate status of the West Bank. This is for the Israelis and the Palestinians to negotiate. International law does not compel a particular outcome, nor create any legal obstacle to a negotiated resolution.

Third, the conclusion that we will no longer recognize Israeli settlements as per se inconsistent with international law is based on the unique facts, history, and circumstances presented by the establishment of civilian settlements in the West Bank. Our decision today does not prejudice or decide legal conclusions regarding situations in any other parts of the world.

And finally …calling the establishment of civilian settlements inconsistent with international law hasn't worked. It hasn't advanced the cause of peace.

The hard truth is there will never be a judicial resolution to the conflict, and arguments about who is right and wrong as a matter of international law will not bring peace. This is a complex political problem that can only be solved by negotiations between the Israelis and the Palestinians.

The United States remains deeply committed to helping facilitate peace, and I will do everything I can to help this cause. The United States encourages the Israelis and the Palestinians to resolve the status of Israeli settlements in the West Bank in any final status negotiations.

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B. PEACEKEEPING AND CONFLICT RESOLUTION

1. Afghanistan

In March 2019, U.S. Special Representative for Afghanistan Reconciliation Ambassador Zalmay Khalilzad consulted with his counterparts from the European Union, Russia, and China on the Afghan peace process. See media notes, available at https://www.state.gov/consultations-with-china-and-russia-on-the-afghan-peace-process/ and https://www.state.gov/consultations-with-the-european-union-on-the-afghan-peace-process/.

On April 26, 2019, the United States released as a media note the text of a joint statement by the governments of the United States, Russia, and China after their trilateral meeting, in Moscow on April 25, 2019, on the Afghan peace process. The joint statement follows and the media note is available at https://www.state.gov/joint-statement-on-trilateral-meeting-on-afghan-peace-process/.

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1. The three sides respect the sovereignty, independence, and territorial integrity of Afghanistan as well as its right to choose its development path. The three sides prioritize the interests of the Afghan people in promoting a peace process.

2. The three sides support an inclusive Afghan-led, Afghan-owned peace process and are ready to provide necessary assistance. The three sides encourage the Afghan Taliban to participate in peace talks with a broad, representative Afghan delegation that includes the government as soon as possible. Toward this end, and as agreed in Moscow in February 2019, we support a second round of intra-Afghan dialogue in Doha (Qatar).

3. The three sides support the Afghan government efforts to combat international terrorism and extremist organizations in Afghanistan. They take note of the Afghan Taliban's commitment to: fight ISIS and cut ties with Al-Qaeda, ETIM, and other international terrorist groups; ensure the areas they control will not be used to threaten any other country; and call on them to prevent terrorist recruiting, training, and fundraising, and expel any known terrorists.

4. The three sides recognize the Afghan people's strong desire for a comprehensive ceasefire. As a first step, we call on all parties to agree on immediate and concrete steps to reduce violence.

5. The three sides stress the importance of fighting illegal drug production and trafficking, and call on the Afghan government and the Taliban to take all the necessary steps to eliminate the drug threat in Afghanistan.

6. The three sides call for an orderly and responsible withdrawal of foreign troops from Afghanistan as part of the overall peace process.

7. The three sides call for regional countries to support this trilateral consensus and are ready to build a more extensive regional and international consensus on Afghanistan.

8. The three sides agreed on a phased expansion of their consultations before the next trilateral meeting in Beijing. The date and composition of the meeting will be agreed upon through diplomatic channels.

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After the representatives of the governments of the United States, Russia, Pakistan, and China convened a Four-Party Meeting on the Afghan Peace Process in Beijing, July 10-11, 2019, they released a joint statement, available in a State Department media note at https://www.state.gov/four-party-joint-statement-on-afghan-peace-process/. The text of the joint statement follows.

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Representatives of China, Russia, and the United States held their 3rd consultation on the Afghan peace process in Beijing. China, Russia, and the United States welcomed Pakistan joining the consultation and believe that Pakistan can play an important role in facilitating peace in Afghanistan. Pakistan appreciated the constructive efforts by the China-Russia-US trilateral consultation on the Afghan peace process.

The four sides exchanged views on the current situation and joint efforts for realizing a political settlement to advance peace, stability, and prosperity of Afghanistan and the region. The four sides emphasized the importance of the trilateral consensus on the Afghan peace process reached in Moscow on April 25, 2019. All sides welcomed recent positive progress as the crucial parties concerned have advanced their talks and increased contacts with each other. All sides also welcomed intra-Afghan meetings held in Moscow and Doha.

The four sides called for relevant parties to grasp the opportunity for peace and immediately start intra-Afghan negotiations between the Taliban, Afghan government, and other Afghans. They re-affirmed negotiations should be "Afghan-led and Afghan-owned" and further agreed that these negotiations should produce a peace framework as soon as possible. This

framework should guarantee the orderly and responsible transition of the security situation and detail an agreement on a future inclusive political arrangement acceptable to all Afghans.

The four sides encouraged all parties to take steps to reduce violence leading to a comprehensive and permanent ceasefire that starts with intra-Afghan negotiations.

The four sides agreed to maintain the momentum of consultation, will invite other important stakeholders to join on the basis of the trilateral consensus agreed on April 25, 2019 in Moscow, and this broader group will meet when intra-Afghan negotiations start. The date and venue for the next consultation will be agreed upon through diplomatic channels.

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On October 22, 2019, the State Department released as a media note (available at https://www.state.gov/europe-us-communique-on-the-afghan-peace-process/) the following statement by special envoys and representatives of the European Union, France, Germany, Italy, Norway, the United Kingdom, the United Nations and the United States of America, after their meeting at EU Headquarters in Brussels on October 22, 2019.

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Respectful of the sovereignty, independence and territorial integrity of Afghanistan, participants exchanged views on the current status of the Afghan peace process and discussed ways to support the Afghan people's desire for a lasting peace. To that end, participants:

1. Acknowledged the widespread and sincere demand of the Afghan people for a lasting peace and an end to the war.

2. Reviewed the current situation in Afghanistan and confirmed that a sustainable peace can only be achieved through a negotiated political settlement.

3. Committed to work with the Government of the Islamic Republic of Afghanistan, the Taliban, and other Afghan political and civil society leaders to reach a comprehensive and sustainable peace agreement that ends the war for the benefit of all Afghans and that contributes to regional stability and global security.

4. Urged all parties to take immediate and necessary steps to reduce violence and civilian casualties in order to create an environment conducive for peace.

5. Applauded the courage of Afghan voters, poll workers, election observers and security forces, as well as the work of the Independent Election Commission and the Electoral Complaints Commission, who made the 28 September presidential elections possible, respecting the constitutional order of Afghanistan, and despite technical challenges and security threats; and urged independent Afghan electoral institutions to ensure the votes of Afghans are accurately counted and that results are determined in a fair and transparent manner to ensure the credibility and legitimacy of the electoral process.

6. Welcomed all international efforts that support the Afghan peace process while building upon the gains of the last 18 years and the progress made in protecting the fundamental rights of women and minorities. In that regard, participants congratulated Germany and Qatar for co-organising the historic Intra-Afghan Peace Conference in Doha, Qatar on July 7-8, 2019, and welcomed the Resolution agreed among the Afghan participants in that event; and encouraged

follow-on events to focus on implementation of that Resolution, including ways to achieve the participants' commitment to end civilian casualties, among other things.

7. Stressed that any future intra-Afghan dialogues and peace conferences should build on the achievements of the intra-Afghan Peace Conference in Doha, be inclusive and respect the dignity of all Afghans.

8. Called on President Ashraf Ghani, Chief Executive Abdullah Abdullah and other prominent Afghan leaders to focus immediately on preparing the Islamic Republic of Afghanistan for formal Intra-Afghan Negotiations with the Taliban, including the naming of an inclusive, national negotiating team.

9. Urged all sides to observe a ceasefire for the duration of Intra-Afghan Negotiations to enable participants to reach agreement on a political roadmap for Afghanistan's future.

10. Reaffirmed that any peace agreement must protect the rights of all Afghans, including women, youth and minorities, and must respond to the strong desire of Afghans to sustain and build on the economic, social, political and development gains achieved since 2001, including adherence to the rule of law, respect for Afghanistan's international obligations, and improving inclusive and accountable governance. Highlighted that the Afghan parties inclusion in, and ownership of, intra-Afghan negotiations is important for a successful outcome.

11. Reaffirmed that the Taliban and other Afghan groups must take concrete steps to ensure that territory of Afghanistan should not be used by al-Qa-ida, Daesh or other international terrorist groups to threaten or attack any other country, that the Taliban must cut ties with al-Qaida and other international terrorist groups, and that neither the Taliban nor any other Afghan group or individual should support terrorists operating on the territory of any other country.

12. Stressed the importance of fighting illegal drug production and trafficking and urged all sides to eliminate the drug threat in Afghanistan.

13. Called upon the Government of Afghanistan to effectively fight corruption and promote good governance, and to implement anti-corruption legislation.

14. Agreed that continued international support to Afghan National Defence and Security Forces and other government institutions will be necessary to ensure Afghanistan can defend itself against internal and external threats.

15. Agreed that continued international development assistance will be needed for Afghanistan's reconstruction following a peace agreement, and looked forward to a successful conference in 2020 to discuss international support for Afghanistan.

16. Encouraged all concerned countries to support the Afghan people and contribute to a lasting peace settlement in the interest of all.

17. Expressed their appreciation to the European Union for organising these consultations and agreed to settle the date and venue of the next meeting through diplomatic channels.

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The governments of the United States of America, Russia, China, and Pakistan released a statement after joint meetings on Afghanistan, held in Moscow October 24-25, 2019. The joint statement, excerpted below, is available as an October 28, 2019 State Department media note at https://www.state.gov/u-s-russia-china-and-pakistan-joint-statement-on-peace-in-afghanistan/.

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The Special Representatives of Russia, China, and the United States of America held their fourth consultation on the Afghan peace process in Moscow on October 25, 2019. Russia, China, the United States and Pakistan also held the second round of four-party consultations. Respectful of the sovereignty, independence, and territorial integrity of Afghanistan, participants discussed ways to support the Afghan people's desire for a lasting peace. To that end, participants:

1. Acknowledged the widespread and sincere demand of the Afghan people for lasting peace and an end to the war.
2. Reviewed the current situation in Afghanistan and their joint efforts to reach a sustainable settlement in the country by political and diplomatic means.
3. Confirmed that a sustainable peace can be achieved only through a negotiated political settlement.
4. Committed to work with the Islamic Republic of Afghanistan, both government leaders and others, and the Taliban to reach a comprehensive and sustainable peace agreement that ends the war for the benefit of all Afghans and that contributes to regional stability and global security.
5. In order to create an environment conducive for negotiations, urged all sides to immediately reduce violence.
6. Stated their expectations that all sides will observe a ceasefire for the duration of intra-Afghan negotiations to enable participants to reach agreement on a political roadmap for Afghanistan's future.
7. Called on the Afghan government and the Taliban to release significant numbers of prisoners at the start of intra-Afghan negotiations.
8. Reaffirmed that any peace agreement must include protections for the rights of all Afghans, including women, men, children and minorities, and should respond to the strong desire of Afghans for economic, social, and political development including rule of law.
9. Called on all Afghans including the government and the Taliban to ensure international terrorists do not use Afghan soil to threaten the security of any other country.
10. Highlighted the importance of fighting illegal drug production and trafficking and urged all sides to eliminate the drug threat in Afghanistan.
11. Encouraged all concerned countries to support the Afghan people and contribute to a lasting peace settlement in the interest of all.
12. Welcomed the Chinese proposal to host the next intra-Afghan meeting in Beijing with the participation of a wide range of political figures of the Islamic Republic of Afghanistan, including representatives of the Government of the Islamic Republic of Afghanistan, other Afghan leaders and the Taliban.
13. Noted the importance of current consultations with further involvement of other interested actors on the basis of the trilateral consensus agreed on April 25, 2019 in Moscow.
14. Expressed their appreciation to the Russian side for organizing the four-party consultations and agreed to settle the date and venue of the next meeting through diplomatic channels.

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2. Syria

On September 23, 2019, the State Department issued a press statement welcoming the UN-brokered agreement between the Government of Syria and the Syrian Negotiations Commission to form a Constitutional Committee. The press statement, available at https://www.state.gov/statement-welcoming-un-secretary-generals-announcement-of-an-agreement-between-the-government-of-syria-and-the-syrian-negotiations-committee-to-form-a-constitutional-committee/, further states:

> While much work remains to be done, this is an encouraging step toward reaching a political solution to the Syrian conflict in line with UNSCR 2254. We appreciate the work of the UN Secretary General, UN Envoy Pedersen, Turkey, Russia, and the members of the Small Group in achieving this result. We will continue to strongly support the work of UN Special Envoy Pedersen to advance the political process and all other elements as called for in UNSCR 2254. We will remain engaged with the UN and other parties to encourage all possible efforts to advance the political track.

On September 26, 2019, the foreign ministers of Egypt, France, Germany, Jordan, the Kingdom of Saudi Arabia, the United Kingdom, and the United States of America (the "Small Group") released a joint statement on the urgent need for a lasting political solution for Syria, on the basis of UN Security Council Resolution 2254. The joint statement is available as a State Department media note at https://www.state.gov/joint-statement-by-the-foreign-ministers-of-the-small-group-on-syria/ and appears below.

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The Syrian conflict is in its ninth year, hundreds of thousands of people have died and millions been forcibly displaced. The United Nations assess that in recent months in Idlib, more than 1,000 civilians have been killed and more than 600,000 fled their homes, the humanitarian situation worsened by the targeting of schools, hospitals and other civilian buildings. We deeply regret that the Security Council has failed once again to unite in calling for the protection of civilians, adherence to international humanitarian law, and humanitarian access. We remain fully committed to support such vital measures, and call for an immediate and genuine ceasefire in Idlib. The use of any chemical weapons in Syria shall not be tolerated. We also demand that all parties ensure that all measures taken to counter terrorism, including in Idlib Governorate, comply with their obligations under international law.

There can be no military solution to the Syria crisis, only a political settlement. Without that, Syria will remain weak, impoverished and destabilizing. We therefore strongly support the UN Secretary General's Special Envoy for Syria in his efforts towards a political settlement in line with Security Council Resolution 2254. We welcome the UN's announcement that all parties have now agreed to the establishment of a Constitutional Committee tasked with beginning this process. This is a long-awaited positive step, but one that still requires serious engagement and

commitment to delivery in order to succeed. We encourage the UN to convene the Constitutional Committee, and to start discussion of the substantial issues of its mandate, as soon as possible. It also remains essential to advance all other dimensions of the political process, as outlined in UNSCR 2254.

We strongly support Geir Pedersen's broader efforts to implement all of Resolution 2254, including the meaningful involvement of all Syrians, especially women, in the political process. We fully support efforts towards the mass release of political prisoners and steps to create the safe and neutral environment that would enable Syrians to hold free, fair and credible elections, under UN supervision, in which internally displaced persons, refugees and the diaspora must be able to participate.

We stress the importance of accountability in any efforts to bring about a sustainable, inclusive and peaceful solution to the conflict and therefore continue to support efforts to ensure that all perpetrators of abuses and violations of international humanitarian and human rights law, including those who may be responsible for crimes against humanity, are identified and held accountable.

As the humanitarian situation across Syria continues to deteriorate, we stress the importance of ensuring safe and unhindered humanitarian access for all those Syrians currently in need of it.

We acknowledge the efforts of Syria's neighbors who shoulder the burden of hosting the vast majority of Syrian refugees. We encourage the international community to provide humanitarian assistance as well as financial support to those countries to share the costs of Syria's refugee crisis, until Syrians can voluntarily return home in safety, dignity and security. Any attempts at deliberate demographic change cannot be acceptable. We call on the Regime to cease actions that deter and prevent refugees from returning, and instead to take the necessary positive steps to achieve voluntary, safe and dignified returns.

Finally, we express our satisfaction at the liberation earlier this year of all territory once held by Daesh, who have brought such horror to Syria and Iraq, as well as to the rest of the world. However, the threat from Daesh remnants, as well as from other UN designated terrorist groups, remains, and we are resolved to ensure their lasting defeat. A political settlement in Syria remains essential to this outcome.

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On October 17, 2019, Turkey agreed to a ceasefire in Northeast Syria. See White House press release, available at https://www.whitehouse.gov/briefings-statements/united-states-turkey-agree-ceasefire-northeast-syria/. The agreement came after a week-long offensive by Turkey in the border region of Syria and allows for YPG forces to withdraw from Turkish-controlled territory. See Chapter 16 for discussion of the executive order issued by the United States in response to Turkey's offensive in Syria. The joint U.S.-Turkish statement on Northeast Syria is available at https://www.whitehouse.gov/briefings-statements/united-states-turkey-agree-ceasefire-northeast-syria/, and excerpted below.

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1. The US and Turkey reaffirm their relationship as fellow members of NATO. The US understands Turkey's legitimate security concerns on Turkey's southern border.

2. Turkey and the US agree that the conditions on the ground, northeast Syria in particular, necessitate closer coordination on the basis of common interests.

3. Turkey and the US remain committed to protecting NATO territories and NATO populations against all threats with the solid understanding of "one for all and all for one".

4. The two countries reiterate their pledge to uphold human life, human rights, and the protection of religious and ethnic communities.

5. Turkey and the US are committed to D-ISIS/DAESH activities in northeast Syria. This will include coordination on detention facilities and internally displaced persons from formerly ISIS/DAESH-controlled areas, as appropriate.

6. Turkey and the US agree that counter-terrorism operations must target only terrorists and their hideouts, shelters, emplacements, weapons, vehicles and equipment.

7. The Turkish side expressed its commitment to ensure safety and well-being of residents of all population centers in the safe zone controlled by the Turkish Forces (safe zone) and reiterated that maximum care will be exercised in order not to cause harm to civilians and civilian infrastructure.

8. Both countries reiterate their commitment to the political unity and territorial integrity of Syria and UN-led political process, which aims at ending the Syrian conflict in accordance with UNSCR 2254.

9. The two sides agreed on the continued importance and functionality of a safe zone in order to address the national security concerns of Turkey, to include the re-collection of YPG heavy weapons and the disablement of their fortifications and all other fighting positions.

10. The safe zone will be primarily enforced by the Turkish Armed Forces and the two sides will increase their cooperation in all dimensions of its implementation.

11. The Turkish side will pause Operation Peace Spring in order to allow the withdrawal of YPG from the safe zone within 120 hours. Operation Peace Spring will be halted upon completion of this withdrawal.

12. Once Operation Peace Spring is paused, the US agrees not to pursue further imposition of sanctions under the Executive Order of October 14, 2019, Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Syria, and will work and consult with Congress, as appropriate, to underline the progress being undertaken to achieve peace and security in Syria, in accordance with UNSCR 2254. Once Operation Peace Spring is halted as per paragraph 11 the current sanctions under the aforementioned Executive Order shall be lifted.

13. Both parties are committed to work together to implement all the goals outlined in this Statement.

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On November 6, 2019, a senior State Department official provided a briefing on Syria and Turkey, available at https://www.state.gov/senior-state-department-official-on-syria-and-turkey/, and excerpted below.

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…[W]e're going to be meeting with the Turks in Ankara to talk to them about the implementation of the October 17th joint statement, our overall policies in Syria, and how we can better coordinate them with Turkey, because in many respects, Turkey is a natural ally of ours on the larger Syria issues of the Assad regime, of refugees, of chemical weapons, of the presence of the Iranians and such. The issues that we've had, as you all know as well as I, have been in the northeast.

And then also maintaining very close contacts with the Russians, both because from a military standpoint, there's military de-confliction going on all of the time in the northeast right now, and there's a political side to that as well. We still think that while most of the action has been the Turkish incursion into northeast Syria and everything we have done in response to that, at the same time, you've had the constitutional committee launch in Geneva at the end of last month, which is a victory for, we think, our and the international community's pressure strategy against the Assad regime, and indirectly against its main sponsor, Russia, and that's why we did get this launch.

Where the launch will go and how big of a role it will have in the political future of Syria is yet to be determined. Clearly, the Assad regime would like to see it have its minimal effect. We would like to see it have a maximal effect, and that's where the tension line lies with us and the Russians. The Russians are somewhere in between. Without the Russians, we wouldn't have gotten this constitutional committee, but to what extent they simply need a Potemkin village to prop up their main ally, Assad, and to what extent they realize that they are inheriting ownership of, to use Colin Powell's phrase, a pottery barn—that is, basically just rubble in a graveyard—that's another thing, and we're trying to make that point clear to them that it's going to stay part of rubble in a graveyard until the international community sees some kind of movement towards our list of issues and answers and policies, and you all know them.

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…This is a specific UN Security Council-mandated—not quite mandated, but quasi-mandated initiative that is being overseen by the United Nations, specifically Geir Pedersen. So in that regard, we take it more seriously.

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On November 14, 2019, the State Department released as a media note the text of a joint statement by the foreign ministers of the "Small Group on Syria," which includes Egypt, France, Germany, Jordan, the Kingdom of Saudi Arabia, the United Kingdom, and the United States of America. The November 14, 2019 joint statement follows and is available at https://www.state.gov/joint-statement-by-the-foreign-ministers-of-the-small-group-on-syria-3/.

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The Foreign Ministers of Egypt, France, Germany, Jordan, the Kingdom of Saudi Arabia, the United Kingdom, and the United States of America strongly support the work of the UN Secretary-General and UN Special Envoy Geir Pedersen to implement UN Security Council Resolution 2254.

In recent weeks, the UN has opened a door to progress in the political process with the launching of the Constitutional Committee, which could be a first step towards a political solution. After more than eight years of violence, there is no military solution that can bring stability to Syria, allow displaced Syrians to return safely and voluntarily to their homes, and defeat terrorism.

We remain committed to upholding the sovereignty, unity and territorial integrity of Syria and oppose forced demographic change. We particularly call upon all actors in the northeast to immediately implement a cease fire and to halt all military offensive operations. We commit to disburse no assistance for any resettlement of Syrian refugees into northeast Syria that is not the safe, dignified, and voluntary return of those refugees to their homes.

We also call for an immediate and genuine cessation of hostilities in Idlib, including an immediate halt to attacks against civilians. In addition, we stress the need to deal effectively with the terrorist threat emanating from Idlib and northwest Syria.

We also ask the international community to commit to support the UN on implementation of all aspects of UN Security Council Resolution 2254, notably a nationwide ceasefire, the creation of a genuine and representative Syrian constitution, the mass release of political prisoners, as well as UN-supervised elections that are free, fair and credible. Internally displaced persons, refugees and the diaspora must be able to participate in these elections in a safe and neutral environment. We continue to support efforts to ensure that all perpetrators of abuses and violations of international humanitarian and human rights law throughout Syria are identified and held accountable.

We encourage the international community to provide humanitarian assistance to all of Syria with the support of the UN agencies and stress the importance of ensuring safe and unhindered humanitarian access for all Syrians currently in need of it. We also support the safe, dignified, and voluntary return of refugees to their homes.

Finally, we express our commitment to the enduring defeat of ISIS and other UN designated terrorist groups and remind the international community that a political settlement in Syria remains essential to sustainably achieving this shared goal.

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A December 21, 2019 press statement from Secretary Pompeo denounced the veto by the Russian Federation and China of UN Security Council Resolution 2449 allowing humanitarian aid to the Syrian people. The statement appears below and is also available at https://www.state.gov/russian-federations-and-chinas-veto-of-unscr-2449-aid-to-syrian-refugees/.[*]

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[*] Editor's note: On January 10, 2020, the United States delivered an explanation of vote on the humanitarian crossings issue after abstaining from the vote on the resolution that was ultimately passed. That statement will be discussed in *Digest 2020*.

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The Russian Federation's and China's veto yesterday of a Security Council resolution that allows for humanitarian aid to reach millions of Syrians is shameful. The resolution put forward by Germany, Belgium and Kuwait, and supported by the U.S. would have enabled life-saving assistance to reach at least four million Syrians throughout the country. Unfortunately, the Russian Federation for the 14th time, and China, for the 8th time, failed in this commitment. Both countries preferred instead to provide cover and support for its junior partner in Damascus; thus placing the lives of millions of innocent civilians in the balance at the height of winter, while further threatening civilians by supporting the continued Assad regime and Russian military offensive on Idlib.

To Russia and China, who have chosen to make a political statement by opposing this resolution, you have blood on your hands. There is no substitute for UN cross border deliveries, and there are no viable alternatives to feeding millions of Syrians until the Syrian regime ceases its war on the Syrian people. UN cross-border aid must continue until the Assad regime demonstrates that it is ready to shoulder its moral responsibility to provide unhindered UN humanitarian access to every single Syrian in need, no matter where they live. Russia's and China's vetoes of this resolution demonstrate that these governments simply do not care that the horrible Syrian regime continues to obstruct and deny humanitarian access to its own people.

Russia and China argue that the situation has changed, but that's far from the truth. Millions of Syrians are still in need of assistance. The international community of free and democratic nations, as seen by the Council vote, cannot understand what Russia and China gain from vetoing the resolution and holding humanitarian aid hostage. That is an explanation both nations owe the Council, the Syrian people, and the international community of nations that support human rights and fundamental freedoms.

The United States will remain committed to helping the voiceless, the hungry, the displaced, and the orphaned receive the humanitarian aid they require to survive no matter where they live. We are the largest single humanitarian donor in Syria, having provided $10.5 billion since the start of the crisis in 2011. We are proud of our principled stance to help every Syrian in need—even in regime-held areas—and will continue to shine a light on those who choose not to help.

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3. Colombia

On March 15, 2019, the State Department issued a press statement on U.S. support for the ongoing peace process in Colombia. The statement, available at https://www.state.gov/supporting-colombias-ongoing-peace-process/, includes the following:

> The United States welcomes the Colombian government's efforts to ensure the law implementing the Special Jurisdiction for Peace (JEP) complies with the 2016 Peace Accord and the Colombian Constitution. The United States also welcomes actions that ensure that those who commit serious crimes after the signing of the

> Peace Accord, in violation of the accord's stated aims to promote non-recurrence, are held accountable to the full extent of the law and are subject to extradition as appropriate and foreseen under the 2016 agreement. The United States reaffirms the importance of Colombia's expeditiously passing a statute to implement the JEP to ensure it has a solid legal framework to operate effectively and independently.
>
> …
>
> The United States has provided strong support to Colombia's journey toward peace. We welcome efforts to strengthen accountability for war crimes and violations and abuses of human rights and to ensure that those responsible receive sentences proportionate to the crimes committed, whether by the FARC, paramilitaries, or state agents, including the military in Colombia. The United States views the JEP as an important mechanism for peace and justice in Colombia.

The Secretary of State made a certification on August 13, 2019 related to accountability in Colombia as required under section 7045(b)(4) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019 (Div. F, Pub. L. 116–6). 84 Fed. Reg. 45,197 (Aug. 28, 2019). Specifically, Secretary Pompeo certified and reported to the Committees on Appropriations that:

> (A) the Special Jurisdiction for Peace and other judicial authorities are taking effective steps to hold accountable perpetrators of gross violations of human rights in a manner consistent with international law, including for command responsibility, and to sentence them to deprivation of liberty;
>
> (B) the Government of Colombia is taking effective steps to reduce attacks against human rights defenders and other civil society activists, trade unionists, and journalists, and judicial authorities are prosecuting those responsible for such attacks; and
>
> (C) senior military officers responsible for ordering, committing, and covering up cases of false positives are being held accountable, including removal from active duty if found guilty through criminal or disciplinary proceedings.

On August 30, 2019, the State Department issued a press statement by Secretary Pompeo denouncing calls by some in Colombia to abandon the 2016 peace accord. The press statement, available at https://www.state.gov/the-united-states-denounces-calls-to-resume-armed-conflict-in-colombia/, includes the following:

> We strongly repudiate recent calls by some individuals to abandon the FARC's commitments under the 2016 peace accord and engage in further terrorism and violence. We also condemn the continued terrorist activities of the ELN and those who enable it and give it safe haven.
>
> … The continuing adherence to and implementation of the 2016 peace accord is vital to sustainable progress on security, counternarcotics, human rights, and economic development.

> The United States welcomes actions that ensure those who have committed or continue to commit serious crimes since the signing of the peace accord in 2016 are held accountable to the full extent of the law and are subject to extradition as appropriate and provided for under the agreement.

4. Sudan

See Chapter 9 for the U.S. statement on the overthrow of President Omar al Bashir. On June 4, 2019, the Troika (the United States, Norway, and the United Kingdom) issued a joint statement on developments in Sudan, available at https://www.state.gov/joint-statement-on-developments-in-sudan/, which states:

> The Troika condemns the violent attacks in Sudan on June 3, which resulted in the killing and injuring of many peaceful civilian protesters. By ordering these attacks, the Transitional Military Council has put the transition process and peace in Sudan in jeopardy. We call for an agreed transfer of power to a civilian-led government as demanded by the people of Sudan. We welcome the statement of the Chairperson of the African Union (AU) and support the important role of the AU in solving the crisis in Sudan, including its demand for an immediate handover to a civilian-led government.
>
> The Troika also expresses its serious concern over the TMC's announcement that it will cease negotiations with the Forces for Freedom and Change, retract all previous agreements with them on formation of an interim government, and will hold elections within nine months. The people of Sudan deserve an orderly transition, led by civilians, that can establish the conditions for free and fair elections, rather than have rushed elections imposed by the TMC's security forces.

On June 5, 2019, the State Department issued a further statement on the situation in Sudan, available at https://www.state.gov/situation-in-sudan/, in which the United States condemned attacks on protesters and called on Sudan's Transitional Military Council and the Rapid Support Forces to stop resorting to violence. The United States urged further consultations with the Forces for Freedom and Change toward establishing a civilian-led transition and expressed support for the African Union ("AU") Peace and Security Council's April 30 communiqué.

On June 29, 2019, the Troika issued a statement on freedoms in Sudan, excerpted below and available at https://www.state.gov/troika-statement-on-freedoms-in-sudan/.

> The Sudanese people have a right to freedom of expression and freedom of peaceful assembly. The Transitional Military Council should respect these rights, permit peaceful protests, and avoid any use of violence.
>
> The Troika continues to support the demand of the Sudanese people for a peaceful, agreed transition towards democracy in Sudan. We also support the ongoing African Union-Ethiopian mediation. We call on the Transitional Military Council and the Forces for Freedom and Change to engage constructively with the African Union-Ethiopian proposal to achieve a peaceful democratic transition

through the formation of a civilian-led transitional government. Such a transition will help stabilize the country and enable the Troika and other partners to work with the Government of Sudan to address the country's economic challenges.

On July 6, 2019, the State Department issued a press statement welcoming the July 5, 2019 announcement of an agreement between the Forces for Freedom and Change and the Transitional Military Council to establish a sovereign council in Sudan. The press statement, available at https://www.state.gov/response-to-july-5-agreement-announcement-in-sudan/, commends mediators from the African Union and Ethiopia for their assistance in facilitating progress toward civilian-led government.

On July 23, 2019, U.S. Special Envoy to Sudan Ambassador Donald Booth held a press briefing to discuss international efforts to facilitate a transition to peace and civilian government in Sudan after the exit of President Bashir. Ambassador Booth's remarks are excerpted below and available at https://www.state.gov/press-briefing-with-ambassador-donald-booth-u-s-special-envoy-to-sudan/.

* * * *

I started as the Special Envoy for Sudan on the 10th of June and since then have been in Khartoum three times and done two swings through the region, both in Africa and the Middle East. In my time in Khartoum I've met and spent a fair amount of time with a broad range of Sudanese to better understand where all of them are coming from and what they're trying to achieve. …

The position that the United States has taken is that we support the formation of a civilian-led transitional government that will be broadly supported by the Sudanese people. There are many partners that we have engaged with toward that end. I'm just here in Brussels yesterday for a meeting of the Friends of Sudan, which is a group of Western, Middle Eastern, and African parties that are interested in helping the Sudanese people achieve their desires. That group met last month in Berlin and came up with an agreement for broad support for the mediation effort of the African Union and Ethiopia toward helping the Sudanese achieve their desire for a civilian-led transitional government.

In addition to the African Union and Ethiopian mediation, there have also been roles played by individual Sudanese in trying to bring the Transitional Military Council and the Forces for Freedom and Change together, and we've seen that progress is often made in talks when the Sudanese parties are face to face and engaging with each other.

We all know of the very tragic events of the 3rd of June when close to 150 people were killed at the sit-in site outside the military headquarters. The 3rd of June was a signal of the limits of people power; but then there was the 30th of June, which was when close to a million people again took to the streets and cities throughout Sudan, and I think that demonstrated the limits of military power over the people.

So shortly after those lessons were learned by both sides, we had the announcement of an agreement on a transitional government on the 5th of July, which resulted in the signing of the political declaration on July the 17th.

Now, that political declaration really addresses the structure of a transitional government and not the entire structure of it. For example, it has put off the question of the Legislative

Council. So it is a document that is the beginning of a process. We welcome the agreement on that. But there are still a lot of negotiations to be conducted on what the Sudanese are calling their constitutional declaration, which is a document that will be more detailed and will have to address what the functions of the different parts of the transitional government will be. It's in that document where issues of relative roles and powers of the Sovereignty Council, the Prime Minister and the Cabinet, and ultimately of the Legislative Council will be addressed.

Then after that, it is agreed there's still the issue of who will actually be in the transitional government.

So as you can see, there's still a lot that the Sudanese need to do but as I said, we fully support the desire of the Sudanese people to have a civilian-led transitional government that will tackle the issues of constitutional revision and organizing elections, free and fair, democratic elections, at the end of a transition period.

Another part of my function has been to engage with a broad set of international partners to secure their support to help the Sudanese people achieve their desire for a civilian-led transitional government and to provide peace and stability in Sudan, and to begin the process of restoring Sudan's economy. That's one of the issues that we discussed among the Friends of Sudan in Brussels yesterday.

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…[T]he agreement that was reached on July 17th is only the first step in forming the transitional government, and we certainly need to see the Sudanese reach agreement on the further step of the Constitutional Declaration, which will address the functions of that government so that we have a true sense as to where the relative powers and authorities will lie.

So, the U.S. reaction will depend upon what the Sudanese actually agree upon, and then also, as we say, the broad support of the Sudanese people for any such agreement.

So, under current U.S. restrictions that go back many years, including our designation of Sudan as a state sponsor of [t]errorism, our ability to operate in Sudan in the economic realm has been limited to humanitarian and democracy and governance areas. So those are areas we could definitely engage in going forward in support of a government. And I would think that if it's seen as a government that truly reflects what the Sudanese people have been looking for, it will certainly have the political support of the United States and our active engagement with other partners around the world to support that.

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There are still some sanctions on individuals, particularly sanctions related to gross human rights abuses that were voted through the UN Security Council. There are a number of other issues that would limit U.S. ability to provide assistance, but are not sanctions per se.

The main one that people recognize is the current designation or ongoing designation of Sudan as a state sponsor of terrorism. But there are also limitations on any assistance we can provide outside of the humanitarian and democracy governance area due to shortcomings of Sudan in the area of child soldiers. It's an issue we are engaging General Hemeti in particular on, and I'm pleased to say that he has last week committed to allow the International Committee of the Red Cross and UNICEF to investigate that. We'll see if they secure his cooperation in that matter, but the commitment was made.

We also have concerns about trafficking in persons and lack of Sudan's focus on trying to deal with that issue. Religious freedom is another area where we have concern. So there are

many things that limit what the United States can do in the assistance area, but again, having a civilian-led transitional government we believe will be a start, if they start addressing these issues, to being able to engage Sudan on looking at all these issues where we still have restriction.

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The issue of immunity and accountability—that is an important issue. There is, in the draft, one draft anyway of the Constitutional Declaration, a provision for immunity for members of the Sovereignty Council. That would apply to the civilians as well as to the military members of it. And as I understand, there are negotiations, part of the negotiations will be in limiting the extent of that. Having immunity for the Chief Executive or Executive Branch of a government is not unusual. When you think about it in the U.S. context, only the Congress can move to impeach and try a President.

So it's not an unusual thing, but what they are looking to add to it is not only limitations on it, but what mechanism might be used to lift any immunity for specific reasons.

The issue of accountability gets to one other function to be achieved during the transitional period, and that is the establishment of an independent and credible investigation of the June 3rd events and subsequent violence. Again, a commission has not been established. Who will establish it and how it will be independent has not been yet thoroughly agreed. Though the political declaration that was signed on the 17th of July did include a provision that the independent commission to be established would be able to call on African support. So that gives an opening for assistance and oversight, perhaps, that could add to the credibility of any investigation.

We have certainly cautioned the Sudanese parties that an investigation done in-house, no matter how well done, will always have some suspicion, so the idea of having this being done above board is extremely important I think to the Sudanese people and we certainly support that.

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…There are actually two negotiations going on. One has been the negotiation in Khartoum between the Transitional Military Council and the Forces for Freedom and Change. And in that regard, I frankly think that the focus has been more on the structure of the government and to some extent the authorities of the government rather than on who will occupy what positions.

Now the FFC has told me they have their lists of people that they will propose for ministerial posts, for example, or for their seats on the Sovereignty Council, but that has not, at least in discussions with me or other envoys from other countries that have been involved in this, that has not been a big focus.

What you may be referring to is what you're hearing out of the discussions between the FFC delegation that has gone to Addis Ababa to meet with representatives of some of the armed groups who have been fighting the government of Sudan for some time.

There we have heard calls for positions in the Cabinet, for reserved seats in a legislature. Those discussions in Addis really we think one should not be delaying the formation of a transitional government, and two, the armed groups really need to focus on how they're going to negotiate peace agreements.

The purpose of the FFC engagement with them was to see how that might, peace negotiations might proceed in the future.

I'll be going to Addis shortly to try to talk with all the parties there to get a better sense of where they're coming out in the talks that have been going on there, but clearly we believe and I've communicated this to everyone I've met in Khartoum, that they need to focus on resolving the issue so that they can get a civilian-led transitional government established.

Sudan in effect has been operating really without an agreed government since the fall of President Bashir. The Transitional Military Council has in effect been de facto running things with the old ministries and personnel from those ministries in place. So, the sooner that Sudan can establish a civilian-led transitional government, it can being then to address issues of reform and moving forward to a better future.

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The Troika's December 11, 2019 statement relates to the resumed talks with Sudanese armed opposition groups on December 10, 2019. That statement is excerpted below and available at https://www.state.gov/troika-statement-on-the-resumption-of-peace-talks-with-sudan-armed-opposition-groups/.

> The success of these talks will be critical in Sudan's journey towards ensuring lasting peace. The United States, the United Kingdom, and Norway (the Troika) welcome the resumption of these talks. …
>
> For too long, internal conflict was waged at the expense of Sudan's most vulnerable people. Only lasting peace will ensure that the humanitarian and security needs of those in the areas affected by the conflicts can be met and for those marginalized areas to benefit from the changes ushered in by the creation of a civilian led transitional government. We urge all sides to support the formation of the Transitional Legislative Assembly and appointment of civilian governors (known as walis) by the end of December 2019. We furthermore encourage all sides to come to the talks without pre-conditions. Progress in the talks will maintain confidence in building a stable, secure, democratic and inclusive Sudan where all Sudanese are equal. It is vital that all sides demonstrate the political will to work together, and engage productively, to find solutions to outstanding issues. If they do so they will have the support of the Troika.

5. South Sudan

On February 20, 2019, the State Department issued as a media note, available at https://www.state.gov/joint-statement-on-escalating-conflict-in-south-sudan/, the Troika's joint statement on escalating conflict in South Sudan. The joint statement follows.

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The members of the Troika (Norway, the United Kingdom, and the United States) are alarmed about the escalating conflict around Yei, which represents a flagrant breach of the December 2017 Cessation of Hostilities Agreement and the September 2018 revitalized peace agreement. These military actions, and the trading of blame, must stop.

We are particularly disturbed that fighting by all parties in the Yei area has severe humanitarian consequences for the local population. Thousands of South Sudanese have been

displaced and fled across the border into the Democratic Republic of the Congo in recent days to escape fighting and violence against civilians, the UN's High Commissioner for Refugees has confirmed.

This renewed violence risks undermining the peace agreement and lowers confidence of the Troika and other international partners in the parties' seriousness and commitment to peace at a critical time of the pre-transitional period of the revitalized peace agreement.

We are concerned that if the situation escalates, the progress made in implementing the peace agreement will be irrevocably set back. In addition, if violence against civilians continues unchecked, it could fuel further cycles of violence and atrocities.

All parties—the Government of South Sudan, the SPLM-IO, and National Salvation Front—must end the violence immediately in line with commitments they made in the Cessation of Hostilities Agreement. Namely, they must ensure the safety of civilians and their freedom of movement, and guarantee safe routes for civilians to leave conflict areas. The parties must allow unrestricted access to Yei and the surrounding area for the UN Mission in South Sudan, the Ceasefire and Transitional Security Arrangements Monitoring and Verification Mechanism, as well as all humanitarian actors, to enable them to effectively carry out their roles.

Regional leadership will be essential to securing progress on this matter. We urge the region to respect the UN Arms Embargo and to hold those responsible for violations of the peace agreement and Cessation of Hostilities Agreement to account in line with the Intergovernmental Authority on Development (IGAD) statement of 31 January that called for all parties to "cease hostilities and military preparations immediately." The Reconstituted Joint Monitoring and Evaluation Commission (R-JMEC) has a central role in holding the parties to these agreements accountable to their commitments. We urge IGAD to appoint a credible and empowered R-JMEC Chair as a matter of urgency.

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The July 29, 2019 Troika joint statement on the peace process in South Sudan is available at https://www.state.gov/troika-statement-on-the-south-sudan-peace-process/ and appears below.

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The Troika (the United States, United Kingdom, and Norway) reaffirm their commitment to the IGAD-led South Sudan peace process and to the lasting peace the people of South Sudan deserve. The significant drop in political violence and the presence of many opposition politicians in Juba are welcome developments. However, with less than four months until the new deadline for the end of the pre-transitional period in November, time is running out. While there is progress, lack of momentum to fully implement the peace agreement may threaten the successful formation of the transitional government and prospects for the peace process.

We call on the parties to redouble their efforts to resolve the most pressing remaining issues, which includes ensuring agreed security reforms are delivered, through the mobilization of necessary support. We join the region and South Sudan's civil society in calling for regular engagement between President Salva Kiir and Dr. Riek Machar. Focused discussions on outstanding tasks are critical for progress towards the formation of the Revitalized Transitional Government of National Unity, which will set the foundation for effective joint governance. Credible elections in South Sudan in 2022 are another important milestone.

We are encouraged by the appointment of H.E. Stephen Kalonzo as the Kenyan Special Envoy on South Sudan; this is an important demonstration of commitment from an Intergovernmental Authority on Development (IGAD) member state. The Troika also welcomes the commitment made by the AU High-Level Ad hoc Committee (theC5) at the AU summit on 6 July to re-engage in South Sudan's peace process. The role of IGAD countries and the wider international community remains critical, and the Troika stands ready to support the region's engagement.

For the peace process to remain credible, it is important that the parties demonstrate their commitment to peace and meet the assurances they made in May. The Troika stands by the people of South Sudan and looks forward to working with the peace agreement's mandated reconstituted transitional government to support a successful transitional period.

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On September 12, 2019, the State Department released as a media note the Troika statement on the one-year anniversary of the signing of the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan. The media note is available at https://www.state.gov/troika-statement-on-the-one-year-anniversary-of-the-signing-of-the-revitalized-agreement-on-the-resolution-of-the-conflict-in-the-republic-of-south-sudan/ and the joint statement follows.

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On the one-year anniversary of the signing of the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS), the Troika (United States, United Kingdom, and Norway) wishes to reconfirm its support for the peace process and to underscore the need to implement the terms of the R-ARCSS in a timely manner.

We applaud President Salva Kiir and Dr. Riek Machar for engaging in direct talks in Juba on September 9-10 and for the subsequent recommitment to form a transitional government. We encourage President Kiir to continue to facilitate the dialogue necessary among South Sudan's political leaders, including Dr. Machar, to ensure the formation of a transitional, representative, national government by the November 12 deadline. In forming this government, South Sudan's leaders have the opportunity to set aside ethnic rivalries and personal interests and demonstrate the political will necessary to build a better future for the people of South Sudan.

On this anniversary, we hope that South Sudan's political leaders will demonstrate to the millions of South Sudanese who live in fear of a return to conflict that they are definitively abandoning the use of force to resolve political differences. We urge all of South Sudan's leaders to take the necessary steps to uphold a definitive cessation of hostilities and to initiate the demobilization, disarmament, and reintegration process that will build a truly national security apparatus.

The Troika will continue to stand with and support the people of South Sudan, who deserve a government that respects human rights, empowers women and youth, and enables economic development through the peaceful return of refugees and internally displaced persons to their homes. We further hope for a constructive relationship with the post-November 12 Government of South Sudan.

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On October 21, 2019, the United States joined in a statement from the Troika (with the United Kingdom and Norway) on the formation of South Sudan's revitalized transitional government. The statement appears below and as a State Department media note at https://www.state.gov/troika-statement-on-the-formation-of-south-sudans-revitalized-transitional-government-of-national-unity/.

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South Sudan faces a critical moment in the journey toward a peaceful and prosperous future. There are now less than four weeks for political leaders to form a transitional government as they committed to in the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan. The United States, the United Kingdom, and Norway (the Troika) have consistently welcomed assurances by the parties to implement the agreement and meet its deadlines, and hoped that recent meetings between South Sudan's leadership show a renewed spirit of cooperation. We commend the actions of the Intergovernmental Authority on Development (IGAD) to broker the agreement and maintain momentum and take hope from the continued reduction in overall violence in South Sudan.

For too long, conflict has been waged at the expense of South Sudan's most vulnerable and continues to exacerbate humanitarian needs. We encourage the parties, especially the current government, to take concrete steps to build trust through enhanced cooperation. With the November 12 deadline looming, extended from May, much more needs to be done urgently to ensure the success of the transitional government. Progress would help maintain the confidence of all the parties and the international community, demonstrate that the parties have the political will to work together during the transitional period, and provide the opportunity for the international community to engage productively with an inclusive, new government.

We welcome the discussions of IGAD countries in Addis Ababa last week; the region and the international community's investment and engagement in a peaceful South Sudan remains important. The Troika will continue to stand with and support the people of South Sudan, who want and deserve peace and a government that protects its people. We urge the South Sudanese parties to meet the November 12 deadline to form a transitional government that will enable the conditions for a constructive relationship during the next phase of South Sudan's peace process. We encourage South Sudanese leaders to build on momentum generated by the ongoing UNSC visit to South Sudan to accelerate such progress.

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6. Libya

On March 1, 2019, the joint statement of the governments of the United States, France, Italy, and the United Kingdom appeared in a State Department media note. The joint statement, available at https://www.state.gov/joint-statement-on-libya/, follows:

> The governments of France, Italy, the United Kingdom, and the United States reiterate their strong support to the ongoing efforts of UN Special Representative of the Secretary-General (SRSG) Ghassan Salamé and the UN Support Mission in

Libya (UNSMIL) to de-escalate tensions in Libya and help the Libyan people chart a path toward credible and secure elections. We welcome UN leadership in convening Prime Minister al-Sarraj and LNA Commander Haftar on February 27 and commend the efforts of the Government of the United Arab Emirates to facilitate this discussion. We welcome the announcement by UNSMIL that a political agreement could be reached on the need to end the transitional stages in Libya through holding general elections, and on ways to maintain stability in the country and unify its institutions. Mindful that there is no military solution in Libya, we call on all Libyans to work constructively with SRSG Salamé and seize this vital opportunity to realize a stable and unified government that can deliver security and prosperity for all Libyans.

We also welcome the announcement by the Government of National Accord that parties have agreed to resume oil production at the al-Sharara field. All sides should promptly implement this agreement in order to allow the National Oil Corporation (NOC) to resume its vital work for the benefit of all Libyans. These Libyan resources must remain under the exclusive control of the NOC and sole oversight of the Government of National Accord, as outlined in UN Security Council Resolutions 2259 (2015), 2278 (2016), and 2362 (2017).

On July 16, 2019, a joint statement on hostilities in Tripoli by the governments of Egypt, France, Italy, the United Arab Emirates, the United Kingdom, and the United States appeared in a State Department media note. The joint statement follows and the media note is available at https://www.state.gov/joint-statement-on-hostilities-in-tripoli/.

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The governments of Egypt, France, Italy, the United Arab Emirates, the United Kingdom, and the United States reiterate their deep concern about ongoing hostilities in Tripoli, call for an immediate de-escalation and halt to the current fighting, and urge the prompt return to the UN-mediated political process. There can be no military solution in Libya. Persistent violence has claimed nearly 1,100 lives, displaced more than 100,000, and fueled a growing humanitarian emergency. The ongoing confrontation has threatened to destabilize Libya's energy sector and exacerbated the tragedy of human migration in the Mediterranean.

We note our deep concerns about the ongoing attempts by terrorist groups to exploit the security vacuum in the country, call on all parties to the Tripoli conflict to dissociate themselves from all such terrorists and individuals designated by the UN Sanctions Committee, and renew our commitment to see those responsible for further instability held accountable.

We fully support the leadership of UN Special Representative of the Secretary-General Ghassan Salamé as he works to stabilize the situation in Tripoli, restore confidence in order to achieve a cessation of hostilities, expand his engagement throughout Libya, promote inclusive dialogue, and create the conditions for the resumption of the UN political process. We need to re-energize UN mediation, which aims to promote a transitional government representing all Libyans, prepare for credible parliamentary and presidential elections, enable a fair allocation of resources, and advance the reunification of the Central Bank of Libya and other Libyan sovereign institutions. We also call on all UN member states to fully respect their obligations to contribute to Libya's peace and stability, prevent destabilizing arms shipments, and safeguard

Libya's oil resources in accordance with Security Council resolutions 2259 (2015), 2278 (2016), 2362 (2017), and 2473 (2019). Finally, we remind all Libyan parties and institutions of their responsibility to protect civilians, safeguard civilian infrastructure, and facilitate access to humanitarian supplies.

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On August 11, 2019, the same governments issued a further joint statement, this time welcoming an announced truce in Libya. The August 11 joint statement is available at https://www.state.gov/joint-statement-by-the-governments-of-france-italy-the-united-arab-emirates-the-united-kingdom-and-the-united-states-on-the-truce-in-libya/ and follows.

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The governments of France, Italy, the United Arab Emirates, the United Kingdom, and the United States welcome the announcement of a truce in Libya on the occasion of Eid el-Adha in response to the Special Representative of the UN Secretary General (SRSG) with the support of the Security Council (UNSC press statement on Libya of 11 August), and invite all parties to effectively cease hostilities across Libya. We stand ready to assist the UN Mission in monitoring the observance of the truce and address any attempt to break it.

As proposed by the SRSG and reaffirmed today by the Security Council, this truce should be accompanied by confidence-building measures between the parties that can pave the way for a sustainable cease-fire and a return to a constructive, inclusive dialogue.

The governments of France, Italy, the United Arab Emirates, the United Kingdom, and the United States recall the obligation under international law for all UN Member States to abide by the arms embargo, in line with all relevant UN Security Council Resolutions.

We call on all parties to start working with no delay on a ceasefire agreement and resume efforts, under the auspices of the Special Representative of the United Nations, to build a lasting political solution, based on the principles agreed upon in Paris, Palermo, and Abu Dhabi.

The governments of France, Italy, the United Arab Emirates, the United Kingdom, and the United States, reaffirm their strong commitment to a quick and peaceful resolution of the Libyan crisis. We reiterate that there can be no military option in Libya, and we urge all parties to protect civilians, safeguard Libya's oil resources, and protect its infrastructure.

The governments of France, Italy, the United Arab Emirates, the United Kingdom, and the United States condemn in the strongest terms the attack that targeted a UN convoy in Benghazi yesterday. The circumstances of this vicious act must be established with no delay and those who were behind it must be identified and held accountable. We reiterate their full support to the essential work of the UN Mission in Libya.

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7. Yemen

On June 24, 2019, the State Department released, in a media note (available at https://www.state.gov/joint-statement-by-saudi-arabia-the-united-arab-emirates-the-united-kingdom-and-the-united-states-on-yemen-and-the-region/), a joint statement on Yemen by the governments of Saudi Arabia, the United Arab Emirates, the United Kingdom, and the United States (the "Quad"). The joint statement follows.

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The Kingdom of Saudi Arabia, the United Arab Emirates, the United Kingdom and the United States of America express their concern over escalating tensions in the region and the dangers posed by Iranian destabilizing activity to peace and security both in Yemen and the broader region, including attacks on the oil tankers at Fujairah on 12 May and in the Gulf of Oman on 13 June. These attacks threaten the international waterways that we all rely on for shipping. Ships and their crews must be allowed to pass through international waters safely. We call on Iran to halt any further actions which threaten regional stability, and urge diplomatic solutions to de-escalate tensions.

We further note with concern the recent escalation in Houthi attacks on Saudi Arabia using Iranian made and facilitated missiles and Unmanned Aerial Vehicles. In particular, we condemn the Houthi attack on Abha civilian airport on 12 June, which injured 26 civilians. We express full support for Saudi Arabia and call for an immediate end to such attacks by the Iranian-backed Houthis.

The Quad members express concern that the World Food Program has been forced to suspend food deliveries to Sanaa due to Houthi interference in aid delivery. We call on the Houthis to immediately end all restrictions on aid agencies to ensure the delivery of life-saving assistance to those Yemenis most in need.

We reiterate our commitment to the Yemeni peace process and relevant Security Council Resolutions, including UNSCR 2216. We express our full support for the UN Special Envoy Martin Griffiths. In this regard, we call on the Yemeni parties to engage constructively with the Special Envoy to accelerate implementation of the agreements reached in Stockholm. We call on the Houthis to facilitate full and unhindered access for UNMHA, UNDP and UNVIM.

We call on the Yemeni parties to participate constructively in the joint Redeployment Coordination Committee to accelerate implementation of the Hodeidah Agreement, which includes agreeing the Concept of Operations and tripartite monitoring, as well as engaging constructively on local security issues. We call on the Houthis to withdraw fully from the ports of Hodeidah, Ras Issa and Saleef. We look to the Security Council to review progress when they meet on 17 July.

The Quad nations note that implementation of the Stockholm Agreement will give the opportunity to start a comprehensive political process which can lead to an enduring political settlement that will end the conflict in Yemen.

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On November 6, 2019, the United States welcomed the signing of the Riyadh Agreement between the Republic of Yemen Government ("ROYG") and the Southern Transitional Council ("STC"). The State Department press statement on the subject, available at https://www.state.gov/agreement-in-southern-yemen/, includes the following:

> We are hopeful that with this agreement, all parties will work together to end the conflict and to achieve the peace and stability that Yemen's people deserve. We thank Saudi Crown Prince Mohammed Bin Salman and the government of Saudi Arabia, President Hadi and his government, and the government of the United Arab Emirates for facilitating this pivotal agreement, which will support UN-led efforts toward a comprehensive political settlement. Yesterday, the ROYG and STC demonstrated the spirit of compromise needed from all sides to reach a lasting solution. The United States urges the parties to adhere to the agreement's implementation. We will continue to work with our international partners to bring peace, prosperity, and security to Yemen.

8. Nagorno-Karabakh

On December 5, 2019, the heads of delegation of the OSCE Minsk Group co-chair countries issued a joint statement on the Nagorno-Karabakh conflict. The co-chair countries are the Russian Federation, France, and the United States. For background on the conflict and the OSCE Minsk Group, see *Digest 2008* at 830-32. See also *Digest 2012* at 568-69 and *Digest 2016* at 764-66. The December 5, 2019 joint statement is available at https://www.osce.org/minsk-group/441242 and includes the following:

> We welcome the intention of the Foreign Ministers of Azerbaijan and Armenia to meet again in early 2020 under Co-Chair auspices to intensify negotiations on the core issues of a peaceful settlement and to facilitate further talks at the highest level. The Co-Chair Heads of Delegation reiterate that a fair and lasting settlement must be based, in particular, upon the principles of the Helsinki Final Act of non-use of force or threat of force, territorial integrity, and the equal rights and self-determination of peoples, recalling the joint statement of the Co-Chair country Heads of Delegation and the Azerbaijani and Armenian Foreign Ministers at the OSCE Ministerial Council meeting in Athens in 2009, which was subsequently endorsed by the OSCE Ministerial Council. It should also embrace additional elements proposed by the Presidents of the Co-Chair countries in 2009-2012.

C. CONFLICT AVOIDANCE AND ATROCITIES PREVENTION

1. Congressional Report under the Elie Wiesel Genocide and Atrocities Prevention Act

On January 14, 2019, the Elie Wiesel Genocide and Atrocities Prevention Act of 2018 ("Elie Wiesel Act") was signed into law. On September 12, 2019, the State Department announced the submission of the first congressional report under the Elie Wiesel Act by the President. See press statement, available at https://www.state.gov/submission-of-the-congressional-report-under-the-elie-wiesel-genocide-and-atrocities-prevention-act/. The report is available at https://www.whitehouse.gov/wp-content/uploads/2019/09/ELIE-WIESEL-GENOCIDE-AND-ATROCITIES-PREVENTION-REPORT.pdf. Excerpts follow from the State Department press statement.

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Elie Wiesel said, "Action is the only remedy to indifference, the most insidious danger of all." The President committed the United States to action by signing the *Elie Wiesel Genocide and Atrocities Prevention Act of 2018* into law in January 2019. It is a testament to the impact of Elie Wiesel's life, and the universal recognition of the importance of protecting populations from mass atrocities, that this bill garnered strong bipartisan, bicameral support.

Today, the President submitted the first congressional report mandated under the Elie Wiesel Act. It provides an overview of the United States Government's current and planned efforts to prevent, mitigate, and respond to mass atrocities globally. Specifically, the report highlights how the Department of State uses foreign assistance, diplomatic advocacy, and multilateral engagement, as well as training for our diplomats.

The release of the report announces the launch a new White House-led interagency mechanism to coordinate efforts—the Atrocity Early Warning Task Force. The State Department's Bureau of Conflict and Stabilization Operations serves as the Secretariat of this Task Force and the Department's Policy Lead, working across the Department to address the unique threats posed by mass atrocities. The Bureau of Democracy, Human Rights, and Labor and the Bureau of International Narcotics and Law Enforcement Affairs also conduct vital atrocity prevention programming and training. The Office of Global Criminal Justice promotes transitional justice including through accountability for atrocity crimes. This underscores the critical role that diplomacy plays in preventing atrocities and ensuring that those responsible are held accountable.

Preventing human rights violations and abuses, including atrocities, is fundamental to American values and the diplomatic efforts undertaken by the Department of State around the world. We are pleased to continue the United States' global leadership on this issue.

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2. Accountability for Atrocities in Syria

On December 20, 2019, the State Department issued a press statement by Secretary Pompeo on a new U.S. law promoting accountability for atrocities by the Assad regime in

Syria. The statement is excerpted below and available at https://www.state.gov/passage-of-the-caesar-syria-civilian-protection-act-of-2019/.

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Today, the President signed into law the "Caesar Syria Civilian Protection Act of 2019" (the Caesar Act), an important step in promoting accountability for the large-scale atrocities Bashar al Assad and his regime have carried out in Syria. The Caesar Act is named after a former photographer for the Syrian military who risked his life to smuggle thousands of photographs out of Syria that document the torture and murder of prisoners inside Assad regime jails. Caesar has dedicated his life to seeking justice for those suffering under the Assad regime's brutality. This new law brings us closer to doing just that.

The Caesar Act provides the United States tools to help end the horrific and ongoing conflict in Syria by promoting accountability for the Assad regime. It also holds accountable those responsible for the widespread death of civilians and for numerous atrocities including the use of chemical weapons and other barbaric weapons. The law provides for sanctions and travel restrictions on those who provide support to members of the Assad regime, in addition to Syrian and international enablers who have been responsible for, or complicit in serious human rights abuses in Syria. The law also seeks to deny the Assad regime the financial resources used to fuel his campaign of violence and destruction that has killed hundreds of thousands of civilians. The Caesar Act sends a clear signal that no external actor should enter into business with or otherwise enrich such a regime.

The United States will continue to promote accountability efforts like the Caesar Act. Our work is directed towards answering the calls of Syrian people for a lasting political solution to the Syrian conflict in line with UNSCR 2254.

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3. U.S. Push for Action on Ethnic Cleansing of Rohingya

On August 24, 2019, the State Department issued a press statement following up on the 2017 conclusion by the Department that the Burmese military committed ethnic cleansing against Rohingya in Rakhine state. The statement follows and is available at https://www.state.gov/u-s-continues-to-push-for-action-two-years-after-rohingya-ethnic-cleansing/.

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Two years ago, Burma's security forces engaged in a brutal attack against hundreds of thousands of unarmed men, women, and children in a grossly disproportionate response to attacks by militants on security posts in northern Rakhine State. The Burmese military's horrific atrocities against Rohingya villagers caused an exodus of more than 740,000 Rohingya to Bangladesh in actions that constituted ethnic cleansing.

Rakhine State is not the only place in Burma where the military has committed violations of human rights against the Burmese people over the past seventy years. The lack of accountability and civilian oversight of the military means that military abuses continue today in Rakhine State, as well as Kachin and Shan States and elsewhere in Burma. We call upon all those involved to respect human rights, allow unhindered humanitarian access, and engage in political dialogue to pursue peace.

We appreciate the Government of Bangladesh's ongoing generosity in hosting these refugees. The United States is the leading contributor of humanitarian assistance in response to the Rohingya crisis, providing nearly $542 million since the outbreak of violence in August 2017. We continue to call on others to join us in contributing to this humanitarian response. Our thoughts are with the victims of these abuses and the more than one million refugees who have been forced to find refuge in Bangladesh. Justice and accountability are essential for Burma's efforts to build a strong, peaceful, secure, and prosperous democracy. We continue to call on others to support efforts to promote justice and facilitate conditions for voluntary return.

As August also marks the two years since the release of the Kofi Annan-led Advisory Commission on Rakhine State's report and recommendations, many of which concern the institutional discrimination against Rohingya that continues to this day. We continue to encourage the Burmese government to implement the Advisory Commission's recommendations, which offer the best path forward for Burma and all the people of Rakhine State, as well as all those who fled. We continue to work with international organizations to encourage Burma to create the conditions that would allow for the voluntary, safe, dignified, and sustainable return of refugees to their places of origin or other places of their choosing.

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4. Responsibility to Protect

On June 28, 2019, Deputy Political Coordinator for the U.S. Mission to the UN Elaine French delivered remarks on the responsibility to protect at the UN General Assembly. Her remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-general-assembly-debate-on-responsibility-to-protect/.

* * * *

Thank you, Mr. President. The United States is pleased to participate in this debate on the Responsibility to Protect. We continue to support the 2005 World Summit outcome document and believe that each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

We applaud the work of Special Adviser Karen Smith and encourage the Assembly to consider making this debate an annual agenda item. We recommend the Secretary General more closely examine the impact of human rights violations and abuses, including sexual violence, as key early warning indicators in the 2020 report.

The United States recognizes that there are vital interests in protecting populations from mass atrocities. Our December 2017 National Security Strategy highlighted the importance of holding perpetrators of genocide and mass atrocities accountable.

On January 14, 2019, the Elie Wiesel Genocide and Atrocities Prevention Act came into law, reaffirming the U.S. commitment to preventing and responding to atrocities. This legislation

highlights the importance of a coordinated "whole of government" approach to strengthen our government's ability to forecast, prevent, and respond to mass atrocities.

In support of early warning and prevention, the Department of State conducts regular analysis of global atrocity risks, and a deeper analysis focused on high-risk countries susceptible to atrocities. To address atrocity risks, the U.S. government identifies gaps in existing diplomatic and programmatic activities and formulates recommendations and policy options.

The United States is engaged in preventative work too. In early June, we unveiled the U.S. Strategy on Women, Peace, and Security—a government-wide framework which articulates the United States' commitment to promoting the meaningful participation of women in efforts to respond to conflict. Through women's meaningful participation in mediation efforts and preventative work, we can avert atrocities before they happen.

The United States continues to play an active role in the Global Network of R2P Focal Points, and was pleased to participate in recent meeting in Brussels. We continue to support best practices in the prevention space.

The United States has also been a strong supporter of the "Human Rights Up Front" initiative since its creation. The initiative is a valuable convening mechanism to ensure a whole-of-UN approach to prevention with regards to human rights abuses and violations. Given that human rights abuses and violations are often an early warning indicator of mass atrocities, we encourage member states to engage further in the work of the Third Committee. Member states can deliver statements on the Third Committee's agenda items during interactive dialogues with the Special Rapporteurs, such as the Special Rapporteur on Freedom of Expression, and the Special Rapporteur on Human Rights Defenders.

Mr. President, the U.S. government supports a range of efforts that both directly and indirectly reduce risks of mass atrocities. Such efforts include establishing and training local communities to use early warning systems, supporting criminal justice system reform, and documenting human rights abuses for justice and accountability processes. In one example, we surveyed and documented human rights violations and abuses against … Rohingya in 2017 in a time sensitive and comprehensive manner. The data collected is bolstering current efforts to pursue accountability for those responsible for atrocities and to contribute to justice for victims.

We commend the Secretary-General's efforts to better coordinate within the UN system to prevent atrocities and we are pleased to support this formal debate. Moving forward, we will continue to look for opportunities to integrate prevention efforts across the UN system. Thank you for your attention.

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Cross References

Denial of Visas to PLO and Palestinian Authority Officials, **Ch. 1.B.4.d.**
Extradition of Syrian General Jamil Hassan, **Ch. 3.A.3.**
ICC case on situation in Palestine, **Ch. 3.C.1.b.**
UN International Impartial and Independent Mechanism (Syria), **Ch. 3.C.3.b.**
Klieman v. Palestinian Authority, **Ch. 5.A.1.**
Al-Tamimi v. Adelson, **Ch. 5.C.**
Accountability of UN Officials and Experts on Mission, **Ch. 7.A.1.**
ILC Draft Articles on Crimes Against Humanity, **Ch. 7.C.1.**
Talks between Venezuela's interim government and former Maduro regime, **Ch. 9.A.2.**
Post-Bashir government transition in Sudan, **Ch. 9.A.4.**
U.S. Ambassador to South Sudan called back, **Ch. 9.A.5.**
Libya, **Ch. 9.A.6.**
Israel (Jerusalem, Golan Heights), **Ch. 9.B.5.**
Syria sanctions, **Ch. 16.A.2.**
Sanctions relating to Turkey's actions in Syria, **Ch. 16.A.3.**
Chemical weapons in Syria, **Ch. 19.D.2.**

CHAPTER 18

Use of Force

A. GENERAL

1. Frameworks Guiding U.S. Use of Force

On July 24, 2019, State Department Acting Legal Adviser Marik String testified before the Senate Foreign Relations Committee on the scope of authority in the 2001 and 2002 authorizations for the use of military force ("AUMFs"). The testimony is excerpted below and available at https://www.foreign.senate.gov/download/string-testimony-073019.

* * * *

I am here today to address the Administration's view of the scope of the 2001 and 2002 AUMFs as they relate to Iran, as well as more general questions about the President's current authorities to use force and the Administration's position on a new AUMF.

The Administration is not seeking a new AUMF against Iran or any other nation or non-State actor at this time. In addition, the Administration has not, to date, interpreted either the 2001 or 2002 AUMF as authorizing military force against Iran, except as may be necessary to defend U.S. or partner forces as they pursue missions authorized under either AUMF. The latter nuance is simply a reassertion of a long-standing right of self-defense for our military forces and those allies and partners deployed alongside them. Simply put, where U.S. forces are engaged in operations with partner forces anywhere in the world pursuant to either the 2001 or 2002 AUMF, if those forces either come under attack or are faced with an imminent armed attack, U.S. forces are authorized to use appropriate force to respond where it is necessary and appropriate to defend themselves or our partners. This principle is not new, and it is not specific to Iran or to any other particular country or non-State group.

The 2001 and 2002 AUMFs remain the cornerstone for ongoing military operations in multiple theaters and are a demonstration of U.S. strength and resolve. The 2001 AUMF provides the President authority to use military force against al-Q'aida, the Taliban, and their associated forces, including against ISIS. That authority includes the authority to detain enemy personnel captured during the course of the ongoing armed conflict.

But it is important to note that the 2001 AUMF is not a blank check. It does not authorize the President to use force against every group that commits terrorist acts or could have links to terrorist groups or facilitators. As of today, the Executive Branch has determined that only certain terrorist groups fall within the scope of the 2001 AUMF, none of which are currently

state actors. These groups are: al-Qa'ida; the Taliban; certain other terrorist or insurgent groups affiliated with al-Qa'ida and the Taliban in Afghanistan; al-Qa'ida in the Arabian Peninsula; al-Shabaab; al-Qa'ida in the Lands of the Islamic Maghreb; al-Qa'ida in Syria; and ISIS.

The 2002 AUMF remains an important source of additional authority for military operations against ISIS in Iraq and to defend the national security of the United States against threats emanating from Iraq. The United States also relied on the 2002 AUMF as an additional source of authority to detain in recent litigation.

As you know, Section 1264(b) of the FY2018 National Defense Authorization Act states that, not later than 30 days after the date on which a change is made to the legal and policy frameworks for the United States' use of military force and related national security operations, the President is to notify the appropriate congressional committees of the change, including its legal, factual, and policy justifications. As such, there is a mechanism to report to Congress if any changes to our legal assessments may occur in the future, which has been used by this Administration on more than one occasion to keep the relevant Committees informed. More generally, the Administration has kept Congress informed about operations overseas on a regular basis, consistent with the War Powers Resolution.

Beyond the AUMFs, Article II of the Constitution empowers the President, as Commander in Chief and Chief Executive, to order certain military action in order to protect the Nation from an attack or imminent threat of attack and to protect important national interests. The legal and historical foundation of this Constitutional authority to protect the national security interests of the United States is extensive. The Department of Justice's Office of Legal Counsel (OLC) has issued a series of opinions under both Democratic and Republican presidents about the President's use of the Article II authority over more than two centuries.

Prior Administrations have consistently relied on the President's Constitutional authority to direct military force without specific prior congressional authorization, including in military operations in Libya in 2011; a bombing campaign in Yugoslavia in 1999; troop deployments in Haiti twice, in 2004 and 1994, Bosnia in 1995, and Somalia in 1992; air patrols and airstrikes in Bosnia from 1993-1995; an intervention in Panama in 1989; and bombings in Libya in 1986. Most recently, OLC explained this view in its 2018 opinion concerning the April 2018 use of force against chemical weapons targets in Syria.

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2. Notifications to Security Council of Action in Self-Defense

On August 1, 2019, the U.S. Mission to the UN transmitted to the president of the Security Council a letter informing the Council of an action taken in self-defense, when the United States took necessary and proportionate defensive military action that resulted in the destruction of at least one Iranian unmanned aerial system ("UAS") approaching a U.S. ship in the Strait of Hormuz on July 18, 2019. The text of the letter follows, and is available at https://undocs.org/en/S/2019/624. U.N. Doc. S/2019/1624.

* * * *

I wish, on behalf of my Government, to report that, on 18 July 2019, the United States took action in the self-defence of United States forces following a threat to a United States Navy vessel by forces of the Islamic Republic of Iran.

On that date, at approximately 10 a.m. local time, the amphibious ship USS *Boxer* was in international waters conducting a planned inbound transit of the Strait of Hormuz. Iranian unmanned aerial systems approached the USS *Boxer* and closed within a threatening range. In response, and in accordance with the inherent right of self-defence, United States forces aboard the ship took necessary and proportionate defensive military action to ensure the safety of the ship and its crew, resulting in the destruction of one or more unmanned aerial systems.

This action occurred in the context of a series of escalating hostile acts by the Islamic Republic of Iran that have endangered international peace and security, including recent attacks on commercial vessels off of the port of Fujayrah and in the Gulf of Oman. In addition, on 19 June 2019, the Islamic Republic of Iran used a surface-to-air missile to shoot down an unmanned United States Navy MQ-4 surveillance aircraft monitoring the Strait of Hormuz. The aircraft was operating in international airspace on a routine surveillance mission, supporting the freedom of navigation and the security of international commerce.

The United States wishes to note that it stands ready to engage without preconditions in serious negotiations with Iran, with the goal of preventing further endangerment of international peace and security or escalation by the Iranian regime.

I ask that you circulate the text of the present letter as a document of the Security Council.

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3. Use of Force Issues Related to Counterterrorism Efforts

On November 19, 2019, the President sent a letter to the U.S. Senate and House of Representatives pursuant to the War Powers Resolution. The letter is excerpted below and available at https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-7/.

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As I most recently reported on July 22, 2019, United States Armed Forces have been deployed to the Middle East to protect United States interests and enhance force protection in the region against hostile action by Iran and its proxy forces. Iran has continued to threaten the security of the region, including by attacking oil and natural gas facilities in the Kingdom of Saudi Arabia on September 14, 2019. To assure our partners, deter further Iranian provocative behavior, and bolster regional defensive capabilities, additional United States Armed Forces have been ordered to deploy to the Middle East.

Additional forces ordered to deploy to the Kingdom of Saudi Arabia include radar and missile systems to improve defenses against air and missile threats in the region, an air expeditionary wing to support the operation of United States fighter aircraft from the Kingdom of Saudi Arabia, and two fighter squadrons. The first of these additional forces have arrived in

Saudi Arabia, and the remaining forces will arrive in the coming weeks. With these additional forces, the total number of United States Armed Forces personnel in the Kingdom of Saudi Arabia will be approximately 3,000. These personnel will remain deployed as long as their presence is required to fulfill the missions described above.

I have taken this action consistent with my responsibility to protect United States citizens at home and abroad and in furtherance of United States national security and foreign policy interests, pursuant to my constitutional authority to conduct United States foreign relations and as Commander in Chief and Chief Executive.

I am providing this report as part of my efforts to keep the Congress informed, consistent with the War Powers Resolution (Public Law 93-148). I appreciate the support of the Congress in these actions.

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4. Bilateral and Multilateral Agreements and Arrangements

a. North Macedonia Accession to NATO

On February 6, 2019, in Brussels, the United States and the other parties to the North Atlantic Treaty signed the Protocol to the North Atlantic Treaty on the Accession of the Republic of North Macedonia. The United States is the depositary government for the North Atlantic Treaty and agreed also to serve as depositary for the Protocol. On October 22, 2019, the Senate provided its advice and consent to ratification of the Protocol. See https://www.congress.gov/treaty-document/116th-congress/1/resolution-text?r=4&s=2. On October 23, 2019, the State Department issued a press statement by Secretary of State Michael R. Pompeo, available at https://www.state.gov/welcoming-u-s-senate-approval-of-nato-accession-protocol-for-north-macedonia/, noting the Senate's advice and consent and looking forward to North Macedonia becoming the 30th NATO Ally.

On November 29, 2019, the United States deposited its instrument of ratification of the Protocol, which requires the deposit of similar instruments by all North Atlantic Treaty parties before entry into force.*

b. Defense Cooperation with Hungary

On April 4, 2019, the United States and Hungary signed an agreement on defense cooperation ("DCA"), which entered into force August 21, 2019. An April 4, 2019 State Department media note, available at https://www.state.gov/united-states-and-hungary-sign-defense-cooperation-agreement-2/, includes the following statement on the agreement: "The DCA builds on many aspects of the strong U.S.-Hungary defense relationship and will facilitate greater partnerships to address shared threats and global challenges." The text of the DCA is available at https://www.state.gov/hungary-19-821.

* Editor's note: On March 27, 2020, North Macedonia deposited its instrument of accession.

c. Special Measures Agreement with Republic of Korea

On April 5, 2019, the United States and the Republic of Korea signed a defense special measures agreement ("SMA"), which entered into force upon signature and with effect from January 1, 2019. The text of the agreement, with an implementing arrangement, can be found at https://www.state.gov/19-405. The SMA expired December 31, 2019.

d. Defense Cooperation Agreement with Egypt

On January 8, 2019, the United States and Egypt signed an agreement regarding the furnishing of defense articles, related training, and other defense services from the United States to Egypt. The agreement entered into force upon signature. The text is available at https://www.state.gov/19-108/.

e. Defense Research and Development Agreement with Switzerland

On April 17, 2017, the U.S. Defense Department and the Swiss Department of Defence signed an agreement for research, development, test, and evaluation projects. The agreement entered into force April 17, 2019. The text of the agreement, with annexes, is available at https://www.state.gov/19-417.

f. Brazil Designated as Major Non-NATO Ally

In Presidential Determination No. 2019–21 of July 31, 2019, the President designated the Federative Republic of Brazil as a "Major Non-NATO Ally" pursuant to section 517 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2321k) (the "Act"), for the purposes of the Act and the Arms Export Control Act (22 U.S.C. 2751 *et seq.*). 84 Fed. Reg. 43,035 (Aug. 19, 2019).

5. International Humanitarian Law

a. Civilians in Armed Conflict

The United States participated in the Vienna Conference on Protecting Civilians in Urban Warfare, October 1-2, 2019. The U.S. paper provided at the conference is available at https://www.bmeia.gv.at/en/european-foreign-policy/disarmament/conventional-arms/explosive-weapons-in-populated-areas/protecting-civilians-in-urban-warfare/protecting-civilians-in-urban-warfare/statements//. The Vienna paper identifies and provides links to official U.S. documentary sources (i.e. laws, orders, manuals, studies, reports) related to U.S. practice in mitigating civilian harm in military operations. The United States provided a joint working paper along with Belgium, France, Germany, and the United Kingdom for the follow-up Geneva Meetings on Protection of Civilians, which is excerpted below, and available at https://www.dfa.ie/our-role-

policies/international-priorities/peace-and-security/ewipa-consultations/informalconsultationswrittensubmissions/written-submissions---18-november-2019-consultations.php.

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Practical Measures to Strengthen the Protection of Civilians During Military Operations in Armed Conflict

This technical compilation of practical measures is submitted on behalf of the following contributing States: Belgium, France, Germany, the United Kingdom, the United States, [. . . .].

The purpose of this technical compilation is to identify practical measures that States can implement to strengthen the protection of civilians in military operations in the context of armed conflict, consistent with their existing obligations in international humanitarian law (IHL, also often referred to as the law of war or law of armed conflict).[22]

Concerns have been raised regarding civilian casualties in current armed conflicts, especially civilian casualties in urban warfare when explosive weapons have been used. The causes of harm to civilians in current armed conflict can be complex and involve a range of factors, including incidental harm caused during lawful attacks directed against military objectives, deliberate targeting of civilians in violation of IHL, mistaken or lack of identification of the presence of civilians, or the use of human shields by terrorist groups. Although recognizing this complexity and the need to continue to consider comprehensively all sources of risk to civilians, the promotion of the broad range of practical measures to strengthen the protection of civilians in military operations conducted by responsible States can yield immediate and concrete results.

Under a strong convergence of legal, humanitarian, and strategic imperatives, responsible militaries have developed programs of compliance with IHL and a broad range of other practical measures to reduce the likelihood of harm to civilians and civilian objects. These practices, including training, operational procedures and methodologies, and diverse weapon systems and capabilities, when applied together, can be mutually reinforcing and be even more effective than when applied individually. Moreover, the sharing and promotion of these practical measures among States could lead to their wider implementation, which would strengthen the protection of civilians in current and future armed conflicts.

This paper: (1) recognizes key IHL requirements for the protection of civilians; (2) identifies general measures that States can take to strengthen implementation of existing legal requirements and to improve civilian protection in military operations; and (3) identifies specific good practices that States can implement to improve civilian protection in military operations.

I. Key IHL Requirements for the Protection of Civilians

IHL requirements must be implemented to help effectuate the goal of protecting civilians, although IHL recognizes that civilian casualties are a tragic but, at times, unavoidable consequence of armed conflict.

[22] The paper is not intended to and does not create new obligations under international law or modify existing obligations and is without prejudice to the discretion States have with regards to the manner in which they fulfill their legal obligations and in taking possible further policy measures to enhance the protection of civilians. The discussion of particular IHL obligations is without prejudice to other obligations under IHL that may be applicable. The listing of a particular practice should also not be understood as an indication that the practice is undertaken out of a sense of legal obligation under customary law.

IHL includes, *inter alia*, obligations to distinguish between the armed forces and civilian population, which apply both to parties in conducting attacks and to parties in defending against attacks.

In conducting attacks, a party to an armed conflict must, *inter alia*:

- refrain from any use of weapons that are prohibited as inherently indiscriminate;
- only make military objectives the object of attack, and refrain from making civilians or civilian objects the object of attack;
- refrain from attacks expected to cause death or injury to civilians and damage or destruction to civilian objects excessive in relation to the concrete and direct military advantage expected to be gained; and
- take precautions to reduce the risk of harm to civilians and other protected persons and objects in accordance with applicable international law. Such precautions can include, *inter alia*: effective advance warnings; cancelling or suspending an attack; and choice in the means or method of attack.

Outside the context of conducting attacks, a party to an armed conflict has obligations to take precautions to protect the civilian population, individual civilians, and civilian objects under their control against the dangers resulting from military operations. Such precautions can include, in accordance with applicable international law, *inter alia*:

- refraining from placing military objectives in densely populated areas;
- removing civilians and civilian objects from the vicinity of military objectives;
- establishing areas where civilians are protected; and
- using distinctive and visible signs to identify certain specially protected persons and objects, such as hospitals and cultural property, in accordance with applicable international law.

A party to an armed conflict must also refrain from the use of "human shields." In particular, parties to a conflict may not use the presence or movement of protected persons or objects

- to attempt to make certain points or areas immune from seizure or attack;
- to shield military objectives from attack;
- or otherwise to shield or favor one's own military operations or to impede the adversary's military operations.

II. General Measures to Strengthen Implementation of IHL and Civilian Protection in Military Operations

The following general measures can be taken by States to strengthen the implementation of existing legal requirements and to improve civilian protection in military operations:

1. Instituting effective programs within their armed forces to help ensure compliance with IHL obligations related to the protection of civilians, which include:

a. Dissemination of IHL to the armed forces and periodic training of members of the armed forces on IHL;

b. Legal advisers advising commanders and other decision-makers within the armed forces on IHL;

c. Instructions, regulations, and procedures to implement IHL standards and to establish processes for ensuring compliance with IHL;

d. Internal mechanisms for the reporting of incidents involving potential IHL violations;

e. Assessments, investigations, inquiries, or other reviews of incidents involving potential IHL violations; and

f. Corrective actions, as appropriate.

2. Implementing, where appropriate, the specific good practices on civilian protection described below.

3. Developing, reviewing, and routinely improving other practices and policies to help protect civilians in military operations.

4. Supporting, as appropriate, the efforts of other States or parties to a conflict to implement their legal obligations and to improve the protection of civilians during military operations.

5. Sharing and exchanging, as appropriate, with other States information about policies, and practices, and lessons learned related to the protection of civilians.

III. Specific Good Practices to Improve the Protection of Civilians During Military Operations

The following good practices can be implemented where States deem relevant and appropriate, whether individually or in combination with other States, to improve the protection of civilians during military operations:

1. Commanders, at all levels, exercising leadership necessary to reduce the risk of harm to civilians and civilian objects. This may include:

a. Setting a command climate that fosters discipline, IHL compliance, and an understanding of the importance of civilian protection.

b. Determining the appropriate application of accountability and other corrective measures to ensure that the forces under their command respect IHL and effectively implement other good practices to protect civilians.

2. Training personnel on practices that reduce the likelihood of civilian casualties. This may include:

a. Training commensurate with each person's duties and responsibilities,

b. Additional training before an individual or unit is deployed to an active theater of military operations.

c. Practical learning, such as the use of exercises, simulations of complex operational environments that include civilians, and the use of specialized, realistic training environments, such as urban warfare training centers.

3. Developing, acquiring, and fielding intelligence, surveillance, and reconnaissance systems that contribute to the protection of civilians by enabling more accurate battlespace awareness.

4. Developing, acquiring, and fielding a range of weapons systems and other technical capabilities that further enable discriminate military operations in different environments and operational contexts, such as technology that results in more precise kinetic effects, weapons designed to avoid or minimize the occurrence of explosive remnants, and capabilities that can neutralize military objectives with temporary or reversible effects.

5. Issuing military procedures, including doctrine (such as tactics, techniques, and procedures), standard operating procedures, and special instructions, that address the effective conduct of military operations across the targeting cycle. This may include:

a. Targeting processes for analyzing, selecting, and prioritizing targets and matching the appropriate responses against them, considering operational requirements and capabilities.

b. Collateral Damage Estimation Methodologies to conduct collateral damage analyses and to produce collateral damage estimates that assist commanders in understanding risks to civilians and in applying the principle of proportionality.

c. Weaponeering processes to determine the specific means required to create a desired operational effect (*e.g.*, destruction, neutralization, suppression, or disruption), and for taking actions to mitigate the risk of collateral damage, such as the appropriate pairing of weapons and targets, aim points, timing or angle of weapons fire, and munition fuzing.

6. Issuing to the armed forces rules of engagement (ROE) to ensure that the individuals within the chain of command best positioned to make judgments relevant to accomplishing the mission and to protecting civilians are empowered to do so. This may include:

a. Authorizing subordinates to take additional precautions to mitigate previously unanticipated risks to civilians that they discover or to refrain from conducting an attack when such action would best achieve the commander's intent if the commander had known about such risks;

b. Procedures for presenting to more senior commanders for decision certain potential attacks on targets that involve higher risks of incidental harm; and

c. Requirements for additional review or higher-level approval before certain sensitive military objectives may be attacked.

d. Requirements for fielded forces at the tactical level to apply sound judgment and to comply with IHL continually when dynamic weapon employment occurs outside of deliberate targeting processes.

7. Conducting assessments and other reviews that assist in reducing civilian casualties by identifying risks to civilians and evaluating efforts to reduce such risks. This may include:

a. General assessments of the risks to the civilian population that inform operational planning and other civilian protection measures, such as the identification of places and facilities for placement on a "no-strike" or "special authorization" list, including places and facilities that are protected from the effects of military operations under international law and places and facilities whose destruction may have entail significant risk of collateral damage, such as dams.

b. Assessments or other reviews of reports of specific incidents involving civilian casualties.

8. Considering civilian protection issues in the course of operational planning. This may include consideration of:

a. Risks of death or injury to the civilian population, including risks that have been specifically identified in assessments and those risks posed by the potential placement of military bases, facilities, or forces.

b. Potential measures to mitigate risks to the civilian population, such as hospital and safety zones, civilian evacuation measures, the delivery of warnings, and adjusting the timing of operations and the places where enemy forces are engaged.

c. The likely military and humanitarian effects from the implementation of such potential measures, including possible responses by an adversary or another party that would place civilians at greater risk and possible risks to civilians posed by inaction or delay.

9. Communicating with impartial humanitarian organizations, such as the International Committee of the Red Cross, or other relevant non-governmental organizations,

including to encourage them to assist in efforts to distinguish between military objectives and civilians by appropriately marking protected facilities, vehicles, and personnel and by providing updated information on the locations or movements of such facilities, vehicles, and personnel.

10. Studying past operations to identify lessons learned with respect to civilian protection and incorporating those lessons into military doctrine and other military guidance and procedures.

* * * *

b. Report on Civilian Casualties

On March 6, 2019, President Trump issued Executive Order 13862, which revokes Section 3 of Executive Order 13732. 84 Fed. Reg. 8789 (Mar. 11, 2019). Section 3 of Executive Order 13732 required certain reporting on civilian casualties. A White House press release (excerpted below and available at https://www.whitehouse.gov/briefings-statements/text-letter-president-selected-congressional-committee-leadership/) further explains the President's decision to revoke Section 3 of Executive Order 13732 and clarifies that all other provisions of that order (which include policy statements regarding the protection of civilians in armed conflict) continue to apply:

> After closely evaluating the reporting requirement called for in Executive Order 13732 and in light of subsequent requirements specified by the Congress in the Act, I determined to revoke section 3 of Executive Order 13732, while retaining all other portions of that Executive Order. The report submitted to the Congress by the Department of Defense pursuant to section 1057 of the Act is more comprehensive in certain ways than the report Executive Order 13732 required, which was limited in geographic scope and type of United States Government operation.
>
> The United States Government is committed to minimizing civilian casualties and complying with its obligations under the law of armed conflict. All United States efforts to minimize civilian casualties described in Executive Order 13732 continue to apply.

c. UN Security Council Briefing on International Humanitarian Law

On August 13, 2019, Acting U.S. Permanent Representative to the UN Ambassador Jonathan Cohen delivered remarks at a Security Council briefing on international humanitarian law. Ambassador Cohen's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-international-humanitarian-law/.

* * * *

Seven decades ago, with the horrors of World War II still fresh, representatives from around the world gathered in Geneva to try and change the way wars were waged. Building on an existing framework of law of war treaties, the resulting Geneva Conventions enshrined formal legal rules

to govern the conduct of war. The Conventions have played a significant role in shaping parties' behavior on the battlefield and improving protections for combatants and civilians alike.

Mr. President, today's briefing is an important opportunity to reflect on the successes of the Geneva Conventions, and to deepen and strengthen international compliance with, and enforcement of, these obligations.

Much has changed in the past 70 years. New technologies have emerged, which allow for greater precision in many cases, but also more deadly force. The rise of terrorist groups like Al Qaeda and ISIS has created new challenges as States work to defeat enemies who abide by no rules whatsoever. Today, the Geneva Conventions remain some of the very few universally-ratified international treaties. They are a powerful articulation of international humanitarian law and have become synonymous with ethical behavior in war.

Mr. President, as UN Member States, we have several tools at our disposal to address violations of international humanitarian law. In certain instances of grave and systematic violations, war crimes tribunals have been important tools to hold offenders accountable. The United States is proud to have supported the establishment of the tribunals for Cambodia, Rwanda, Sierra Leone, and the former Yugoslavia, as well as their subsequent work to punish some of the worst offenders of international humanitarian law.

In other cases, however, obstacles to accountability remain. For the relevance of these Conventions to endure into the future, compliance and accountability are key. While Member States and parties to armed conflict are ultimately responsible for adhering to their IHL obligations, each of us has an important role to play in calling out violations and holding those responsible to account.

Mr. President, we continue to push for greater compliance with the Geneva Conventions by other actors, and we are also firmly committed to respecting our own obligations.

To this end, we support efforts to disseminate accurate information about IHL among all parties to conflicts. For example, the training of U.S. military personnel includes a thorough coverage of IHL in principle and practice.

We also incorporate IHL adherence into U.S. training for international military partners. This includes peacekeeping pre-deployment training that we offer for troop and police contributors supporting the UN and regional peace operations.

We have made the protection of civilians and civilian infrastructure, as well as humanitarian personnel, locations, and missions, a high priority in conflict areas, and we know that effective protection requires full adherence to IHL by all parties to conflict.

Mr. President, the United States will continue our efforts to respect, and ensure respect for, the Geneva Conventions. We call on all Member States—and the actors they support—to comply fully with their obligations, and to hold violators accountable.

* * * *

d. Applicability of international law to conflicts in cyberspace

On April 19, 2019, the U.S.-Japan Security Consultative Committee released a joint statement, which included an affirmation that international law applies in cyberspace. The joint statement is available in full at https://www.state.gov/u-s-japan-joint-press-statement/. The portion on cyberspace issues follows.

> On cyberspace issues, the Ministers recognized that malicious cyber activity presents an increasing threat to the security and prosperity of both the United States and Japan. To address this threat, the Ministers committed to enhance cooperation on cyber issues, including deterrence and response capabilities, but as a matter of priority, emphasized that each nation is responsible for developing the relevant capabilities to protect their national networks and critical infrastructure. The Ministers affirmed that international law applies in cyberspace and that a cyber attack could, in certain circumstances, constitute an armed attack for the purposes of Article V of the U.S.-Japan Security Treaty. The Ministers also affirmed that a decision as to when a cyber attack would constitute an armed attack under Article V would be made on a case-by-case basis, and through close consultations between Japan and the United States, as would be the case for any other threat.

On September 23, 2019, the United States joined a group of countries in issuing a joint statement on advancing responsible state behavior in cyberspace. The joint statement by Australia, Belgium, Canada, Colombia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Italy, Japan, Latvia, Lithuania, the Netherlands, New Zealand, Norway, Poland, the Republic of Korea, Romania, Slovakia, Spain, Sweden, the United Kingdom, and the United States is available at https://www.state.gov/joint-statement-on-advancing-responsible-state-behavior-in-cyberspace/ and excerpted below.

* * * *

Over the past decade, the international community has made clear that the international rules-based order should guide state behavior in cyberspace. UN member states have increasingly coalesced around an evolving framework of responsible state behavior in cyberspace (framework), which supports the international rules-based order, affirms the applicability of international law to state-on-state behavior, adherence to voluntary norms of responsible state behavior in peacetime, and the development and implementation of practical confidence building measures to help reduce the risk of conflict stemming from cyber incidents. All members of the United Nations General Assembly have repeatedly affirmed this framework, articulated in three successive UN Groups of Governmental Experts reports in 2010, 2013, and 2015.

We underscore our commitment to uphold the international rules-based order and encourage its adherence, implementation, and further development, including at the ongoing UN negotiations of the Open Ended Working Group and Group of Governmental Experts. We support targeted cybersecurity capacity building to ensure that all responsible states can implement this framework and better protect their networks from significant disruptive, destructive, or otherwise destabilizing cyber activity. We reiterate that human rights apply and must be respected and protected by states online, as well as offline, including when addressing cybersecurity.

As responsible states that uphold the international rules-based order, we recognize our role in safeguarding the benefits of a free, open, and secure cyberspace for future generations. When necessary, we will work together on a voluntary basis to hold states

accountable when they act contrary to this framework, including by taking measures that are transparent and consistent with international law. There must be consequences for bad behavior in cyberspace.

We call on all states to support the evolving framework and to join with us to ensure greater accountability and stability in cyberspace.

* * * *

B. CONVENTIONAL WEAPONS

1. Convention on Certain Conventional Weapons ("CCW")

a. Lethal Autonomous Weapons Systems

On November 13, 2019, Josh Dorosin of the State Department's Office of the Legal Adviser delivered the U.S. statement at the CCW Meeting of High Contracting Parties on consideration of the report of the Group of Governmental Experts ("GGE") on lethal autonomous weapons systems ("LAWS"). Mr. Dorosin's statement is excerpted below and available at https://geneva.usmission.gov/2019/11/20/ccw-u-s-statement-on-consideration-of-the-gge-report-on-laws/.

* * * *

The United States places great value in the Convention on Certain Conventional Weapons (CCW) as an international humanitarian law (IHL) treaty framework that brings together States with diverse security interests to discuss issues related to weapons that may be deemed to be excessively injurious or to have indiscriminate effects. We reaffirm our commitment to the full implementation of our obligations and to active, constructive participation in this week's conference.

* * * *

The United States fully supports the GGE's report. It demonstrates that the GGE—under the auspices of the CCW—is an important forum for exploring the complex issues related to emerging technologies in the area of LAWS, and that it can produce substantive, consensus conclusions that have real value for States. In particular, we support the endorsement of the eleven Guiding Principles affirmed by the GGE, including the new Guiding Principle developed this year. In our view, the GGE must, in furtherance of its mandate over the coming two years, underscore the Guiding Principle that IHL continues to apply fully to all weapons systems, including LAWS, and in that light we recommend giving significant attention to clarifying further the application of IHL to the potential development and use of LAWS.

The United States also particularly supports the inclusion of legal, technological, and military experts in States' participation at the GGE, in order to ensure that the work of the GGE reflects the best possible understanding of existing technology, the applicable legal framework, and military practice.

The United States remains of the view that form should continue to follow function in the GGE's work. Dictating a particular format for an outcome before working through the substance will not allow for the fullest and most rigorous discussion of the relevant issues and development of common understandings. The Guiding Principles themselves have proven to be a very

productive construct for building consensus, and continuing their elaboration and development through substantive discussion will allow the GGE to make real, tangible progress.

Finally, with regard to the bracketed text in the GGE report, the United States can support the inclusion of the term "development" in paragraph 26(e). We believe this term accurately characterizes the work the GGE has already been doing with regard to the Guiding Principles. This work should continue, as well as other potentially useful work, such as the compilation of good practices in conducting the legal review of weapons. We are also flexible on whether the GGE meets for thirty, twenty-five, or twenty days over the next two years, recognizing the need for sufficient time to discuss these complex issues fully, as well as the need to bear in mind the financial situation of the CCW.

We look forward to continuing our participation in the GGE in the coming years and affirm our readiness to work actively with the incoming Chairman on this very important topic.

* * * *

The final report of the GGE, which the High Contracting Parties adopted by consensus with strong U.S. backing, contains 11 Guiding Principles in Annex 4. UN Doc. CCW/GGE.1/2019/3, https://undocs.org/en/CCW/GGE.1/2019/3.

b. Incendiary Weapons

On November 14, 2019, Amanda Wall of the Office of the Legal Adviser delivered the U.S. statement at the CCW Meeting of High Contracting Parties on implementation of, and compliance with, the Convention and its Protocols. Ms. Wall's statement is excerpted below and available at https://geneva.usmission.gov/2019/11/20/ccw-u-s-statement-on-implementation-of-and-compliance-with-the-convention-and-its-protocols/.

> The United States does not support adding a separate item on Protocol III to the agenda of next year's meeting or amending Protocol III. Any focus on Protocol III at this time should be toward: (1) encouraging High Contracting Parties to comply with their obligations under Protocol III, and (2) encouraging States not party to the CCW and/or Protocol III to become party to the CCW and to consent to particular prohibitions and restrictions related to the use of incendiary weapons near concentrations of civilians.
>
> The United States believes that Protocol III defines the term "incendiary weapon" properly and that the scope of Protocol III should not be amended to include weapons that are not "primarily designed to set fire to objects or to cause burn injury … through flame [and] heat." Many weapons have incidental or secondary incendiary effects, and the risk of weapons causing fires that might harm civilians depends on the circumstances in which the weapons are used. Just like with weapons that do not have any expected incendiary effect, it is incumbent on the parties to use such weapons consistent with international humanitarian law, including by only making military objectives the object of attack, refraining from attacks expected to cause excessive injury or death to civilians and damage to civilian objects, and taking feasible precautions to reduce the risk of harm to civilians, including the risk of harm from fire.
>
> In the U.S. experience, we think Protocol III is and continues to be a valuable and effective instrument of international humanitarian law. We believe

that it has adequately contributed to norms related to the use of incendiary weapons.

c. Explosive Weapons and Protection of Civilians

On November 14, 2019, Matthew McCormack of the U.S. Department of Defense, Office of the General Counsel, delivered the U.S. statement at the CCW Meeting of High Contracting Parties on emerging issues, including protecting civilians. Mr. McCormack's statement is excerpted below and available at https://geneva.usmission.gov/2019/11/20/ccw-meeting-of-high-contracting-parties-u-s-statement-on-emerging-issues/.

* * * *

With respect to the agenda item on emerging issues, the United States shares the goal of protecting civilians during armed conflict, and we appreciate our German colleagues' support for the UNIDIR workshop in 2019 to bring attention to some of the challenges related to protecting civilians during urban warfare, including the risks posed when parties try to protect their military objectives by placing them in densely populated areas. We also appreciate the leadership of the Irish and Austrian delegations in this area, including by convening the Vienna Conference last month and by chairing the consultations next Monday in an open, inclusive, and transparent manner.

Urban areas are admittedly complex operating environments during war, but existing IHL appropriately governs the use of explosive weapons, like all weapons, including through principles and rules related to the protection of civilians. We believe that it is impractical and counterproductive to try to ban or stigmatize the lawful and appropriate use of explosive weapons as inherently problematic because the proper use of explosive weapons could strengthen civilian protection compared to other means and methods of warfare.

We also do not support making "EWIPA" or the "protection of civilians" a specific agenda item because the CCW is focused on prohibitions and restrictions applicable to certain types of weapons, rather than being a forum to address general issues related to the implementation of IHL. We would note in this regard that a focus on "EWIPA" rather than the broader issues with respect to improved implementation of IHL serves as an obstacle to progress on strengthening protections for civilians.

In this regard, the United States supports the sharing of good practices on civilian protection and improved implementation of IHL. If international dialog is to improve protections for civilians, the discussion must include substantial engagement by States conducting military operations. These States can bring necessary expertise and experience to assist in focusing the discussions on the concrete issues related to civilian harm and its root causes, and on specific measures that will effectively improve protections for civilians. We are ready and willing to share our own practices in this regard and look forward to engaging with others on this very important topic.

* * * *

2. U.S.-Ukraine MOU on Conventional Weapons Destruction

On June 25, 2019, the United States and Ukraine signed a new memorandum of understanding on conventional weapons stockpile management. The State Department media note announcing the MOU is excerpted below and available at https://www.state.gov/u-s-signs-new-conventional-weapons-destruction-memorandum-with-ukraine/.

* * * *

[T]he memorandum sets out a $4 million U.S. contribution toward construction of six explosive storehouses over the next two years for the Ukrainian Ministry of Defense. This project will enhance the safety and security of Ukraine's munitions stockpiles, as well as advance Ukraine closer to its goal of meeting NATO and international standards for physical security and stockpile management.

From 2004 to 2018, the U.S. Conventional Weapons Destruction program has invested more than $40 million in support of Ukraine's effort to address the legacy of the large quantities of conventional arms and ammunition inherited after the dissolution of the Soviet Union. In 2018, as the Lead Nation for the NATO Partnership for Peace Trust Fund, the United States funded the destruction or demilitarization of over 1,700 metric tons of obsolete Soviet-vintage munitions in Ukraine.

In recent years, we have extended this partnership to save lives by providing support to clear landmines and other explosive hazards along the line of contact between the Ukrainian armed Forces and Russia-led forces in eastern Ukraine. In 2018 alone, the U.S. government funded conventional weapons destruction efforts that cleared over 227,000 square meters (56 acres) of land and returned them to local communities.

* * * *

C. DETAINEES

1. Criminal Prosecutions: *Hamidullin*

As discussed in *Digest 2016* at 856-65, *Digest 2017* at 750-63, and *Digest 2018* at 696-710, the issue in *Hamidullin v. United States* is whether the United States was prohibited from prosecuting Hamidullin in federal district court without first holding a hearing before a military tribunal to determine whether he qualified as a prisoner of war under the Third Geneva Convention and thus was entitled to combatant immunity. The district court and court of appeals agreed that the United States was not required to hold such a hearing and that Hamidullin did not qualify for POW status or combatant immunity. On January 16, 2019, the United States submitted its brief in the U.S. Supreme Court in opposition to the petition for certiorari. The petition was denied on February 19, 2019. *Hamidullin v. United States*, No. 18–6011. Excerpts follow from the U.S. opposition brief.

* * * *

Petitioner renews his contentions that (1) before the United States can prosecute him in federal district court for committing federal crimes, Army Regulation 190-8 (1997) first requires a military tribunal to determine whether he is entitled to prisoner-of-war status and combatant immunity; and (2) he was entitled to combatant immunity under a broader, "common law" theory that goes beyond the Geneva Convention and allows fighters belonging to non-State insurgent groups to assert combatant immunity even in non-international armed conflicts. The court of appeals correctly rejected both claims, and its decision does not conflict with any decision of this Court or any other court of appeals. This case would also be a poor vehicle for review. No sound basis exists for concluding that a military tribunal would declare that petitioner is entitled to prisoner-of-war status under the Geneva Convention, when the Executive Branch and the federal courts in this case have already made a contrary determination. And even under the "common law" approach petitioner advocates, petitioner's claim of combatant immunity would fail because members of the Taliban and Haqqani Network would not be entitled to such immunity. Further review is unwarranted.

1. The court of appeals correctly rejected petitioner's argument that the United States government cannot prosecute him in an Article III court for committing federal crimes until after a military tribunal declares that he is not a prisoner of war.

a. Congress has provided that the Article III district courts "shall have original jurisdiction * * * of all offenses against the laws of the United States." 18 U.S.C. 3231. Here, petitioner was charged with (and convicted of) serious federal offenses based on his role in a violent attack on U.S. personnel.

The Geneva Convention provides that "[p]risoners of war" are entitled to certain protections, including combatant immunity, in "cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties," i.e., during an international armed conflict. Convention art. 2; … Article 4 defines the categories of persons who qualify as prisoners of war within the meaning of the Convention. Among other things, members of a non-state militia group like the Taliban do not qualify unless they operate under a responsible commander, wear "a fixed distinctive sign recognizable at a distance," carry arms openly, and "conduct[] their operations in accordance with the laws and customs of war." Geneva Convention art. 4(A)(2). Article 5 then provides that, in an international armed conflict, if "doubt arise[s] as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," qualify for prisoner-of-war status, then "such persons shall enjoy" those protections "until such time as their status has been determined by a competent tribunal." *Id*. art. 5; see *id*. art. 2. The term "competent tribunal" was selected to allow civil courts to settle questions of prisoner-of-war status, and civilian courts have done so. See Department of Defense Law of War Manual § 4.27.3 n.534 (rev. Dec. 2016).

Here, even if it applied, the Convention's "competent tribunal" requirement has been satisfied because the district court—an Article III court—is obviously a "competent tribunal" within the meaning of the text of Article 5. And the district court squarely determined that petitioner does not qualify as a prisoner of war under the relevant criteria set forth in Article 4—and thus is not entitled to combatant immunity—regardless of whether the Geneva Convention otherwise applied. See 114 F. Supp. 3d at 386-388. Specifically, the court found that "neither the Taliban nor the Haqqani Network fulfills the conditions of Article 4(A)(2)," because they "do not have a clearly defined command structure nor a fixed distinctive sign recognizable at a distance"; they "frequently utilize suicide bombers with concealed explosives" in addition to sometimes carrying guns openly; and they do not "conduct[] their operations in accordance with

the laws and customs of war." *Id*. at 387. On appeal, petitioner "d[id] not identify a clear error in the district court's factual findings" and he does not claim in this Court that the Taliban or Haqqani Network satisfy the criteria under Article 4(A)(2).

Without disturbing those factual findings, the court of appeals—which would also be a "competent tribunal"—affirmed on an alternate ground. The court determined that, by 2009, the conflict in Afghanistan was clearly not an international armed conflict; rather, it was a non-international armed conflict governed instead by Article 3 of the Geneva Convention. As such, neither the Convention's protections for prisoners of war grounded in Article 4, nor Article 5's requirement of a determination of prisoner-of-war status by a "competent tribunal," applied. Petitioner does not seek review of the court of appeals' predicate determination that the conflict in Afghanistan was a non-international armed conflict at the time of the attack in 2009, which accords with the views of the "International Committee of the Red Cross and the executive branch of the United States government."

b. Notwithstanding the lack of any dispute on the underlying findings by the courts below—(1) that members of the Taliban and Haqqani Network would not be entitled to prisoner-of-war status under the Geneva Conventions even in an international armed conflict; and (2) that in any event, the attack here did not occur during an international armed conflict—petitioner contends that, under Army Regulation 190-8, he cannot be prosecuted for his federal crimes until a three-member military tribunal declares that he is not a prisoner of war. But even assuming that an Army Regulation could impose a prerequisite to the Department of Justice's prosecution of a criminal defendant in an Article III court under statutory authority, Army Regulation 190-8 does not do so here—let alone does it require a remand so that a military tribunal can make the same determination that both Article III courts in this case (and the Executive) have already made.

Army Regulation 190-8 expressly "implements" the "1949 Geneva Convention Relative to the Treatment of Prisoners of War." Army Reg. 190-8 ¶ 1-1(b) and (b)(3). It states that "U.S. policy" is that "[a]ll persons taken into custody by U.S. forces will be provided with the protections of" that Convention "until some other legal status is determined by competent authority." *Id*. ¶ 1- 5(a)(2). It states that, "[i]n accordance with Article 5" of the Geneva Convention, "if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces" qualifies for prisoner-of-war status, "such persons shall enjoy" such protection "until such time as their status has been determined by a competent tribunal." *Id*. ¶ 1- 6(a); see *id*. ¶ 1-6(b) ("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces" and "who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists."). It then provides that a "competent tribunal shall be composed of three commissioned officers, one of whom must be of a field grade." *Id*. ¶ 1-6(c).

Petitioner's reliance on the regulation in this case is misplaced for several reasons. First, no appreciable doubt exists that petitioner does not qualify as a prisoner of war. See Gov't C.A. Br. 25, 27-41. Second, the regulation's implementation of Article 5 with respect to detainees "in the custody of the U.S. Armed Forces," Army Reg. 190-8 ¶ 1-1(a), does not purport to exclude Article III courts from being "competent tribunals" for purposes of Article 5 in the context of a criminal prosecution. Third, as the court of appeals correctly determined, Army Regulation 190-8 does not require that any "competent tribunal" determine petitioner's prisoner-of-war status because, like Article 5, it does not apply to someone like petitioner who committed his crimes while acting as part of a non-State armed group during a non-international armed conflict. As the

decision below explained, "Army Regulation 190-8, in implementing Article 5, is also restricted by Article 5's applicability," and Article 5 is "only applicable in cases of international armed conflict." Instead, detention of such forces during a non-international armed conflict is governed by Article 3, which does not provide petitioner with any right not to be prosecuted for his crimes in federal court.

Petitioner asserts that "[n]othing" in the text of that regulation "limits its application" to "international armed conflicts." But as noted above, the regulation expressly states that it implements the Geneva Convention, which is generally limited to such conflicts. Paragraph 1-6 of that regulation—upon which petitioner principally relies—imposes requirements "[i]n accordance with Article 5," reiterates the text of Article 5 nearly verbatim, then gives specific content to that text. Army Reg. 190-8 ¶ 1-6(a). The relevant provisions of that regulation are accordingly appropriately understood, based on their text and context, to apply only during such conflicts.

Indeed, petitioner's contrary argument is foreclosed by more recent Department of Defense directives that were issued by higher-level authorities (*e.g.*, the Deputy Secretary of Defense) to provide authoritative guidance applicable to all DoD detention operations, including those in Afghanistan. See, *e.g.*, DoD Directive No. 2310.01E, DoD Detainee Program, Aug. 19, 2014, Incorporating Change 1, May 24, 2017. That Directive makes clear that the requirement to provide prisoner-of-war protections in certain cases until a competent tribunal has determined a detainee's status applies only "[d]uring international armed conflict." *Id.* ¶ 3(h); see also Department of Defense Law of War Manual § 4.27.2 (same).

c. The court of appeals also correctly rejected petitioner's argument that he is entitled to combatant immunity as a matter of the common law. Petitioner contends that this Court's Civil War-era cases establish that fighters belonging to non-State insurgent groups may assert combatant immunity in certain circumstances in which the Geneva Convention would provide no such protection, and that the court of appeals' decision conflicts with this Court's precedents. Those contentions lack merit.

The court of appeals correctly "decline[d] to broaden the scope of combatant immunity beyond the carefully constructed framework of the Geneva Convention." As the court explained, "[t]he principles reflected in the [pre-Geneva Convention] common law decisions" were "refined" and codified in the Geneva Convention, which "represents an international consensus" on the scope of combatant immunity. For that reason, the Geneva Convention's "explicit[]" definition "of lawful and unlawful combatants is conclusive."

The sweeping extension of combatant immunity to non-State insurgent groups that petitioner seeks would undermine the international consensus that the Geneva Conventions reflect; require the United States to treat lawless insurgents as if they were members of a regular national military; and would inhibit the government's ability to bring terrorists to justice. …

In any event, petitioner errs in suggesting that he would be entitled to common-law immunity under this Court's precedents. As those decisions recognize, during the Civil War the President determined that it was necessary to treat Confederate forces as enemy belligerents who might thereby receive combatant immunity, and the courts deferred to that determination. See *The Prize Cases*, 67 U.S. 635, 670 (1863) ("Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was

entrusted."); see also *Baker v. Carr*, 369 U.S. 186, 212 (1962) ("[R]ecognition of belligerency abroad is an executive responsibility" that "defies judicial treatment.").

This Court explained that "[t]he insurgent States" during the Civil War "united in an organization known as the Confederate States, by which they acted through a central authority guiding their military movements," to which "belligerent rights were accorded by the Federal government" as "shown in the treatment of captives as prisoners of war, the exchange of prisoners, the release of officers on parole, and in numerous arrangements to mitigate as far as possible the inevitable suffering and miseries attending the conflict." *Dow v. Johnson*, 100 U.S. 158, 164 (1880). Here, by contrast, the "political department has not recognized the existence of a de facto belligerent power" entitled to belligerent rights, but has "recognized the existence of insurrectionary warfare prevailing," *The Three Friends,* 166 U.S. 1, 64 (1897), particularly by the time of the attacks here in 2009.

3. Petitioner does not contend that the decision below conflicts with any decision of any other court of appeals. Indeed, the issues petitioner raises here have not been addressed by any other court of appeals, and it is unclear how often they will arise in the future in the Fourth Circuit.

This would also be a poor vehicle for addressing the questions petitioner raises. First, petitioner cannot show that a remand to a tribunal of three military officers would change the outcome of this case. As the court of appeals explained, the federal prosecution of petitioner in this case reflects the Executive Branch's determination that he is not a prisoner of war; the President determined in 2002 that Taliban forces were not entitled to prisoner-of-war status, even on the assumption that the conflict in Afghanistan was of an international character at that time; the Executive subsequently made clear its view that the conflict in Afghanistan is not of an international character; the district court here found (and the court of appeals did not disturb the determination) that petitioner would not be entitled to prisoner-of-war status even if the conflict were of an international character; and the court of appeals further determined that, "by 2009, the conflict in Afghanistan had shifted from an international armed conflict between the United States and the Taliban-run Afghan government to a non-international armed conflict against unlawful Taliban insurgents." No sound basis exists for concluding that three military officers would—or could—reach the opposite result, in contravention of the determinations by both the President and the federal courts. …

Second, even if the applicability of combatant immunity should be decided under the common law (rather than the terms of the Geneva Convention), petitioner still could not prevail. Even before the Geneva Convention, fighters for non-State insurgent groups during non-international armed conflicts were not entitled to prisoner-of-war protections. See, *e.g.*, William Winthrop, *Military Law and Precedents* 783 (2d ed. 1920) ("Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished."); General Orders No. 100: Instructions for the Government of Armies of the United States in the Field art. 82 (Lieber Code) (1863) (similar). In any event, the Taliban's systematic failure to adhere to the law of war would foreclose their members from claiming prisoner-of-war status. Indeed, the district court squarely determined that members of the Taliban and Haqqani Network would not be entitled to combatant immunity even if the conflict in Afghanistan in 2009 was still of an international character, because the Taliban defies the laws of war. See 114 F. Supp. 3d at 386-388. Petitioner identifies no authority for the proposition the common law requires application of

combatant immunity to members of insurgent groups that do not themselves respect the law of war, and federal courts in other cases have uniformly rejected assertions of combatant immunity on behalf of members of the Taliban and other non-State armed groups that defy the laws of war. See, *e.g.*, *United States v. Hausa*, 2017 WL 2788574, at *6 & n.6 (E.D.N.Y. Jun. 27, 2017) (rejecting combatant immunity defense because al Qaeda does not comply with the laws of war); *United States v. Arnaout*, 236 F. Supp. 2d 916, 917 (N.D. Ill. 2003) (same); *Lindh*, 212 F. Supp. 2d at 553-558 (same for the Taliban); see also *United States v. Buck*, 690 F. Supp. 1291, 1298 (S.D.N.Y. 1988). Petitioner provides no sound basis for reaching a different result, or for believing that a military tribunal would do so.

* * * *

2. U.S. Court Decisions and Proceedings

a. Ali v. Trump

Ali, along with ten other Guantanamo detainees, filed a joint habeas petition in January 2018, arguing that their continued detention violates (1) the due process clause of the U.S. Constitution, because their detention is indefinite and arbitrary; and (2) the 2001 Authorization for the Use of Military Force ("AUMF"), because the AUMF and the laws of war do not permit indefinite detention, and any justification for their detention has unraveled because the practical circumstances of the armed conflict against the Taliban, al-Qaeda, and associated forces are unlike those of previous armed conflicts. The district court denied Ali's petition in 2018 and Ali appealed.

Ali sought initial hearing en banc solely on the question of whether the Due Process Clause applies to detainees at Guantanamo. The government response argued, *inter alia*, that the due process clause does not extend to unprivileged alien enemy combatants detained at Guantanamo. That response brief (not excerpted herein) is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/. The D.C. Circuit denied the petition for en banc review and the case was considered by a regular panel. The U.S. brief on appeal in *Ali v. Trump*, No. 18-5297 (D.C. Cir. 2019) is excerpted below and available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

Petitioner Abdul Razak Ali is detained at Guantanamo Bay as an unprivileged alien enemy combatant. In 2005, he filed a habeas petition challenging the legality of his detention. After a three-day evidentiary hearing, the district court found that petitioner had traveled to Afghanistan after September 11, 2001, to fight against U.S. and Coalition forces; that petitioner was captured while living in a safehouse in Pakistan with terrorist leader Abu Zubaydah and senior leaders of Abu Zubaydah's force; that the safehouse contained documents and equipment associated with terrorist operations; that petitioner had participated in Abu Zubaydah's terrorist-training program at the safehouse; and that, after his capture, petitioner had lied to the U.S. government about his identity for two years. The court therefore ruled that the government had demonstrated its

authority to detain petitioner, and this Court affirmed that ruling. *Ali v. Obama*, 736 F.3d 542, 543 (D.C. Cir. 2013).

* * * *

I. Petitioner's Detention Is Authorized By The AUMF.

The threshold question presented by petitioner's appeal—albeit one that petitioner addresses only in perfunctory terms at the end of his brief (Br. 31-33)—is whether his law-of-war detention is authorized by statute. Because the statutory argument informs petitioner's constitutional arguments and its resolution could obviate the need to decide the constitutional questions presented in this case, we address it first. As the district court correctly determined, petitioner's claim that the government lacks statutory authority to detain him is foreclosed by controlling precedent.

The government's authority to detain petitioner derives from the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), as informed by the laws of war. The AUMF authorizes the use of "all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." *Id.*

The Supreme Court has interpreted this language as unambiguously allowing the President to detain an enemy combatant captured in the armed conflict authorized by the AUMF for the duration of that conflict. As a plurality of the Court explained in *Hamdi v. Rumsfeld*, the "detention of individuals . . . for the duration of the particular conflict in which they were captured[] is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." 542 U.S. 507, 518 (2004) (plurality). The plurality thus held that "Congress' grant of authority for the use of 'necessary and appropriate force' … include[s] the authority to detain for the duration of the relevant conflict." *Id.* at 521…

Congress ratified *Hamdi*'s holding in the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a), (b)(2), 125 Stat. at 1562. The NDAA "affirms that the authority of the President" under the AUMF "includes the authority … to detain covered persons … pending disposition under the law of war." *Id.* § 1021(a). The NDAA further provides that "disposition of a person under the law of war" includes "[d]etention under the law of war without trial until the end of the hostilities authorized by the [AUMF]." *Id.* § 1021(c)(1). The NDAA thus makes clear that the AUMF authorizes detention "until the end of the hostilities"—not until some indeterminate deadline before the end of the hostilities.

This interpretation of the AUMF makes sense, and comports with the laws of war. "The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 542 U.S. at 518. The risk that a combatant will return to the battlefield lasts as long as active hostilities remain ongoing. As a result, the power to detain also lasts as long as active hostilities remain ongoing—a principle this Court reaffirmed as recently as last year. *Al-Alwi v. Trump*, 901 F.3d 294, 298 (D.C. Cir. 2018) ("[W]e continue to follow *Hamdi*'s interpretation of the [2001] AUMF and the [NDAA's] plain language. Both of those sources authorize detention until the end of hostilities.").

* * * *

II. Even Assuming *Arguendo* That The Due Process Clause Extends To Petitioner, His Detention Comports With Due Process.

Petitioner separately argues that, whether or not his detention is statutorily authorized, he is entitled to habeas relief because his detention violates substantive and procedural due process. To reject that argument, the Court need not address the question whether petitioner has due-process rights. For even accepting for the sake of argument the mistaken premise that he does, the district court's judgment should be affirmed because petitioner's detention fully comports with whatever the Due Process Clause could be thought to contemplate in this context.

A. Substantive due process does not impose temporal limits on law-of-war detention.

Petitioner first argues that his law-of-war detention while ongoing hostilities continue violates substantive due process. As noted, petitioner cannot reasonably dispute that the government's detention authority, conferred by the AUMF as informed by the laws of war, allows detention while hostilities continue. *Supra*, Part I. And petitioner does not contest that hostilities remain ongoing. *See Al-Alwi*, 901 F.3d at 298 ("Although hostilities have been ongoing for a considerable amount of time, they have not ended."). Petitioner nevertheless proposes that the Fifth Amendment imposes an unspecified limit on the length of law-of-war detention even while hostilities continue—a limit the government would transgress whenever a court determines that the duration of that detention "shocks the conscience." (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)). The clear implication of this argument is that *no* amount of process could justify petitioner's continued detention, since substantive due process would forbid the government from detaining him at all.

Petitioner has not cited, and the government is not aware of, any case embracing the proposition that substantive due process requires the government to release enemy combatants before active hostilities have ended. Nor does such detention "shock the conscience" even if that standard were proper in the context of law-of-war detention, which it is not given the history and tradition of such detention. The purpose of law-of-war detention is to "prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 542 U.S. at 518 (plurality). Such detention is a "fundamental and accepted … incident to war" that is accepted by "'universal agreement and practice.'" *Id.* (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)). Neither precedent nor common sense suggests that the government's detention authority should dissipate simply because hostilities are protracted. *Id.* at 520-21; *Al-Alwi*, 901 F.3d at 297-98. Accepting that substantive due process entitles petitioner to release would effectively reward the Nation's enemies for continuing to fight. Indeed, the government would be forced to release enemy fighters whenever a court believed that a conflict had gone on too long. Nothing in the Fifth Amendment, even if applied to enemy combatants detained at Guantanamo, would compel these radical results.

Petitioner attempts to justify his position that substantive due process precludes his detention with a trio of cases involving detention in contexts far removed from this one. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (immigration); *Clark v. Martinez*, 543 U.S. 371, 384 (2005) (immigration); *United States v. Salerno*, 481 U.S. 739, 746-47 (1987) (pre-trial detention). All three cases are inapposite because they did not concern the detention of enemy combatants captured abroad during active hostilities. …

* * * *

Even if petitioner's reliance on these cases were not misplaced, petitioner's detention would not offend substantive due process because it is not indefinite. Petitioner is detained because he was part of forces associated with al Qaeda, *Ali v. Obama*, 736 F.3d 542, 551 (D.C. Cir. 2013), and remains detained because hostilities against al Qaeda remain ongoing. His

detention, in short, is bounded by the duration of those hostilities—which the Nation's adversaries are themselves extending by continuing to fight—and continues to serve the purposes of the detention while hostilities are ongoing. *See Demore v. Kim*, 538 U.S. 510, 527-29 (2003); *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018). Nor is petitioner's detention "arbitrary and punitive," as he asserts (Br. 21). "Captivity in war is neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war." *Hamdi*, 542 U.S. at 518 (plurality) (alterations and quotation marks omitted). Moreover, to ensure that military detention at Guantanamo remains "carefully evaluated and justified, consistent with [U.S.] national security and foreign policy," the Executive has chosen periodically to review whether certain Guantanamo detainees' continued confinement is necessary to protect against a continuing significant threat to the security of the United States. 76 Fed. Reg. 13,277, 13,277 (Mar. 7, 2011) (Exec. Order No. 13,567); *see* NDAA § 1023 (establishing procedures for periodic detention review of unprivileged alien enemy combatants detained at Guantanamo). Pursuant to that process, the Executive has exercised its discretion to transfer out of U.S. custody most of the individuals detained at Guantanamo at the time of the Executive Order's issuance. In petitioner's case, however, the Executive has consistently determined through multiple periodic reviews that petitioner poses a continuing and significant threat to the security of the United States, and therefore should not be transferred.

B. The procedures governing petitioner's habeas proceeding are consistent with procedural due process.

Petitioner separately argues that, given the length of his detention, the government is required as a matter of procedural due process to prove the legality of his detention with "clear and convincing evidence," rather than by a preponderance of the evidence. But even assuming that petitioner has rights under the Due Process Clause, due process does not impose that heightened standard on habeas proceedings for an alien detained as an unprivileged enemy combatant at Guantanamo Bay. A majority of the Supreme Court has agreed that, even in the context of a *U.S. citizen* detained as an enemy combatant *in the United States*, requiring the government merely to put forward "credible evidence" of the lawfulness of detention is consistent with due process. *Hamdi*, 542 U.S. at 533-34 (plurality); ... The framework that is constitutionally permissible for U.S. citizens detained within U.S. sovereign territory is *a fortiori* sufficient for noncitizens detained at Guantanamo Bay. In light of *Hamdi*, this Court has held that the preponderance standard is constitutionally adequate. *Hussain v. Obama*, 718 F.3d 964, 967 n.3 (D.C. Cir. 2013); *Uthman v. Obama*, 637 F.3d 400, 403 n.3 (D.C. Cir. 2011); *Awad v. Obama*, 608 F.3d 1, 10 (D.C. Cir. 2010); *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010). Those holdings control here.

Petitioner suggests that the passage of time requires the government to satisfy a heightened evidentiary burden, rather than the evidentiary standard both the Supreme Court and this Court have held sufficient. But as this Court has previously recognized, in the context of a habeas petition filed by this very petitioner, "it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention." *Ali*, 736 F.3d at 552.

Moreover, even setting aside that the length of petitioner's detention does not permit this Court to ignore binding precedent and address petitioner's constitutional argument anew, the constitutional balance continues to weigh in the government's favor. That is because, petitioner's assertions notwithstanding, the government's interest in preventing enemy combatants such as petitioner from returning to the battlefield while hostilities continue has not "grown weaker" over time. …

Furthermore, petitioner has failed to show that his preferred evidentiary standard would make any difference with respect to the lawfulness of his detention. This Court has already held that the record in petitioner's habeas case supplies "overwhelming" evidence of the legality of his detention. *Ali*, 736 F.3d at 545-46. Petitioner's boilerplate filings in district court, which were identical to those filed on behalf of ten other Guantanamo detainees, made no attempt to address this Court's analysis of the circumstances of his capture and his two-year deception of investigators. …

* * * *

Finally, petitioner asserts that his continued detention cannot be justified under *any* evidentiary standard unless the government can prove that he would currently pose a "specific and articulable danger" if released. But the cases on which petitioner relies arose in the context of pretrial detention and are inapposite. When fashioning procedures governing habeas petitions brought by Guantanamo detainees, "courts are neither bound by the procedural limits created for other detention contexts nor obliged to use them as baselines from which any departures must be justified." *Al-Bihani*, 590 F.3d at 877. "Detention of aliens outside the sovereign territory of the United States during wartime is a different and peculiar circumstance" that "cannot be conceived of as mere extensions of an existing doctrine." *Id.* Adopting a constitutionalized specific-and-articulable-danger standard would be especially inappropriate because the detention authority conferred under the AUMF is not contingent "[up]on whether an individual would pose a threat …if released"; instead, the Executive's detention authority turns exclusively "upon the continuation of hostilities." *Awad*, 608 F.3d at 11; *accord* Department of Defense, Law of War Manual § 8.14.3.1 (last updated Dec. 2016) ("For persons who have participated in hostilities or belong to armed groups that are engaged in hostilities, the circumstance that justifies their continued detention is the continuation of hostilities."), https://go.usa.gov/xymRX.

Furthermore, whether or not courts may assess a detainee's future dangerousness in other contexts, the question of petitioner's future dangerousness would not be justiciable in *this* context because it involves assessments of military conditions and national-security risks that the judiciary is ill-suited to address. *See Ludecke v. Watkins*, 335 U.S. 160, 170 (1948) (upholding an order removing an "enemy alien[]" during wartime because such a detainee's "potency for mischief" is a "matter[] of political judgment for which judges have neither technical competence nor official responsibility"); *People's Mojahedin Org. of Iran v. Department of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (*People's Mojahedin I*) (holding that the government's finding that "the terrorist activity of [an] organization threatens …the national security of the United States" is "nonjusticiable").

III. The Due Process Clause Does Not, In Any Event, Extend To Petitioner.

Because petitioner's detention comports with both substantive and procedural due process, this Court need not and should not decide whether the Due Process Clause extends to individuals such as petitioner, an Algerian national who is not present in the sovereign territory of the United States but rather is detained as an unprivileged enemy combatant outside that territory. Because petitioner's detention complies fully with any due process requirements that might apply, a judicial ruling on the threshold question whether petitioner has any due-process rights would be at best a gratuitously broad constitutional holding (if this Court holds that petitioner has no due-process rights) and at worst an improper advisory opinion (if this Court holds that petitioner has some due-process rights, though not the ones he claims in this case).

Should the Court nevertheless reach the question, however, it should hold— consistent with controlling precedent—that petitioner lacks due-process rights.

A. The Due Process Clause does not extend to unprivileged alien enemy combatants detained at Guantanamo under the AUMF.

The Supreme Court's "rejection of extraterritorial application of the Fifth Amendment" has been "emphatic." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court held that aliens arrested and imprisoned overseas could not seek writs of habeas corpus on the theory that their convictions had violated the Fifth Amendment. The Court explained that "[s]uch extraterritorial application…would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment." *Id.* at 784. Yet "[n]ot one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it." *Id.* (citation omitted); *accord United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). The Court's holding in *Eisentrager* "establish[es]" that the "Fifth Amendment's protections" are "unavailable to aliens outside of our geographic borders." *Zadvydas*, 533 U.S. at 693 (citations omitted).

Consistent with this unbroken line of precedent, this Court has declined to extend the Due Process Clause to aliens "without property or presence" in the sovereign territory of the United States. *See, e.g.*, *People's Mojahedin Org. of Iran v. Department of State*, 327 F.3d 1238, 1240-41 (D.C. Cir. 2003) (*People's Mojahedin II*) (describing this Court's application of the property-or-presence test to determine whether various foreign entities could invoke the Due Process Clause to challenge their designation as foreign terrorist organizations); *accord Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) (reiterating that "non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections").

The principle that the Due Process Clause extends only to aliens who are present in the United States (or claim due-process rights in connection with property they own in the United States) precludes the Clause's extension to petitioner, an alien unprivileged enemy combatant detained at Guantanamo under the AUMF. Both the Supreme Court and this Court have recognized that, as a *de jure* matter, the U.S. Naval Station at Guantanamo Bay is not part of the sovereign territory of the United States. *Rasul v. Bush*, 542 U.S. 466, 471 (2004) (explaining that Cuba exercises "ultimate sovereignty" over the base); *Kiyemba v. Obama*, 555 F.3d 1022, 1026 n.9 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (per curiam), *reinstated in relevant part*, 605 F.3d 1046, 1047-48 (D.C. Cir. 2010) (per curiam), *cert. denied*, 563 U.S. 954 (2011) (same). This Court has therefore rejected due-process claims brought by identically situated detainees. *Kiyemba*, 555 F.3d at 1026-27 (holding that, because the Due Process Clause does not extend to Guantanamo detainees, a district court lacked authority to order the government to release seventeen detainees into the United States). And in *Al-Madhwani v. Obama*, the Court similarly declined to accept the "premise[]" that Guantanamo detainees have a "constitutional right to due process," before concluding that even if they did, any procedural violation had been harmless. 642 F.3d 1071, 1077 (D.C. Cir. 2011). Because petitioner is indisputably an alien with no presence in the United States, the Due Process Clause does not extend to him with respect to his detention at Guantanamo. His substantive and procedural due process claims are therefore foreclosed.

The Court's decision in *Qassim v. Trump*, 927 F.3d 522, 2019 WL 2553829 (D.C. Cir. June 21, 2019), does not alter this conclusion. The question at issue in *Qassim* was whether

Kiyemba's recognition that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States," *id.* at *3 (quoting *Kiyemba*, 555 F.3d at 1026), constituted binding Circuit precedent as to "whether Guantanamo detainees enjoy procedural due process protections under the Fifth Amendment … in adjudicating their habeas petitions," *id.* at *4. The Court held that the answer was no, and construed *Kiyemba*'s holding to apply only to "substantive due process claim[s] concerning the scope of the habeas remedy." *Id.* According to the Court, the district court's decision rested on the premise that "*Kiyemba* [had] firmly closed the door on procedural due process claims for Guantanamo Bay detainees." *Id.* The Court thus reversed the district court's judgment and remanded for that court "to consider in the first instance whether and how the Due Process Clause" applied to the *Qassim* petitioner's procedural due process claims. *Id.*

Qassim casts no doubt on the settled principle that substantive due process does not extend to aliens without property or presence in the United States. In *Kiyemba*, this Court applied that principle to reject a substantive due process claim regarding the scope of habeas relief. 555 F.3d at 1026-27; *accord* App. 22 (Tatel, J., concurring in denial of initial hearing en banc) ("Context … indicates that the [*Kiyemba*] court was referring to the right to substantive due process."). And *Qassim* had no occasion even to consider the question because the *Qassim* petitioner's constitutional claims sounded exclusively in procedural due process. 2019 WL 2553829, at *4. Thus, petitioner's substantive due process argument—that the Fifth Amendment independently limits the duration of his law-of-war detention even while hostilities remain ongoing and statutory authorization exists, and that *no* amount of process could justify his detention past that unspecified temporal limit, Br. 20-23—remains foreclosed.

Nor does *Qassim* undermine the vitality of the property-or-presence test as applied to procedural due process claims brought by foreign entities and persons. The Court declined to decide, or even to opine on, the merits of the *Qassim* petitioner's procedural-due-process claim. 2019 WL 2553829, at *6-7. The Court simply held that "Circuit precedent leaves open and unresolved the question of what constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions." *Id.* at *6. That uncertainty is resolved by the Supreme Court's categorical refusal to apply the Fifth Amendment extraterritorially. *Eisentrager*—the Court's leading case, and indeed directly addressing the detention of enemy combatants under the laws of war—did not parse whether petitioners' due process claims sounded in substance or procedure before rejecting them out of hand. And the Court has continued to characterize *Eisentrager*'s holding broadly, never distinguishing between the Due Process Clause's substantive and procedural components. *Zadvydas*, 533 U.S. at 693; *Verdugo-Urquidez*, 494 U.S. at 269.

This Court's decisions in prior Guantanamo cases may not have answered "the specific question of what constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions." *Qassim*, 2019 WL 2553829, at *6. Nevertheless, the Court's application of *Eisentrager* in *People's Mojahedin I* clearly resolves the question against petitioner. In that case, two foreign entities challenged the State Department's decision to designate them as "foreign terrorist organizations" pursuant to 8 U.S.C. § 1189. *People's Mojahedin I*, 182 F.3d at 18. The entities asserted that, because the State Department had failed to "giv[e] them notice and opportunity to be heard," their designations violated procedural due process. *Id.* at 22. Relying on *Eisentrager* and its progeny, this Court rejected the entities' constitutional claims. The Court explained that, because the Due Process Clause does not extend to aliens without property or presence in the United States, the entities "ha[d] no constitutional

rights[] under the due process clause." *Id.* Thus, "[w]hatever rights [the entities] enjoy in regard to [their designations] are … statutory rights only." *Id.*

B. *Boumediene v. Bush* did not alter the principle that the Fifth Amendment does not apply to aliens such as petitioner.

Petitioner's only response to this body of precedent is to declare it irrelevant in light of the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008). *Boumediene*, however, held only that "Art. I, § 9, cl. 2 of the Constitution"—which prohibits Congress from suspending the privilege of the writ of habeas corpus—"has full effect at Guantanamo Bay" in the specific context of law-of-war detainees who had been detained there for an extended period. 553 U.S. at 771. The Court repeatedly emphasized that its holding turned on the unique role of the writ of habeas corpus in the separation of powers. *E.g.*, *id.* at 739 ("In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause."); *id.* at 746 ("The broad historical narrative of the writ and its function is central to our analysis."); *id.* at 743 ("[T]he Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme."). The Court concluded that treating "*de jure* sovereignty [as] the touchstone of habeas," even though the United States has *de facto* sovereignty over Guantanamo given its complete control, was "contrary to fundamental separation-of-powers principles." *Id.* at 755. Accordingly, *Boumediene* is consistent with the rule that the Fifth Amendment does not extend to aliens without property or presence in the United States.

Petitioner concedes that *Boumediene*, which "decided only that the Suspension Clause applies" at Guantanamo, did not itself confer Fifth Amendment rights on Guantanamo detainees such as himself. But petitioner suggests that *Boumediene*'s "functional" standard—which the Court created to govern the Suspension Clause's extraterritorial scope—should govern the extraterritorial scope of other constitutional provisions, including the Due Process Clause. Petitioner fails to appreciate the limits on *Boumediene*'s holding that the Supreme Court itself imposed. The Court expressly admonished that "our opinion does not address the content of the law that governs [the] detention" of Guantanamo detainees. *Boumediene*, 553 U.S. at 798.

Moreover, as *Boumediene* itself acknowledged, it is the *only* case extending a constitutional right to "noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty." 553 U.S. at 770. These caveats reflect the reality that, contrary to petitioner's suggestion that due process and habeas corpus are necessarily "intertwined" for purposes of extending due-process rights to Guantanamo detainees, the Suspension Clause secures "the common-law writ" of habeas corpus. In fact, the Clause was enacted "in a Constitution that, at the outset, had no Bill of Rights" or even a Due Process Clause. *Boumediene*, 553 U.S. at 739. Accordingly, *Boumediene*'s standard for determining whether the Suspension Clause extended to Guantanamo detainees does not apply *ipso facto* to the Due Process Clause and instead must be understood as limited to the Suspension Clause, in light of that Clause's centrality to the separation of powers. Indeed, this Court has previously recognized that "*Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions[] other than the Suspension Clause." *Rasul*, 563 F.3d at 529.

In any event, the Supreme Court has instructed that, "[i]f a precedent of th[e] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this

Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Given *Boumediene*'s express refusal to decide the extraterritorial scope of the substantive law governing detention, and given settled pre-*Boumediene* precedent holding that the Due Process Clause does not extend to aliens outside the sovereign territory of the United States—and specifically to alien law-of-war detainees—this Court must follow the latter body of case law even if "*Boumediene* has eroded the precedential force of *Eisentrager* and its progeny." *Rasul*, 563 F.3d at 529; *see also Kiyemba*, 555 F.3d at 1031 ("[T]he lower federal courts may not disregard a Supreme Court precedent even if they think that later cases have weakened its force.").

Petitioner suggests that, in *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc), the government conceded that *Boumediene*'s functional standard governs the extraterritorial scope of all constitutional rights. But the government's brief made no such concession. That brief stated only that the "Ex Post Facto Clause applies in military commission prosecutions" of certain Guantanamo detainees due to a "unique combination of circumstances" not present in this case. *Id.* at *64. Most significantly, the Ex Post Facto Clause was placed in Article I of the Constitution to constrain Congress's legislative authority by forbidding the criminal punishment of certain conduct. *Id.* And regardless, the Court's controlling *en banc* opinion in *Al Bahlul* assumed without deciding that the Ex Post Facto Clause would apply, underscoring that "we are not to be understood as remotely intimating in any degree an opinion on the question." 767 F.3d at 18 (quotation marks omitted). *Al Bahlul*'s treatment of the Ex Post Facto Clause does not bear on the question presented here.

C. Petitioner's particular due-process claims are at a minimum barred because they are not sufficiently intertwined with vindicating the Suspension Clause.

Finally, the due-process claims asserted by petitioner would not be available even if the Due Process Clause applied in some manner to Guantanamo detainees. Petitioner's due-process claims are cognizable only insofar as the Suspension Clause compels their adjudication through a habeas petition, because Congress eliminated statutory jurisdiction for this Court to consider his due-process claims. *Boumediene*, 553 U.S. at 771; *see* 28 U.S.C. § 2241(e). The Suspension Clause, however, "protects only the fundamental character of habeas proceedings," not "all the accoutrements of habeas for domestic criminal defendants." *Al-Bihani*, 590 F.3d at 876.

Thus, even if the Fifth Amendment applied to Guantanamo detainees such as petitioner, he would not be entitled to raise the full panoply of due-process rights possessed by domestic detainees, but at most only those fundamental rights recognized at the time of the Founding as part of the common and statutory law redressable through a habeas petition—and particularly as they would be applied to unprivileged enemy combatants. Petitioner's due process arguments, in contrast, are premised on substantive and procedural rights that, at the very least, lack this historic pedigree. Petitioner has thus failed to demonstrate how any of his due-process claims are sufficiently intertwined with vindicating the writ's constitutional core that they may be asserted in habeas under the Suspension Clause notwithstanding Congress's elimination of statutory jurisdiction. This conclusion is amplified by the fact that the Due Process Clause, at its core, is likewise aimed at protecting "those settled usages and modes of proceeding existing in the common and statute law of England." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856); *see Kerry v. Din*, 135 S. Ct. 2128, 2132-33 (2015) (plurality) (explaining that, "at the time of the Fifth Amendment's ratification, the words 'due process of law'" were coextensive with "the words 'by the law of the land'").

The government acknowledges that the Court has previously held that, when *Boumediene* concluded that the Suspension Clause barred application of 28 U.S.C. § 2241(e)(1) to preclude habeas petitions brought by unprivileged alien enemy combatants seeking to challenge the legality of their detention at Guantanamo, the *Boumediene* Court "necessarily restored the status quo ante[] in which detainees at Guantanamo had the right to" bring not only "core habeas claims" but a panoply of other habeas claims under the federal habeas statute. *Kiyemba v. Obama*, 561 F.3d 509, 512 n.2 (D.C. Cir. 2009); *see also Aamer v. Obama*, 742 F.3d 1023, 1030 (D.C. Cir. 2014) (holding that the federal habeas statute encompasses conditions-of-confinement claims, even though they "undoubtedly fall outside the historical core of the writ"). The government continues to disagree with that result, which incorrectly interprets *Boumediene* to have improperly invalidated applications of 28 U.S.C. § 2241(e)(1) to collateral habeas claims that are not actually protected by the Suspension Clause, and preserves the issue for further review.

* * * *

b. Al-Hela v. Trump

In *Al-Hela v. Trump*, the district court denied habeas relief, reasoning that the government had authority under the 2001 AUMF to detain al-Hela at Guantanamo because he was substantially supporting al-Qa'ida and two associated forces—Egyptian Islamic Jihad ("EIJ") and the Aden-Abyan Islamic Army ("AAIA"). Al-Hela appealed and the United States filed a response brief in November 2019. *Al-Hela v. Trump*, No. 19-5079 (D.C. Cir.). A public, unclassified version of that brief is excerpted below and available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

L Al-Hela Was Part Of And Substantially Supported Al Qaeda And Its Associated Forces

The district court's factual findings demonstrate that al-Hela was both part of and substantially supported al Qaeda and associated forces. Al-Hela does not address much of the most damaging evidence (his own [redacted text] statements), the district court's findings about al-Hela's lack of credibility during his live testimony at the merits hearing, or the evidence as a whole, instead attempting to undermine individual pieces of the case against him. These failures are especially glaring in light of the clear error standard of review. And al-Hcla's legal contentions have no basis in the text of the AUMF and NDAA, are inconsistent with the decisions of this Court, and ignore the realities of the conflict authorized by the AUMF.

A. Al-Hela's Travel Facilitation Activities and Logistical Support for Terrorist Plots Justify His Detention

The district court found that al-Hela more likely than not was a trusted facilitator for al Qaeda and its associated forces over a period of years. Al-Hela's relationships with numerous high-level al Qaeda, EIJ, and AAIA figures; his travel facilitation activities on behalf of al Qaeda and EIJ; and his support for multiple plots largely planned or carried out by AAIA all demonstrate that al-Hela was part of and substantially supported al Qaeda and associated forces.

1. During al-Hela's time in Afghanistan during the Soviet-Afghan war, he developed connections to other prominent jihadists, including with individuals close to Osama bin Laden and with Yasir Tawfiq al-Sirri, a high-level member of EIJ. The district court found that al-

Hela's statements at the merits hearing about his age, which he used in an attempt to undermine the government's evidence of his time in Afghanistan, were not truthful.

These relationships continued—and grew in number—after al-Hela's return to Yemen. …

* * * *

3. Al-Hela's connections also played a role in his involvement in five planned, attempted, or accomplished terrorist attacks in Yemen in late 2000 and early 2001, including two planned attacks on the U.S. Embassy in Sana'a. Three of those attacks—a bombing of the British Embassy in October 2000, the attempted assassination of the Yemeni Minister of Interior in December 2000, and bombings around New Year's Day 2001—were carried out by AAJA members with logistical support from al-Hela. Al-Hela had a "relationship" with Jayul, the AAIA leader and bin Laden associate responsible for the attacks. Al-Hela likewise "assist[ed] members" of AAIA with another plot likely targeting the U.S. Embassy. [redacted text]

4. This evidence demonstrates that al-Hela is "part of" al Qaeda and associated forces. As this Court has explained, there is no "exhaustive list of criteria" for determining when an individual is "part of" al Qaeda or an associated force; instead, "that determination must be made on a case-by-case basis using a functional rather than a formal approach and by focusing on the acts of the individual in relation to the organization." *Bensayah v. Obama,* 610 F.3d 718, 725 (D.C. Cir. 2010). Al-Hela's relationship with members of al Qaeda and EIJ began with his time in Afghanistan, and then continued through the late 1990s and early 2000s. He had close relationships with multiple prominent al Qaeda, EIJ, and AAIA figures; [redacted text] …

For many of the same reasons, these activities are also sufficient to show that al-Hela "substantially supported" al Qaeda and associated forces. As this Court has explained, "substantial support" of an enemy force is an "independent" criteria for detention. *Al-Bihani v. Obama.* 590 ft.3d 866,. 873-74 (D.C. Cir. 2010). Al-Hela does not appear to contest the district court's conclusion that his activities—serving as a "trusted and important facilitator" who obtained "fraudulent passports and passports with false identities" that enabled members of al Qaeda and EIJ to travel and providing "logistical support to numerous terrorist attacks and plots carried out by AAIA—are the sort of activities that can qualify as substantial support. …

B. Al-Hela Identifies No Error in the District Court's Findings That He Engaged in Travel Facilitation and Assisted With Terrorist Attacks

Al-Hela devotes much of his brief to efforts to undermine the district court's factual findings about his close relationships with numerous al Qaeda, AAIA, and EIJ figures; travel facilitation; and involvement in five terrorist plots. But al-Hela shows no error—much less clear error—in the district court's assessment of the evidence.

* * * *

C. Al-Hela's Contentions That These Activities Do Not Support Detention Are Meritless

1. Al-Hela offers various challenges to the legal basis for his detention, particularly the district court's conclusion that he "substantially supported" al Qaeda and its associated forces. These challenges are largely irrelevant; as discussed above, the district court's factual findings are more than sufficient to demonstrate that al-Hela was "part of" al Qaeda and associated forces, and this provides an alternative basis for affirming the district court's judgment. Al-Hela

contends that conclusion is unwarranted because he did not "swear allegiance," "serve as a combatant," or visit a guesthouse or training camp. But this argument simply ignores this Court's rejection of efforts to create an "exhaustive list of criteria" for demonstrating that an individual is "part of" al Qaeda or an associated force, and this Court's instruction that the determination instead turns on a "functional" analysis of "the actions of the individual in relation to the organization." *Bensayah,* 610 F.3d at 725; *accord Hussain,* 718 F.3d at 968. Al-Hela's actions in relation to al Qaeda and associated forces—including serving as a trusted travel facilitator and assisting with multiple terrorist plots—are sufficient to demonstrate that he was "part of" al Qaeda and associated forces. …

2. Al-Hela's complaints about the district court's conclusion that he "substantially supported" al Qaeda and associated forces are likewise unpersuasive.

a. As an initial matter, al-Hela suggests that he cannot be detained unless his support rendered him "functionally part of an enemy force." Al-Hela's "functionally part of" test is indistinguishable from the test this Court already employs to determine whether an individual is "part of" al Qaeda and associated forces, see *Hussain,* 718 F.3d at 968, and thus would render the government's express authority to detain those who "substantially supported" enemy forces wholly superfluous. But detention authority under the AUMF and the NDAA by necessity covers individuals who are not "functionally part of" an enemy force, but instead provide substantial support. *See Al-Bihani,* 590 F.3d at 874. At a minimum, that standard for detention must encompass individuals, like al-Hela, who provide support to al Qaeda and two of its associated forces that is collectively substantial. If that support does not render him functionally "part of" one or more of those forces, it would be anomalous to conclude that, by distributing his support activities among multiple organizations covered by the AUMF, al-Hela has insulated himself from detention.

The NDAA's inclusion of substantial support as an independent ground for detention accords with the nature of this armed conflict. Unlike a state-sponsored regular armed force, al Qaeda and associated forces operate in substantial part through loosely affiliated terrorist cells of individuals who often seek to hide their connection to the broader organization. As this Court has recognized, such individuals do not "wear uniforms" or carry "membership cards." *Ali,* 736 F.3d at 546. Treating individuals who knowingly provide recruitment, transportation, travel facilitation, communications services, financing and financial services, or other forms of substantial support to al Qaeda and associated forces as beyond the scope of the AUMF would subvert the statute and undermine the law of war by rewarding terrorist groups for assigning pivotal tasks to individuals who purposefully attempt to disguise their connection to the organization.

As the district court recognized, the law of war provides for detention in certain analogous circumstances. For instance, in certain circumstances, the Geneva Conventions afford prisoner of war status to (and thus contemplates the detention of) individuals like "supply contractors" "who accompany the armed forces without actually being members thereof." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art.4, 6 U.S.T. 3316, 75 U.N.T.S. 135. Similarly, as a historical matter, one of the first codifications of the law of war recognized that a sovereign may detain persons who aid the enemy, including certain individuals who contribute to the enemy's war efforts or threaten the security of the detaining state. *See, e.g.*, Instructions for the Government of Armies of the United States in the Field, art. 15 (Apr. 24, 1863) (Lieber Code) ("Military necessity ... allows of the capturing of every armed

enemy," as well as "every enemy of importance to the hostile government, or of peculiar danger to the captor").

b. Al-Hela is likewise wrong to suggest that the support he provided must be tied to a specific hostile act against the United States or a coalition partner. As a factual matter, the district court found that al-Hela provided support to a successful attack on the British Embassy in 2000, and was involved in two plots against U.S. targets as well. In any event, the text of the 2012 NDAA makes clear that detention authority extends to "[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities." 2012 NOAA § 1021(b)(2). It is the organizations and forces that are "engaged in hostilities against the United States or its coalition partners," not the "person" who is a "part of or substantially supported" those forces. *Id.* This is confirmed by the NDAA's "including" clause, which lists individuals: who "commit a belligerent act" or "directly support such hostilities" as examples of those who may be detained, without indicating that those circumstances are the *only* justifications for detention. And it is wholly consistent with this Court's precedent, which has consistently reject[edl the notion that a detainee must have engaged in hostilities" to be subject to detention. *Hussain,* 718 F.3d at 968.

c. A1-Hela also offers various temporal arguments about his detention. He contends that he cannot be detained because he "was not substantially supporting al Qaeda, the Taliban, or an associated force at the time of his abduction in September 2002," or, more broadly, because there was no finding of specific instances of support for the September 11, 2001 attacks, or after September 11, 2001.

Despite his long-term and repeated track record of support, outlined in his own statements, al-Hela apparently believes that the United States was required to wait to detain him until it developed evidence that he had successfully facilitated an attack or the travel of an al Qaeda fighter post-September 11. These contentions lack merit.

* * * *

d. Al-Hela's general contentions about the nature of his relationship with al Qaeda and associated forces fare no better. His contention that his support was only "sporadic and informal" is inconsistent with the evidence. The evidence of al-Hela's involvement in bomb plots alone places him in five plots over roughly seven months. [redacted text] …

II. The District Court Properly Found That AAIA And EIJ Were Associated Forces Of Al Qaeda

Al-Hela contests the district court's findings that AAIA and EIJ were "associated forces" of al Qaeda such that his involvement with those organizations renders him detainable. His arguments fail.

A. 1. Al-Hela primarily contends that no evidence supports the proposition that AAIA "entered the fight alongside al Qaeda." Al-Hela does not contest that AAIA announced its support for al Qaeda and bin Laden after the fatwa in 1998 and began to call for attacks against Western targets in Yemen. Nor does he contest that in the wake of those statements, AAIA began to undertake attacks against Westerners, including the kidnapping of a group of Western tourists in 1998. And he does not contest that AAIA carried out a successful bombing attack on the British Embassy in 2000. The district court also found that AAIA, or members of the organization, had a role in two additional plots to attack the U.S. Embassy in Yemen (one with al-Hela's assistance). The district court properly concluded that these efforts demonstrated that

AAIA "entered the fight alongside al Qaeda by participating in hostilities against the U.S. and its coalition partners in the same comprehensive armed conflict;" and that AAIA was an associated force "at the time al-Hela was captured in 2002."

* * * *

B. Al-Hela's arguments that the district court erred in concluding that EIJ was an associated force fail for essentially the same reasons. Al-Hela's only dispute with the facts of EIJ's connection to al Qaeda is his contention that the June 2001 merger between EIJ and al Qaeda involved very few EIJ members, but that contention rests on a web article and a book not submitted to or considered by the district court. Otherwise, al-Hela does not seriously contest that EIJ leader Ayman al-Zawahiri signed bin Laden's fatwa in l998; that EIJ was a primary ally of bin Laden in the ensuing years; and that al-Zawahiri is now the leader of al Qaeda, a position he assumed after bin Laden's death. The district court also found that "EIJ members had access to al Qaeda training facilities and terrorist operatives," and that EIJ planned to attack the U.S. Embassy in Albania after signing the fatwa in 1998. Al-Hela complains that this plan "was not shown to have an al Qaeda link," but ignores the evidence of EIJ's alliance with al Qaeda in 1998 and the fact that this attack showed EIJ "had changed its targeting to include Western targets outside Egypt after al-Zawahiri signed bin Laden's fatwa. As the district court explained, "EIJ, under the leadership Ayman al-Zawahiri, made clear that the U.S. was one [of] its primary enemies when Zawahiri signed bin Laden's fatwa in 1998 and planned to attack the U.S. Embassy in Albania that same year." And these conclusions are supported by EIJ's designation as an entity associated with al Qaeda by the United Nations, as well as its designation as a foreign terrorist organization by the Department of State and the blocking of its assets under Executive Order No. 13,224. 66 Fed. Reg. 49,079 (Sept. 23, 2001). Al-Hela cannot show clear error in the district court's determination that EIJ was an associated force of al Qaeda.

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Cross References

International crime issues relating to cyberspace, **Ch. 3.B.6**
Advice and consent to ratification of NATO accession of North Macedonia, **Ch. 4.A.1.**
Rule of Law (IHL), **Ch. 7.A.4.**
ILC Draft Articles on Crimes Against Humanity, **Ch. 7.C.1.**
ILC's work on protection of the environment in relation to armed conflicts, **Ch. 7.C.2.**
Iraq claims cases regarding detention under the law of armed conflict, **Ch. 8.E.**
Maritime cybersecurity, **Ch. 12.A.4.a**
Establishment of U.S. Space Force, **Ch. 12.B.1.**
Cyber activity sanctions, **Ch. 16.A.10**
Israeli settlements in the West Bank, **Ch. 17.A.**
Responsibility to Protect, **Ch. 17.C.4.**

CHAPTER 19

Arms Control, Disarmament, and Nonproliferation

A. GENERAL

Compliance Report

In April 2019, the State Department submitted its report to Congress on "Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments," including an unclassified trends section, pursuant to Section 403 of the Arms Control and Disarmament Act, as amended, 22 U.S.C. § 2593a. A longer unclassified version of the report was released in August 2019. The 2019 Report addresses U.S. compliance with and adherence to arms control, nonproliferation, and disarmament agreements and commitments, other States' compliance with and adherence to arms control, nonproliferation, and disarmament agreements and commitments pertaining to nuclear issues, other States' adherence to missile commitments and assurances, and other States' compliance with and adherence to arms control, nonproliferation, and disarmament agreements and commitments pertaining to chemical issues, biological issues, and conventional issues. The 2019 report primarily covers the period from January 1, 2018 through December 31, 2018. The report is available at https://www.state.gov/2019-adherence-to-and-compliance-with-arms-control-nonproliferation-and-disarmament-agreements-and-commitments-compliance-report/.

B. NONPROLIFERATION

1. Non-Proliferation Treaty

On December 9, 2019, Assistant Secretary of State Christopher Ashley Ford addressed the NATO Parliamentary Assembly at the National Defense University in Washington, D.C. on responsible nuclear weapons stewardship. His remarks are excerpted below and available at https://www.state.gov/challenges-of-policymaking-in-responsible-nuclear-weapons-stewardship/.

* * * *

Every review conference of a treaty is, by definition, a chance to look back and review how countries have handled the challenges the instrument was designed to address, and how they have (or have not) lived up to its aspirations. It is also a chance to draw lessons from that history about how best to approach what challenges remain before us. The upcoming 50th Anniversary of the Nuclear Nonproliferation Treaty (NPT)'s entry into force is an especially good opportunity for such stock-taking — and for assessing our own way ahead — as we remember its successes, assess its limitations, and plan for the future by recommitting ourselves to the Treaty and to ensuring that it does at least as well in its second half century as it did in its first.

And I do think it's important to look back on the NPT's history, not least in order to remind ourselves of what we have accomplished — and thus what might be imperiled if we allow the nonproliferation regime to weaken. As I've pointed out many times, it is critical on this anniversary to remember the security benefits that the NPT has brought to the world by helping forestall the catastrophic proliferation of nuclear weapons and risk of nuclear war that experts feared in the early 1960s. It is also critical to remind ourselves of the ways in which the nonproliferation regime has provided a foundation for other benefits we all hold dear, such as by making possible worldwide sharing of the benefits of peaceful nuclear technology, and by helping keep proliferation from precluding movement toward disarmament. It is of paramount importance that we remember all this on the Treaty's Golden Anniversary.

I. *Seriousness and Unseriousness*

But what I'd like to do today is take a slightly different approach, by exploring with you less *what* has been accomplished by the nonproliferation regime as a whole than drawing lessons from *how* some of this was done. I think such historical lessons can illustrate the complexities of living in a nuclear-armed world, as well as provide us examples to draw upon today from how thoughtful statesmen have wrestled with these challenges in the past.

* * * *

Studying our collective history in the nuclear realm can help us learn how to approach our collective future more wisely. Among other things, aspects of the NPT's history can help illustrate at least two points to assist us in being prepared for its next 50 years. Familiarity with this history can provide a corrective for moralistic absolutism and oversimplification, by demonstrating how complex the various legitimate equities actually involved in nuclear policymaking can be. And it can provide insights into how such equities indeed *can* sometimes be balanced in responsible and enduring ways.

Such lessons are, I would submit, extremely important to all of us today. Whether we acknowledge it or not, those of us in government charged with such policy questions bear heavy responsibilities for stewardship of our countries' national interests — and those of international peace and security more broadly — that I believe we would betray by cynical fluidity and moralistic obsession alike. It is our job to navigate the ship of state between these rocks, and the study of history can help us do so better.

II. *Responsible Nuclear Stewardship: A Case Study*

To that end, my case study in nuclear negotiating and the challenges of responsible nuclear weapons stewardship derives from the dilemmas that the United States faced in trying to maintain NATO's nuclear deterrent against the threat of Soviet aggression while bringing to

closure its negotiations with the Soviet Union over the core provisions of the international convention that would ultimately become the NPT. This example is valuable, I would argue, for a couple of reasons.

For one thing, it helps insulate us in the present day against propagandistic manipulation, for if you believe current Russian narratives, everything I am about to tell you is false and NATO nuclear policy violates the NPT. We should remember history in order to repudiate such disingenuous silliness. More importantly, however, this case study is important because it helps illustrate how responsible nuclear stewards struggle — but can nonetheless succeed — in balancing complex, interrelated equities. So let's take a look.

A. *Balancing Equities*

As the NPT negotiations advanced, Washington found itself having to manage a number of important equities. All of these were legitimate and important, but not all of them seemed to point in the same direction, at least not easily.

One obvious one was the importance in the mid-1960s of bringing the NPT negotiations to a close. U.S. intelligence estimates had for some years been giving grim forecasts of the nuclear weapons proliferation that could happen as various countries around the world acquired the technical capacity to develop such weapons. Accordingly, there was a strong sense of urgency in successfully concluding a treaty that would help reduce these dangers. Ever since the so-called "Irish Resolution" at the United Nations in 1961, the conceptual core of the proposed treaty was the need for provisions both barring non-possessors from getting (or trying to get) nuclear weapons and barring possessors from giving non-possessors access to such devices or know-how. These twinned prohibitions indeed ultimately became Articles I and II of the NPT, but as of the mid-1960s there was not agreement between Washington and Moscow upon the details.

One source of such disagreement was the relationship between these core nonproliferation rules and another important equity the United States also badly needed to protect — specifically, the need to ensure the continued efficacy of the nuclear deterrent with which Washington confronted the Soviet Union as NATO and the Warsaw Pact faced off in Central Europe. With the Alliance numerically outgunned on the central front, it was critical to U.S. and NATO planners that they maintain a *nuclear* deterrent posture sufficient to deter the Soviet aggression that they most feared, and which they felt unequipped to meet with conventional arms alone. This meant that NATO needed to make its threats of nuclear retaliation against Soviet attack highly believable.

A third equity was the importance of constraining nuclear proliferation pressures *within* NATO, and this was greatly complicated by game-theoretical problems of deterrence within an alliance framework. Specifically, the challenge was to make nuclear deterrence credible not merely to Moscow, but indeed to the NATO allies themselves.

The construct of U.S. "extended nuclear deterrence" in support of NATO relied heavily upon Washington's willingness to use its own nuclear forces to back up the Alliance, and U.S. planners went to great lengths to make this threat as credible as possible. Nevertheless, the fact remained that the anticipated ground battle for Europe would take place thousands of miles from the U.S. homeland, and would most immediately decide the fate of territories and peoples that were not, at the end of the day, American.

This led some Europeans to worry about the possibility of the Alliance being "decoupled" from Washington, inasmuch as a Soviet invasion that *only* threatened Europe would confront the Americans with the choice — in phrasings one might have heard at the time — of

whether to sacrifice Chicago in order to save Hamburg. It was central to U.S. planning to make American nuclear weapons available to prevent defeat at the hands of Warsaw Pact armor in Europe, but some Europeans worried that, in a pinch, Washington might opt to *avoid* risking Chicago. Might the United States, they feared, be tempted to *not* intervene with U.S. nuclear weapons against a Soviet invasion if doing so would imperil U.S. cities?

At least some such concerns might be imagined to lie behind the British and French decisions to maintain their own, independent nuclear deterrents — but such thinking was not confined to London and Paris. West Germany, in particular, also had such fears, and much of NATO planning during this period was devoted to trying to provide an answer to this reassurance problem that did *not* involve the Germans acquiring their own nuclear weapons — as indeed some in Bonn did feel might be needed. At this point in the mid-1960s, Nazism and World War II were still very recent memories, and the thought of German fingers on the proverbial nuclear "button" was a worrying one even in the West, and a terrifying one in Moscow.

And here's where it got particularly tricky, however, because some of the ways one might reassure allies against "decoupling" might be *very* problematic from the perspective of crisis stability vis-à-vis the Warsaw Pact. How could the Federal Republic of Germany (FRG) be made sufficiently comfortable with the reliability of nuclear deterrence — and thus dissuaded from itself engaging in weaponization — without steps being taken that might exacerbate the escalation-management challenges associated with having more Western fingers on more triggers, and which could potentially also provoke overreactions from Moscow?

When my story begins, NATO had already begun to consult with NATO allies about potentially making U.S. nuclear weapons available to some of them in time of war. But at this point in the mid-1960s, NATO was entertaining a further possibility: a Multilateral [Nuclear] Force (MLF) of jointly-owned and -controlled nuclear missile submarines manned by crews drawn from the various NATO nations.

The MLF, however, was opposed by Moscow with a vehemence that threatened, at the very least, to sink the global effort then underway to establish a nonproliferation regime. Worse still, these dilemmas threatened to make the deterrent standoff in Central Europe more unstable. What ability the MLF might give NATO allies to launch nuclear weapons independently was not entirely clear — at least not to Moscow, at any rate — and it might in any event give these allies access to some non-trivial amount of nuclear weapons knowledge. To the degree that Soviet planners imagined the FRG being able to launch NATO nuclear weapons against them at will, these discussions raised important questions of crisis stability vis-à-vis the Kremlin.

These challenges with the FRG thus wrapped together a complex brew of deterrence, reassurance, nonproliferation, and crisis stability issues. All of these equities came together in U.S.-Soviet negotiations over what would become Article I of the NPT: the Treaty's provision prohibiting helping others acquire nuclear weapons.

The resolution of all this balancing is well known to anyone who has followed these issues. It occurred in three more or less simultaneous moves:

- First, the United States dropped the MLF concept (as well as the alternative Atlantic Nuclear Force concept) in favor of sticking with a construct of purely wartime nuclear sharing arrangements in which the Americans forward-deployed nuclear warheads in Europe that were slated for employment in conflict by Allied air forces, but in which the United States retained absolute control over these devices in peacetime and prior to any U.S. decision to implement any such wartime allocation;

- Second, the Soviets grudgingly *accepted* that this NATO posture was better than the available alternatives — and that it met Moscow's fundamental security needs vis-à-vis potential additional NATO states' access to nuclear weaponry — and they agreed to the text of what became the NPT, while conceding that NATO's mere nuclear consultations and training for wartime operations did *not* present Article I problems; and
- Third, the FRG accepted that these arrangements met Bonn's deterrence needs without the necessity of either MLF-style shared launch authority *or* indigenous weaponization.

This historic compromise successfully balanced the complex and simultaneously compelling equities of deterrence, reassurance, nonproliferation, and crisis stability — and this bargain has held ever since, at least so far. It is in this compromise that the extraordinarily valuable nonproliferation norms of the NPT and U.S. nuclear deterrence policy ended up working together to help establish, and provide a strong foundation for, the nonproliferation regime.

B. *The Story in Documents*

While its broad contours are well known, however, one new element in recent years is that thanks to the declassification of U.S. records from the years of the NPT's negotiation, it is now possible to document this story in great detail. I will spare you today the blow-by-blow details of how U.S., Soviet, German, and other Allied officials worked out this momentous understanding, but I will put a more complete description in the longer version of these remarks we post on the ISN Bureau website. Last year the United States released a declassified negotiating history and NATO released a collection of contemporaneous documents, and we are working to declassify more of the original record.

For present purposes, one can treat this documentary story as beginning in October 1965, when U.S. National Security Council staffer Spurgeon Keeny wrote a memorandum to his boss, President Lyndon Johnson's National Security Advisor McGeorge Bundy, observing that the draft NPT text that had been tabled by the Soviet Union would prohibit the proposed NATO MLF concept, and potentially any other NATO bilateral arrangements. This was obviously a problem for Keeny, since those arrangements represented U.S. policy at the time. Nevertheless, he also observed, presciently, that Moscow "might eventually propose to give up the language outlawing our NATO arrangements if we were prepared to give up the MLF." Ambassador Jacob Beam, who headed the Arms Control and Disarmament Agency (ACDA)'s International Relations Bureau, made a similar point to Secretary of State Dean Rusk a month later, recounting that discussions with the Soviets had "conveyed an impression of a degree of possible flexibility on the subject of existing [nuclear] arrangements in NATO."

After mulling over these ideas, President Lyndon Johnson wrote a letter to the Chairman of the Soviet Council of Ministers, Alexei Kosygin, in January 1996, declaring that the United States was "not prepared to enter into any agreement that would deny our allies the possibility of participating in their own defense through arrangements that would not constitute proliferation." He also made pointedly clear, however, that Washington understood "proliferation" to occur only when "a non-nuclear nation acquires its own national capability or the right or ability to fire nuclear weapons without the explicit concurrent decision of an existing nuclear nation."

With this letter to Prime Minister Kosygin — the version I have is undated, but it was probably written in January of 1966 — President Johnson thus clearly flagged to the Soviets the idea that notwithstanding prior MLF planning, NATO's nuclear arrangements would stop short of allowing European allies possession or control of nuclear weapons: the weapons would

remain U.S. weapons and under U.S. control, and Washington would retain absolute veto rights over their actual use. The United States exhorted the Soviets to accept this principle as the basis of their work on the NPT's core prohibitions upon proliferation.

A few months later, in June of 1966, Spurgeon Keeny wrote another memorandum recounting that ACDA Director William Foster had talked about this with Soviet ambassador Anatoly Dobrynin — and that the Russians seemed willing to accept *existing* NATO nuclear arrangements (of strict unilateral, peacetime U.S. control and an American veto upon Allied employment) as long as "the Soviets could be sure that Germany would not use or would not be able to use nuclear weapons on their own decision." This was echoed in August by a memo from Foster himself to Secretary Rusk, arguing that joint ownership of nuclear weapons would need to be ruled out, but that in return for this concession "our present bilateral arrangements within NATO" could likely be preserved. Foster made just such a case to President Johnson himself in September.

But an implied signal from Dobrynin was one thing, and actually getting Soviet agreement to an NPT text was quite another. Nevertheless, progress was made, and declassified memoranda from the succeeding few months show the two sides gradually circling in on that conclusion from their respective positions. To this end, Rusk met repeatedly with Soviet Foreign Minister Andrei Gromyko at the United Nations in New York. In these discussions — memorialized in U.S. memoranda — the Soviets were keen to ensure that the draft treaty would bar "transfers" of nuclear weapons either to individual non-weapon states or "through an alliance," while Rusk reassured Gromyko that some such agreement seemed feasible.

The superpowers' two top diplomats also explicitly discussed the fact that NATO's arrangements, in which the United States maintained complete control over its forward-deployed weapons, only applied in peacetime: should a war actually break out, Rusk made clear, things would be different. This did not bother Gromyko, however, who replied that such wartime questions were mere "political considerations" rather than issues of legality under the draft NPT. (Neither side seemed to think it was either desirable or feasible to worry about such treaty provisions in the event of all-out war between two alliances that between them then possessed perhaps 40,000 or 50,000 nuclear weapons.) To help reassure Moscow that U.S. transfers of control or launch authority over nuclear weapons to NATO allies would never occur in peacetime, ACDA Director Foster met with Soviet Ambassador Alexei Roshchin later in September 1966 to make these points once more.

A U.S.-Soviet Working Group convened to work through the drafting challenges associated with these basic concepts was meeting by late September, and it reported back to the White House on September 30 that its members had agreed upon "compromise language for a non-proliferation treaty that both sides can live with." This language would be "very nearly coextensive with present U.S. nuclear policy," in that it would permit the continuation of the NATO *status quo* in which "U.S. nuclear weapons available for use by allied forces assigned to NATO in the event of hostilities could … be transferred to those forces in that event." The Soviets had agreed to drop draft treaty language upon which they had previously insisted, leaving only text that acceptable to the Americans since it would not apply to "consultative and planning arrangements of the type contemplated within NATO." To make sure there was no misunderstanding, Rusk met with Gromyko again in early October to reaffirm their understanding that the treaty should focus on what was prohibited, not what was permitted, and to reinforce the message that the treaty would not ban U.S. nuclear consultations with NATO

allies — that is, the kind of training and contingency planning that had then already been formalized within the Alliance.

All that really remained, then, was to convince the Germans. Accordingly, ACDA Director Foster reached out in January 1967 to the FRG's ambassador in Washington, Karl Heinrich Knappstein, to recount that the Soviets seemed to have become reconciled to NATO's existing consultative arrangements, had dropped language that would have prohibited "training of allied troops for possible use of nuclear weapons in the event of war," and seemed to understand that delivery vehicles (such as allied dual-capable aircraft [DCAs]) would not be covered by the treaty as long as no actual "transfer of warheads or control over them" occurred. This didn't mean that the Soviets wouldn't *criticize* NATO's arrangements, Foster stressed, but he made clear to the Germans that Moscow had indeed abandoned its prior argument that those arrangements would be *unlawful* under the draft treaty. National Security Advisor Walt Rostow later made a similar point to German parliamentary leader Rainer Barzel at the White House in February 1968: the Soviets, Rostow made clear, now "know they cannot raise the [NATO nuclear-use] double-key question or the question of nuclear consultation" as NPT problems.

These understandings with the Soviets and the Germans clinched the deal making clear that NATO's "nuclear sharing" arrangements were not a problem under Articles I and II of the NPT. Under Secretary of State Nicholas Katzenbach duly summed things up in a letter to Secretary of Defense Clark Clifford in April 1968, recounting that as a result of the Rusk-Gromyko negotiations in 1966, the NPT's Article I now protects NATO "alliance consultations on nuclear defense" and "nuclear defense deployment arrangements." An attachment to Katzenbach's letter explained that the NPT would permit transfers of delivery vehicles or delivery systems "so long as such transfer does not involve [nuclear] bombs or warheads." It also stressed that if "a decision were made to go to war … the treaty would no longer be controlling."

The various sides had thus reached a compromise that neatly handled all of the complex tensions and interrelationships between the important equities involved. The Soviets killed off the MLF, the Americans gained agreement that NATO arrangements were not barred by the NPT, and Germany retained the reassurance provided by an Alliance system that promised it the ability to deliver U.S. nuclear weapons against Warsaw Pact targets in wartime. It had proven possible to reach agreement on a nonproliferation treaty; NATO could still rely upon its existing arrangements to ensure Alliance "coupling" in the interests of deterrence; Germany and other NATO allies felt reassured enough about their likely degree of active involvement in the event of nuclear war not to pursue nuclear weapons on their own; and the Soviets did not have to worry about a new peacetime *status quo* in which Germans had their fingers upon the proverbial atomic trigger. Not too bad, I'd say.

III. *Conclusion*

So thus was history made. Notably — except for recent attempts by Putin regime propaganda to pretend, in effect, that none of this negotiating ever happened, and therefore to convince historically ignorant listeners that NATO's nuclear policy is somehow in violation of the NPT — this historic compromise has lasted to the present day. It still remains critical to NATO's nuclear deterrent concept.

We should remember this compromise as we approach the 50th Anniversary of the NPT's entry into force. It can help remind us that actual policymaking in the nuclear arena requires the

management and balancing of multiple legitimate but partly competing equities — and is thus entirely *unlike* the simplistic morality play that some would have it seem.

The story of negotiating the final text of the NPT's Articles I and II illustrates how difficult it is to have a nuclear posture, and to conduct diplomacy, in ways that maximize the deterrence of aggression, minimize escalation risk and crisis instability, maximize ally reassurance, and minimize proliferation pressures — *all at the same time*. It also provides a case study in responsible nuclear stewardship, visible in how the Treaty's negotiators worked through the ways in which these interrelated challenges then manifested themselves.

In the fraught security environment of our own time, we face our own challenges — not least with regard to how to do all of these sorts of things *and* to explore constructive ways forward that reduce tensions and strengthen trust (as the NPT exhorts us) in order to facilitate nuclear disarmament. Informed and inspired by the lessons of our past, and keenly aware of the complexities of nuclear policymaking and the responsibilities of nuclear stewardship, we are working to do this in multiple ways.

First and foremost, of course, we are continuing to modernize our own nuclear forces to avoid the block obsolescence of our strategic delivery systems and thereby preserve the nuclear deterrence upon which our security — and that of our friends and allies — has depended for many decades. It is important to bear in mind, however, that all "modernization" programs are not the same. For our part in the United States, we are replacing like with like — *i.e.*, simply replacing older systems with newer versions of the same thing, and in comparable numbers: a new ICBM, a new strategic ballistic submarine, and a new manned bomber.

These U.S. plans stand in sharp contrast with Russia's push to add to its strategic arsenal with exotic new systems, such as the "flying Chernobyl" of its accident-prone nuclear-powered cruise missile and a nuclear-powered underwater drone. Our modernization also stands in sharp contrast with Russia's anticipated expansion of its number of *non*-strategic weapons, and with China's perilous track to at least *double* the size of its nuclear arsenal — while also expanding the range and diversity of its delivery systems — over the next ten years.

We are also modernizing the nuclear deterrence aspects of our NATO relationships in order to keep this longstanding capability viable in the years ahead, even while continuing to adapt the Alliance to the modern challenges of conventionally-armed deterrence forced upon us by Russia's aggression against its neighbors and belligerent posturing against us and our allies. We hope that our NATO allies will remain true to this path, and live up to their commitments in these regards, for our collective security depends upon it.

At the same time, we are doubling down on diplomacy in order to help build the foundations for a better security environment in the future. We are, for instance, implementing a new multilateral disarmament dialogue, based around our Creating an Environment for Nuclear Disarmament (CEND) initiative, that reconceptualizes and reframes global disarmament discourse to redirect it from its past fixation upon mere manifestations of underlying problems in the strategic environment to a serious exploration of how to start addressing the problems themselves.

This dialogue, while still in its early stages, continues to show promise. Sixty-two participants from 31 countries, including the United States, met at Wilton Park in the United Kingdom on November 20-22 for the second meeting of the CEND Working Group. Participants attended from NPT nuclear-weapons States and non-nuclear-weapons States alike, as well as from some nuclear weapons possessors who are not signatories of the NPT at all. These

Participants began to lay the groundwork for translating the CEND dialogue into action by developing Concept Notes for each of the three CEND subgroups on:

- Reducing perceived incentives for states to retain, acquire, or increase their holdings of nuclear weapons and increasing incentives to reduce and eliminate nuclear weapons.
- Mechanisms to bolster nonproliferation efforts and build confidence in and further advance nuclear disarmament.
- Interim measures to reduce the risks associated with nuclear weapons.

The next meeting of the CEND Working Group will take place early next year.

We are also developing new approaches to arms control that aim to include both Russia and China, for the first time, in an accord to prevent a destabilizing new global arms race and help build a more stable security environment. And we are helping lead the global charge to develop norms of responsible behavior and "best practice" standards in new security domains being created by complex, rapidly-evolving, and potentially transformative technologies — such as in cyberspace and outer space — that can intersect with traditional deterrence approaches, but which in their very complexity are resistant to traditional legal-prohibitive arms control.

There is nothing simple or easy about these steps, nor about the complicated relationships between them. Doing all this *is* difficult — and none of what we are about is by any means guaranteed to succeed. But that is how things work in the real world; struggling to preserve and advance such interwoven equities in a complex environment is what responsible players do.

I hope that the upcoming anniversary of the NPT's entry into force can remind us of the importance of wrestling with such problems responsibly today — and in the future — as our predecessors did in bequeathing to us that important Treaty and the global nonproliferation regime of which it today forms the cornerstone.

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On December 16, 2019, Dr. Ford delivered remarks on the P5, the "N5" and the NPT Review Conference at the Wilton Park Nonproliferation Conference in the United Kingdom. His remarks are available at https://www.state.gov/the-p5-the-n5-and-the-npt-review-conference/ and excerpted below.

* * * *

Our topic for this panel is the so-called "P5 Process" and its potential contributions to the upcoming Review Conference (RevCon) of the Nuclear Nonproliferation Treaty (NPT). I'm glad to have this chance to speak on this, since I do think that the P5 can play a constructive role, but I also think there can be pitfalls in how one approaches this.

I hope to do three things today in this talk: I will talk a little bit about terminology because I'm afraid we are confusing concepts by trying to be too "generic." Second, I'll talk about the value of communication among the nuclear-weapon States and the potential for increased global security, and, finally, I'll explore the idea of communication between nuclear-weapon States and non-nuclear-weapon States to create better conditions for stability.

I. A Note About Terminology

Before I ruminate on where the P5 process can take us I want to take a moment to examine the use of the term "P5" itself, as I wonder whether it might be useful to drop the use of

the term "P5" in the NPT context. We are all probably too casual in our language in talking about the "P5." Properly speaking, the term "P5" refers to the five permanent members of the U.N. Security Council. I would submit that it *isn't* really a good way to refer to the five countries that qualify as nuclear-weapon States (NWS) under Article IX(3) of the NPT by virtue of having "manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967." For my part, I think of the five NPT nuclear-weapon States as the "N5," rather than the "P5."

Since the N5 nowadays happen to be the same five countries as the P5, most people just refer to these states as the "P5" without distinguishing these very different contexts, but I would discourage this. Formally speaking, these are different categories, and historically have not always been the same. After all, the People's Republic of China (PRC) was not recognized as the lawful representative of "China" in the United Nations — and therefore was not among the P5 — until 1971. Although it didn't join the NPT until 1992, the PRC met the NPT's Article IX(3) criteria — that is, those of the "N5" — from the outset, because it had tested a nuclear weapon in 1964. Moreover, the lawful representative of "China" in the United Nations before the change in 1971 was the government of the Republic of China, which had joined the NPT as a *non*-nuclear-weapon state (NNWS) in 1970, and was thus definitely *not* part of the N5.

I'm not just being pedantic, here. One potential risk of speaking too casually about the "P5" in an NPT context — that is, when one really means the N5 — is that a listener might conclude that having nuclear weapons is what earns one a permanent seat on the Security Council. That, of course, is not the case. (When the permanent membership of the Council was established in 1945, in fact, only *one* state had nuclear weapons.) Structurally, legally, and historically, the term "P5" does *not* denote nuclear-weapon States: the P5 countries are, instead, the leading powers — or now, in two cases, the successors of those powers — that came together to anchor the United Nations system in 1945 in order to stabilize, rebuild, and keep the peace in a world shattered by the horrific bloodletting of the Second World War.

For anyone who cares about nonproliferation and disarmament, therefore, confusing the ideas behind the categories of P5 and the N5 can be dangerous. To be part of the P5 is to be a state with a special role and responsibility in the system of global order, while to be part of the N5 is merely to be one of the countries that had manufactured and exploded a nuclear weapon prior to January 1, 1967. Confusing these categories risks seeming — wrongly — to reify nuclear weapons possession as the ticket to some kind of special and laudable global status. Such confusion could have the unintended result of increasing the perceived incentive for non-possessors to acquire such weapons and of decreasing the incentives for current possessors to relinquish them. That's why I think it may be better to speak about the "N5" rather than the "P5" when talking about NPT issues.

II. The N5 Process and Direct Arms Control Engagement

So… let's see where careful thinking about the "N5 Process" can take us.

First of all, let me manage expectations by urging you not to overestimate the N5 Process and its potential contributions to the NPT RevCon. To be sure, there are things the N5 is already planning to do that should be constructive. We are planning to hold a side event at the Conference, for instance, at which all five nuclear-weapon States will exchange perspectives and answer questions about how we think about nuclear weapons, doctrine, and disarmament issues. To the degree that the N5 can demonstrate that they are responsible stewards of the nuclear arsenals they possess — and that they are living up to their NPT Article VI obligation to pursue negotiations in good faith on effective measures relating to nuclear disarmament — I hope this

will help improve the atmosphere for the RevCon by rebutting false narratives suggesting that all of the N5 are *unserious* about such things.

Nevertheless, except in the sense that it would be worrisome — and not conducive to a constructive NPT RevCon — were the N5 *unable* to talk to each other *at all*, I would urge you not to read too much into the mere fact of meetings occurring among the five. We do continue periodic meetings, and they do help us better understand each other's positions and approaches. But meetings *per se* are just that: meetings. The name of the game should be to achieve substantive progress, which is a different question than just whether or not N5 diplomats are willing to get together in a room from time to time.

Don't get me wrong. I am pleased that we are still meeting. But I am resistant to holding meetings *just* in order to be able to say that we are doing so. Diplomacy among the N5 should be undertaken for reasons of statesmanship, to improve international peace and security, and not merely as a public relations exercise.

As I'll explain in a moment, I do think some substantive progress is possible. That said, to the degree that it is currently difficult to make progress in N5 engagements, true statesmanship would involve *admitting* this and focusing upon *why* this is the case—rather than just pretending things are fine and holding meetings to paper over the existence of problems that need to be addressed.

Such honesty would seem particularly important to the degree that such problems actually stem from actions by one or more of the N5 states themselves. If you are alarmed by such things, you should want these problems expressly addressed and made the subject of corrective diplomacy.

And, unfortunately, there are a great many things to be alarmed about: Russia's invasion and occupation of portions of two of its neighbors; the PRC's huge military buildup, expansive maritime claims, and provocative conduct in the East Asian littoral; the Kremlin's maintenance of an undeclared chemical weapons program and indeed its use of a military grade nerve agent in an attempted assassination in the UK and its failure to demonstrate whether it dismantled the biological weapons program it inherited from the Soviet Union; as well as Beijing's dramatic expansion of its nuclear delivery systems and stockpile numbers and Moscow's continuing deployment of non-strategic nuclear weapons and development of destabilizing new strategic delivery systems, and the disturbing questions that have arisen about both countries' adherence to the "zero-yield" nuclear weapons testing moratorium adhered to by the United States, the United Kingdom, and France. Especially in the context of a nonproliferation treaty that expressly aims to ease international tension and strengthen trust between states in order to facilitate nuclear disarmament, N5 meetings should not be used to obscure the degree to which such developments in the security environment increase regional proliferation pressures, make movement toward disarmament more challenging, and threaten to ignite a new arms race.

I would also caution against letting the N5 Process interfere with or distract from diplomatic initiatives that hold out the prospect of substantive progress in addressing such problems. From a U.S. perspective, our diplomatic priority right now is to engage with both Moscow and Beijing in order to *stop* such an arms race from emerging—specifically, through the development of a nuclear arms control agreement on a trilateral basis, to stop the dangerous expansions now underway, forestall an arms race, and give humankind a chance to negotiate further, toward a better and safer future.

Trilateral arms control for a new era that moves beyond the bilateral treaties of the past should be a vital objective for the entire arms control community in order to avert a potential new arms race. We want to engage directly with our Russian and Chinese counterparts in bilateral and ultimately trilateral talks on strategic security, nuclear posture and doctrine, and the role of nuclear weapons in our respective security postures, with an eye to setting in place measures to deliver real security results to our nations and the entire world.

In theory, N5 engagement before the NPT RevCon should not interfere with trilateral arms control efforts, and it could perhaps even contribute to their success. I sound a note of caution only to the extent that we should not let ongoing N5 meetings provide Russia and the PRC with excuses *not* to engage directly with the United States on these critical questions. We shouldn't allow N5 meetings to be used as cover for avoiding the critical bilateral and trilateral engagement the world so desperately needs if we are to avoid a dangerous new arms race; the N5 Process must not provide Beijing and Moscow with an excuse for shirking their Article VI obligation to pursue negotiations in good faith on effective measures relating to nuclear disarmament.

III. Don't Forget "the Other Arms Race"

The NPT RevCon, of course, necessarily focuses principally upon issues relating to implementation of the Treaty by its Parties. Nevertheless, another cautionary note I would offer relates to the importance of not forgetting that the international security and nuclear disarmament challenges of the world are in no way restricted to problems among NPT Parties, much less merely among the N5 themselves.

Indeed, the N5 process conspicuously leaves out two major nuclear weapons possessors — India and Pakistan — who find themselves today in a dangerous arms race that presents perhaps the single most likely scenario for nuclear warfare in the world today. Both are developing an ever-wider and more diverse range of potential delivery systems in ways that are likely to be notably destabilizing. They have not applied the hard-won lessons of our Cold War mistakes, instead following paths that shrewd observers now understand to be dangerous and destabilizing — for instance, Pakistan's development of short-range, forward-deployed nuclear weapons of the very sort that NATO by the early 1980s had come to understand were more likely to lead to uncontrollable escalation or loss of control than they were to contribute to stable deterrence.

Meanwhile, Beijing's nuclear build-up continues to catalyze expansion of New Delhi's delivery systems — and these dynamics, coupled with cross-border terrorism emanating from Pakistan, are creating destabilizing ripple effects through the subcontinent. (This points, by the way, to yet another benefit of trilateral arms control between the United States, Russia, and China: it has the potential to help reduce arms race pressures in the South Asian context, too.) We have also watched with concern as Pakistan and India engaged in military confrontation under the "nuclear umbrella" of their mutual deterrence, seemingly overconfident in both governments' ability to manage escalation and avoid catastrophe. Nothing about the South Asian nuclear situation is reassuring at the moment.

As we head toward the NPT RevCon, therefore, we should remember that the N5 Process, by definition, has little direct way to help address such "other-arms-race" problems. If a fixation upon exclusively N5 engagement distracts from such broader challenges, it could make things worse rather than better.

IV. A Constructive N5 Approach: Three Ideas

In light of these cautions, let me suggest three ways in which the N5 Process could — and, I would argue, *should* — contribute constructively to international peace and security in the months leading up to the NPT RevCon and beyond.

First, the N5 could endorse diplomatic efforts to find a future for nuclear arms control that averts a potential three-way arms race between Russia, China, and the United States. They could, moreover, endorse such engagement as a good way to help meet Article VI's requirement to "pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament."

Second, the N5 could lend their support for broader engagement with *other* nuclear weapons possessors in order to end nuclear arms race dynamics *elsewhere*, too. This need not imply any conflation or commingling of the NPT and non-NPT worlds, nor any "legitimizing" of nuclear weapons possession by states that are not recognized as nuclear-weapon States by the NPT. It would simply be a commonsensical recognition that there *are* dangerous nuclear dynamics involving such states, and not just among the N5, and a call for diplomatic engagement to help reduce these dangers. The N5 states could even endorse the principle of their own collective, direct engagement with those NPT non-Parties that are engaged in a nuclear arms race — an initiative that could be approached on a "P5 + 2" basis rather than an "N5 + 2" basis, thus focusing upon the P5's special role at the center of the international security system instead of upon the status of the *N5* as early nuclear weapons possessors.

Third, the N5 could voice support for larger multilateral engagements that are already underway to bring countries together in exploring ways to ameliorate the various conditions in the international security environment that make progress on disarmament so frustratingly slow. Most obviously, since all five of the N5 states are already participating in the Creating an Environment for Nuclear Disarmament (CEND) initiative — which just last month held its first round of working group meetings — the N5 could endorse CEND and encourage all participants to continue their engagement in that process.

Despite my concerns and caveats, therefore, I *do* think there are important ways the N5 can act together — symbolically and diplomatically — that will help make the RevCon more productive and that will genuinely contribute to reducing nuclear dangers.

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2. Civil Nuclear Cooperation

On February 26, 2019, Dr. Ford spoke at the Hudson Institute on civil nuclear cooperation policy. He introduced the concept of the nuclear cooperation memorandum of understanding ("NCMOU") as a means of engaging in civil nuclear cooperation to a lesser degree than that which would require a formal civil nuclear cooperation agreement ("123 agreement"). His remarks are excerpted below and available at https://www.state.gov/a-new-approach-to-civil-nuclear-cooperation-policy/. See also May 30, 2019 State Department fact sheet on NCMOUs, available at https://www.state.gov/nuclear-cooperation-memoranda-of-understanding-ncmou/.

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Under United States' law, U.S. suppliers can only sell nuclear power fuel or equipment abroad subject to a civil nuclear cooperation agreement, often referred to as a "123 agreement" after the relevant section of the Atomic Energy Act. For this reason, a 123 agreement — which my bureau is responsible for negotiating — is an important tool for enhancing the commercial prospects of the U.S. civil nuclear sector. Without a 123 agreement, U.S. suppliers cannot export nuclear material, equipment, or significant reactor components, U.S. industry cannot compete in foreign markets, and Americans forego job opportunities. So with these agreements, we lay the foundations for U.S. competitiveness in this critical, high-technology arena.

And here's the best part: civil-nuclear cooperation agreements are *also* one of the strongest tools we have to promote nonproliferation as a government, because the Atomic Energy Act requires the highest standards in the world when it comes to the nonproliferation protections required with the United States' civil nuclear cooperation partners. These statutory requirements are enormously important, for they ensure that all U.S. 123 agreements legally obligate our partners to observe specific standards in such areas as peaceful use, International Atomic Energy Agency (IAEA) safeguards, physical protection for nuclear materials, and prohibitions on enriching, reprocessing, or transferring U.S.-obligated material and equipment without our consent.

Even beyond these requirements "baked in" to *all* 123s by U.S. law, the State Department also works hard to negotiate as many additional nonproliferation assurances as we can, such as political commitments to rely upon commercial fuel markets rather than explore indigenous uranium enrichment and reprocessing services, consistent with U.S. policy that seeks to limit the further proliferation of these technologies. In two cases, in fact — albeit, alas, pretty unique ones, since they involved one partner that already had domestic legislation prohibiting the activity in question, and another that simply lacked any alternative source of supply at all, thus giving us unique leverage — U.S. negotiators managed to get agreement on a *legally* binding commitment not to engage in any enrichment or reprocessing. We have also in recent years been going beyond the requirements of the Atomic Energy Act in ensuring that our civil-nuclear cooperation partners adhere to the IAEA Additional Protocol, which we consider to be the *de facto* international safeguards standard, as a condition for nuclear exports under those agreements.

What ends up being possible necessarily varies, of course, but *whatever* the negotiated terms, 123 agreements signed by the United States represent the global standard for nonproliferation-related nuclear supply "best practices," and *always* protect nonproliferation equities better than the conditions attached by any other nuclear supplier. There is no case, in other words, in which a U.S. 123 agreement with any given recipient will not promote nonproliferation values better than that same recipient cutting a deal with another, competing supplier state. That's why we view 123s as such a win-win outcome: U.S. industry and American workers have the chance to spread their wings in the international marketplace, and global nonproliferation standards improve in direct proportion to our suppliers' commercial success.

Civil nuclear cooperation under sound nonproliferation conditions is also a win for our overseas partners. Not only do they gain access to the benefits of peaceful uses of U.S. nuclear energy, science and technology; they also develop the capacity to do so sustainably and responsibly, building confidence that such cooperation will not be misused—whether deliberately or inadvertently—to contribute to the proliferation of nuclear weapons. Widespread sharing of the benefits of nuclear power simply would not be possible without a firm foundation

of nuclear nonproliferation measures built upon the Nuclear Nonproliferation Treaty, the IAEA, and the Nuclear Suppliers Group (NSG).

On the other hand, that "virtuous circle" can also work the other way. If we are unable to get a 123 in place—such as if we chase the "perfect" answer so intently that we prevent getting any deal at all by asking unacceptable terms from our would-be cooperation partners—U.S. industry loses the chance to compete *and* nonproliferation loses too, since a partner that goes with the foreign competition is not subject to the obligations we place in our agreements.

Nonproliferation and a competitive U.S. civil nuclear export sector are thus mutually dependent and mutually reinforcing goals for the United States. Because the conditions contained in 123s apply to nuclear material, equipment, and significant reactor components *transferred* subject to the agreement, we will see neither economic nor nonproliferation benefits if U.S. suppliers fail to make the sale. This raises the specter of a "vicious circle" of problems, with the competitiveness of U.S. industry being highly dependent upon the opportunities created by 123 agreements, but with our 123s—especially given their conditionalities—proving less attractive to would-be partners as U.S. industry competitiveness wanes, and with fewer recipients actually *adopting* nonproliferation "best practices" as foreign competitors with deliberately lax proliferation standards gain market share at our expense. That is clearly a lose-lose situation, both for the United States and for the global nonproliferation regime.

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Another way we're responding to these threats is to step up our diplomacy in urging other nuclear suppliers to insist upon the highest standards of safety, security, and nonproliferation in their own civil nuclear cooperation relationships—including by requiring, as we ourselves do, that recipient states have the IAEA Additional Protocol in force, to provide reassurances against the absence of undeclared nuclear activity. We also regularly urge suppliers to consider imposing limits on partners' ability to enrich uranium and reprocess plutonium. And we are working to build "coalitions of caution" in the nuclear business by calling attention to the dangers of nuclear cooperation with Russia and China, both for would-be recipients and for industry partners, and by working with like-minded suppliers to develop joint approaches to counter those two countries' destabilizing and predatory behaviors.

In *fora* such as the NSG and the NPT review cycle, we are also emphasizing the principle of "responsible supply"—urging others to come together with us to insist that *all* nuclear suppliers require nuclear safeguards, safety, and security "best practices" from the states with which they have cooperation agreements. No longer should suppliers be able to use proliferation *irresponsibility* as a marketing tool.

We will also continue to work with NSG partners to ensure that multilateral export control lists are properly updated to ensure that they address advanced nuclear technologies and emerging technologies with potential dual-use applications. And we are working in the NPT process to raise awareness about—and to find ways to advance—the peaceful sharing of nuclear technology, as well as to protect and advance the global nonproliferation regime that provides the foundation upon which the continued availability of such benefits depends.

B. NEW NUCLEAR COOPERATION MOUS

With regard to U.S. nuclear cooperation, the State Department is stepping up efforts to approach our 123 agreement diplomacy in a genuinely strategic way—not only, as before, to strengthen nonproliferation protections in a specific country or region or to help U.S. firms take

advantage of market opportunities, but also to help develop *new* opportunities to advance U.S. strategic competitiveness. A full-fledged nuclear cooperation partnership can lead to the establishment of political and economic ties lasting as long as 50 or 100 years, and can be the catalyst for additional cooperation between governments on many other national security and foreign policy issues. Our diplomatic outreach on civil nuclear issues can thus serve strategic interests as well as economic ones, helping us build and mature relationships that will strengthen mutual prosperity and help ensure the security and autonomy of partner governments around the world against the designs of predatory revisionists.

As I have described, 123 agreements are a critical part of this mix. But they need not be viewed as the *only* tool, for not all countries that wish to develop better civil nuclear relationships with the United States will necessarily need to start that relationship with a 123.

To help provide an *additional* way to catalyze and nurture cooperative relationships, we are working to expand the use of less formal, non-binding bilateral political arrangements more akin to a memorandum of understanding (MOU) than to a full 123. Such nuclear cooperation MOUs—or NCMOUs—would not suffice for actual power reactor projects, of course, which would still require a traditional 123 agreement. But a country weighing the *possible* development of a nuclear power program could use a less formal instrument to build strategic ties with the United States, its experts, industry, and cutting edge researchers about how best to tailor future opportunities to its specific needs. We would use these ties to help states build their own infrastructure for the responsible use of nuclear energy and technology and adopt best practices in nuclear safety, security, and nonproliferation, including independent regulatory oversight.

In such ways, these MOUs could establish the basis for a broader, strategic relationship between the United States and those countries considering civil nuclear energy. Working with our partners at the Departments of Energy and Commerce, the Nuclear Regulatory Commission, and other U.S. departments and agencies, such MOUs could open up new opportunities for all parties, laying the foundation for making partner countries fully prepared to take advantage of the emerging technologies and coming innovations in reactor design and other areas that are being pioneered in the United States, and to do so under the highest standards of safety, security, and nonproliferation. These foundations could provide valuable opportunities both for U.S. industry and for beneficiary states alike, for these are arenas in which the *future* of civil nuclear competitiveness is likely to be decided, and that are the pathfinders for how the benefits of peaceful uses of nuclear energy will be shared over the next century. We envision these NCMOUs as important tools to open doors and allow the U.S. government to build ties with foreign counterparts that will position all of us to take advantage of such opportunities together.

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3. Proliferation Security Initiative ("PSI")

On February 22, 2019, the State Department welcomed the decision by the Federated States of Micronesia to endorse the Proliferation Security Initiative ("PSI") in a media note, available at https://www.state.gov/the-federated-states-of-micronesia-endorses-the-proliferation-security-initiative/. The Federated States of Micronesia is the 107th state to become a PSI participant. Background information on the Proliferation Security Initiative is available at https://www.state.gov/about-the-proliferation-security-initiative/.

4. Country-Specific Issues

a. Iran

On January 15, 2019, the Iranian regime fired off a space launch vehicle, prompting the State Department to release the following press statement by Secretary of State Michael R. Pompeo (available at https://www.state.gov/irans-firing-of-space-launch-vehicle-defies-international-community/):

> In continued defiance of the international community and UN Security Council Resolution 2231, the Iranian regime fired off a space launch vehicle today. Such vehicles incorporate technologies that are virtually identical and interchangeable with those used in ballistic missiles, including intercontinental ballistic missiles. Today's launch furthers Iran's ability to eventually build such a weapon.
>
> We have been clear that we will not stand for Iran's flagrant disregard for international norms. The United States is working with our allies and partners to counter the entire range of the Islamic Republic's threats, including its missile program, which threatens Europe and the Middle East.

On February 7, 2019, the State Department issued a press statement after a second attempted space launch by the Iranian regime. The press statement, available at https://www.state.gov/attempted-space-launch-by-the-iranian-regime/, follows.

* * * *

In defiance of the international community, the Iranian regime continues to develop and test ballistic missiles, including a reported second failed space launch in less than a month. Space launch vehicles use technologies that are virtually identical and interchangeable with those used in ballistic missiles, including in Intercontinental Ballistic Missiles (ICBMs). This attempted launch furthers Iran's ability to eventually build such a weapon that threatens our allies.

The Iranian regime has continued to exploit the goodwill of nations and defied multiple Security Council resolutions in its quest for a robust ballistic missile force. The Iranian regime continues to increase its investment in missile testing and missile proliferation even as its economy crumbles and its people suffer. Today Iran has the largest ballistic missile force in the Middle East. Iran has also exported ballistic missile systems to malign actors in the region, threatening innocent civilians.

Iran continues to defy UNSCR 2231 brazenly, working to enhance missile capabilities that threaten our allies. Iran's blatant disregard for international norms must be addressed. We must bring back tougher international restrictions to deter Iran's missile program. The United States will continue to be relentless in building support around the world to confront the Iranian regime's reckless ballistic missile activity, and we will continue to impose sufficient pressure on the regime so that it changes its malign behavior—including by fully implementing all of our sanctions.

* * * *

b. Japan

On June 25, 2019, the United States and Japan effected the amendment of their March 9, 2012 Agreement Regarding Cooperation in Nuclear Energy-Related Research and Development. The June 25, 2019 exchange of notes amending the agreement is available at https://www.state.gov/19-625.

c. Romania

On September 25, 2019, the State Department announced in a media note, available at https://www.state.gov/u-s-and-romania-sign-nuclear-cooperation-memorandum-of-understanding/, that the United States and Romania had signed a nuclear cooperation memorandum of understanding ("NCMOU") (see Dr. Ford's February 26, 2019 speech, *supra*, introducing the concept of the NCMOU). The United States and Poland had signed an NCMOU earlier in 2019. The media note on the Romania NCMOU includes the following:

> This Memorandum strengthens U.S.-Romania ties in an area of cooperation that is deeply rooted in our mutual national security and strategic interests, and is supportive of our respective energy security goals. It signals our long-term commitment to working together to develop Romania's civil nuclear program and jointly pursue the peaceful uses of nuclear energy. Romania is an invaluable NATO Ally and supports mutual and international security efforts in the region and globally.
>
> Our NCMOUs are diplomatic mechanisms that strengthen and expand strategic ties between the United States and a partner country by providing a framework for cooperation on civil nuclear issues and for engagement between experts from government, industry, national laboratories and academic institutions.

d. Agreements on Nuclear Safety

The governments of Belgium and the United States signed a nuclear safety agreement at Vienna on September 16, 2019. The agreement entered into force upon signature, and the full text is available, with annex, at https://www.state.gov/belgium-19-916-1.

The U.S.- Brazil nuclear safety agreement was also signed at Vienna on September 16, 2019. The agreement entered into force upon signature, and is available with annex at https://www.state.gov/brazil-19-916.

The governments of the Czech Republic and the United States of America signed an agreement on nuclear safety at Vienna on September 18, 2019. The agreement entered into force upon signature. The full text of the agreement, with annex, is available at https://www.state.gov/czech-republic-19-918-1.

The U.S.-South Africa agreement on nuclear safety was signed at Vienna and entered into force on September 18, 2019. The agreement, with annex, is available at https://www.state.gov/south-africa-19-918.

C. ARMS CONTROL AND DISARMAMENT

1. United Nations

a. Arms Trade Treaty

See Chapter 4 for discussion of the U.S. decision to withdraw the Arms Trade Treaty from Senate consideration and not to become a party. For background on the Arms Trade Treaty, see *Digest 2016* at 926-27; *Digest 2015* at 883-84; *Digest 2013* at 710-15; and *Digest 2012* at 674-79.

b. Conference on Disarmament

On January 21, 2019, U.S. Permanent Representative Ambassador Robert Wood addressed the 2019 session of the Conference on Disarmament. His statement is available at https://geneva.usmission.gov/2019/01/22/u-s-statement-by-ambassador-wood-at-the-2019-session-of-the-conference-on-disarmament/ and excerpted below.

* * * *

Today, I would like to speak with you about the importance of compliance with arms control obligations and the consequences when states violate arms control, nonproliferation, and disarmament agreements and commitments.

The Conference on Disarmament is historically known for negotiating landmark agreements but arms control is a means to an end, not an end unto itself. When applied in a verifiable and enforceable manner, arms control helps manage strategic competition among states and contributes to security and stability.

By reducing the risks of miscalculation, arms control can serve the interests of all parties to an agreement. These benefits, however, are diluted or lost when parties do not comply with their obligations.

Unfortunately, the United States increasingly finds that Russia cannot be trusted to comply with its arms control obligations and that its coercive and malign actions around the globe have increased tensions. Its actions, policies, and behavior are not those of a responsible state actor.

We must view the Russian threat in its entirety in order to understand its gravity—from disinformation campaigns; to arms control violations; to attempted annexations of its neighbor's territory; and to the development of advanced and new types of nuclear delivery systems, such as a nuclear-powered cruise missile and a nuclear-powered and -armed underwater drone that the Russian leader proudly described in his March 1, 2018 address to the Federal Assembly. Russian strategy and doctrine emphasize the potential to use nuclear-armed, offensive missiles for coercion. Russia's destabilizing activity seeks to play spoiler in efforts to achieve and maintain global stability while enabling its contemporary revisionist geopolitical ambitions.

I would like to now turn in detail to a few specific examples:

INF Treaty

Russia has developed, produced, flight-tested, and fielded a ground-launched cruise missile, known as the 9M729 or SSC-8, with a range capability between 500 and 5,500 km, in direct and continuing violation of the INF Treaty.

Russia began the covert development of the SSC-8 probably by the mid-2000's.

To be clear the SSC-8 represents a flagrant violation of the INF Treaty that Russia intended to keep secret, and that represents a potent and direct threat to Europe and Asia. The U.S. finding is not based on a misunderstanding of this system or its capabilities. Russia is fielding an illegal missile in contravention of the main provisions of the INF Treaty and has made no concrete steps to return to compliance.

Since first informing Russia of our concerns about Russia's INF Treaty compliance in 2013, the United States has worked to induce Russia to return to full and verifiable compliance through a comprehensive approach that included extensive diplomatic efforts. During that time the United States raised the issue in more than 30 engagements with Russian officials at senior levels, including at the highest levels.

The United States provided detailed information to Russia including information pertaining to the missile and the launcher, including Russia's internal designator for the mobile launcher chassis and the names of the companies involved in developing and producing the missile and launcher. We also provided them with detailed information on the missile's test history, including coordinates of the tests and Russia's attempts to conceal the nature of the program. We provided information showing that the violating ground launch cruise missile, or "GLCM," has a range capability between 500 and 5,500 kilometers. Information showing that the violating GLCM is distinct from other missiles including the R-500/SSC-7GLCM and the RS-26 ICBM was also given to Russia. Finally, we told the Russians that their designator for the system in question is 9M729, and we provided a course of action and framework for the system's destruction in order for Russia to return to Treaty compliance.

For several years, Russia denied that the missile exists.

In parallel to their myriad denials and obfuscations over many years, Russia completed its research and development work and fielded multiple battalions of the SSC-8.

In 2017, the Trump Administration redoubled U.S. efforts to bring Russia back into compliance with an integrated strategy of diplomatic, economic, and military measures.

In December 2017, Russia finally acknowledged the designator of the missile—the 9M729—but did this only after the United States disclosed it publically, discrediting Russia's persistent cover story that the missile does not exist. Russia has since switched to a new cover story to maintain the façade that there is nothing wrong. Russia now admits that the missile does exist, but claims that it is Treaty compliant.

This too is false. The SSC-8 slash 9M729 is a ground-launched cruise missile that has been developed, produced, flight-tested, and fielded with a maximum range between 500 and 5,500 km in direct violation of the INF Treaty.

Russia's INF Treaty violation presents a direct security threat to the United States and our allies. It is destabilizing and has a corrosive effect on arms control and disarmament.

That is why President Trump, on October 20, 2018, stated that the United States intended to "terminate" the INF Treaty and why on December 4, 2018, Secretary Pompeo declared Russia's ongoing violation of the INF Treaty a material breach of the Treaty and that the United States would suspend its obligations under the Treaty effective in 60 days from December 4 unless Russia returns to full and verifiable compliance.

Since the December 4 announcement, Russia has not taken any productive measures to return to compliance, and has responded with the same rhetoric and obfuscations from the past. Rhetoric and hollow words are not action, and they come amid Russia's ongoing efforts to field multiple battalions of the SSC-8 as well as leveling threats against the United States and its Allies.

On December 18, Vladimir Putin threatened that if the United States eventually responds to Russia's violation of the INF Treaty by developing intermediate-range missiles, Russia will "naturally have to respond in kind." He said the European nations that agree to host U.S. weapons should understand that "they would expose their territory to the threat of a possible retaliatory strike."

The truth is that Russia already has such a missile. It is capable of carrying both conventional and nuclear warheads and it is already a threat to many European nations. The United States is not the only country to come to this conclusion. On December 4, all NATO Allies stated that they have concluded that Russia has developed and fielded a missile system which violates the INF Treaty and poses significant risks to Euro-Atlantic security. They strongly supported the finding of the United States that Russia is in material breach of its obligations under the INF Treaty.

On January 15, Under Secretary of State Thompson traveled here to Geneva with an interagency delegation. Our delegation's main goal was to see if Russia was serious about returning to compliance, and we presented a detailed framework illustrating specific steps Russia must take to do so. Unfortunately, rather than come to the meeting prepared to work constructively and seriously on their compliance issue, the Russian delegation continued to deny its violation and make false allegations regarding U.S. compliance. Russia has also used this meeting to try to portray itself publicly as a problem-solver, but Russia's offer of so-called "transparency measures" is disingenuous and would not resolve Russia's violation of the Treaty. A demonstration by Russia cannot possibly address the fact that Russia has previously tested this missile to Treaty-prohibited ranges.

Now it is the time for Russia to take demonstrable steps to return to compliance. There is only one path forward: Russia must verifiably destroy all SSC-8 missiles, launchers, and associated equipment in order to come back into compliance with the INF Treaty. The onus is on Russia to take concrete actions in order to prevent the INF Treaty's demise.

Inertia will not drive policy in the Trump administration and the United States will not stand idly by when others cheat on international agreements. Such behavior both erodes these agreements and threatens our national security, and we will respond with the seriousness that this demands.

CWC

I would like now to turn to Russian non-compliance with the Chemical Weapons Convention, which was negotiated here in the CD. In March 2018, only months after claiming to have completed destruction of its declared chemical weapons stockpile, Russia used an unscheduled, highly toxic nerve agent in an assassination attempt on Sergei and Yulia Skripal in Salisbury, the United Kingdom.

The United Kingdom's investigation into the assassination attempt concluded that two Russian nationals were responsible for the attack.

The use of this nerve agent in Salisbury further demonstrates that Russia has not met its obligations under the CWC.

As a direct result of the use of this unscheduled military grade nerve agent used in the UK, the United States jointly with Canada and the Netherlands put forward a technical change proposal recommending that such chemicals and a closely related family of toxic chemicals be added to the CWC Annex of chemicals. On January 14, the OPCW Executive Council agreed by consensus to recommend the proposal to all States Parties.

The United States urges Russia to meet and fulfill all of its CWC obligations.

Furthermore, Russia's continued support for and defense of the Assad regime's brutal tactics against its own people, including the use of chemical weapons. Russia has attempted to undermine every effort responsible nations have taken to address this unacceptable situation. Russia must be held accountable for enabling the Assad regime to do the same.

BWC

Turning to biological weapons, while Russia confirmed the existence of a BW program in 1992 and committed to its destruction, Moscow has failed to document whether the biological weapons items under these programs were destroyed or diverted for peaceful purposes, as required by the Biological Weapons Convention.

Again, as it has done on INF and CWC, Russia has developed false narratives and intensified its spurious attacks against the United States, its allies and its partners to deflect attention from Moscow's own dubious record. It has created blatantly false non-compliance accusations against U.S. partners to try to achieve its geopolitical aims. We must recognize this for what it is and we must stand united in pushing back against these efforts to obfuscate the truth and avoid accountability.

Open Skies and VDOC

Furthermore, Russia's aggressive actions in Europe and its disregard for basic international principles continue to undermine European security and strain the key pillars of the European conventional arms control architecture.

While Open Skies Treaty flights will resume in 2019 and the vast majority occur without incident, for years the United States and like-minded parties have engaged Russia—only to limited effect thus far—to resolve a number of specific compliance and implementation issues that limit full territorial access over Russia—a fundamental Treaty principle. In June 2017, the United States declared Russia in violation of the Open Skies Treaty and in September 2017 imposed a number of Treaty-compliant, reversible response measures to encourage Russia's return to full compliance with its Treaty obligations. Those efforts will continue, with the support of our allies and partners.

In addition, Russia selectively implements the Vienna Document, and has failed to report required data about its military forces located in the occupied territories of Georgia and Ukraine, and has improperly reported and failed to declare certain types of major armaments and equipment. Since 2015, Russia has blocked efforts to advance modest updates to the Vienna Document that would enhance transparency on military exercises, including most recently a broadly supported effort at the OSCE Ministerial Council in December 2018.

Most fundamentally concerning is Russia's continued occupation and attempted annexation of Crimea, Ukraine in 2014, as well as its arming, training, leading, and fighting alongside its proxy authorities in eastern Ukraine. These actions undermine the most basic commitments on refraining from the threat or use of force contained in the Helsinki Final Act and the Stockholm Document, and reaffirmed in the Vienna Document.

Regional Issues

Russian malign activity is perhaps most acutely felt on a regional level. In the Middle East, while the images of dead and dying children following the Syrian regime's chemical weapons attack in April 2018 were a call to action among the world's civilized nations, for Russia, they only served to reinforce its effort to shield the Assad regime from international accountability.

Russia also remains one of Iran's strongest defenders. It has provided Iran with advanced weaponry, such as the S-300 missile defense system. It consistently defends Iran's lack of transparency regarding its nuclear weapons program.

Responsible states must be united and resolute in our efforts to stop Russia's geopolitical revisionist agenda.

Ukraine

Mr. President, I would be remiss if I did not mention Russia's continuing aggression against your own country. Russia's unwarranted attacks on Ukrainian Navy vessels on November 25 have demonstrated yet again Russia's willingness to violate international norms as it escalates its ongoing aggression against Ukraine.

We call on Russia to immediately return to Ukraine its detained crew and vessels and to respect Ukraine's sovereignty and territorial integrity within its internationally recognized borders, extending to its territorial waters. The United States rejects Russia's invasion and attempted annexation of Crimea. We stand with Ukraine in the Donbas, a region that has suffered so greatly because of Russian aggression, and are committed to diplomatic efforts to resolve the conflict. Unfortunately, as with other issues I have already outlined, we still await Russia's constructive engagement.

Broader Russian Activities

Mr. President, Russian violations of arms control agreements and malign activities are not just a bilateral issue for the United States or a regional issue in Europe. The Russian approach disregards human life and often poses a direct threat to public safety in many countries. From the attempted murder of Sergei Skripal and subsequent death of Dawn Sturgess in the UK, to cyber-attacks that target critical infrastructure and electoral processes—Russian activities have broad effects that go beyond usual national security and foreign policy concerns. They target the everyday lives of our citizens and attempt to strike at the core of democratic systems. Responsible states must be united and resolute in our efforts to stop them.

Moving Forward

Mr. President, it is the policy of the United States that all violations of arms control agreements should be challenged and corrected, lest those violators—or other would-be violators—conclude that they may disregard those obligations at will. This policy makes the world a safer, more secure place, where arms control can help manage strategic competition.

We need arms control that works, and an agreement adhered to only by one side is not a working agreement. We also need an international body that, as Secretary Pompeo said at the German Marshall Fund on December 4, 2018: "can help facilitate cooperation that bolsters the security and values of the free world."

Russia must understand that it cannot reap advantages from arms control treaty violations. The Trump administration has moved quickly to rebuild links amongst our old friends and nurture new partnerships. We will continue to take a direct approach to confront Russia where it threatens our institutions, our interests, or our allies.

The dire situation we face today on the INF Treaty does not mean the United States is walking away from arms control. On the contrary, as the 2018 Nuclear Posture Review states,

the United States remains committed to arms control efforts that advance U.S., allied, and partner security; are verifiable and enforceable; and include partners that comply responsibly with all obligations and commitments.

One such example is the continued implementation of the New START Treaty by the United States and Russia. Both countries met the Treaty's central limits in February 2018, and continue to implement the Treaty's verification regime, including 18 on-site inspections each year.

At the same time, the United States is prepared to consider arms control opportunities that return parties to compliance, and enhance predictability and transparency. We will remain receptive to future arms control negotiations if conditions permit and the outcome improves the security of the United States, its allies, and partners. But we need a willing, reliable partner on the other side of the table.

* * * *

On March 19, 2019, Assistant Secretary of State for Arms Control, Verification, and Compliance Yleem D.S. Poblete addressed the 2019 session of the Conference on Disarmament in Geneva. Her remarks are available at https://www.state.gov/remarks-at-the-conference-on-disarmament/.

2. MTCR

On February 12, 2019, Dr. Ford spoke at the Hudson Institute on the U.S. proposal for reforming the Missile Technology Control Regime ("MTCR"). His remarks are excerpted below and available at https://www.state.gov/the-case-for-reforming-the-missile-technology-control-regime/.

* * * *

The United States' proposal to make an adjustment to the Missile Technology Control Regime (MTCR) Annex as [it] relate[s] to unmanned aerial systems (UAS) has been the subject of detailed discussion already in the MTCR for many months, and the MTCR's Technical Experts Meeting (TEM) has explored our proposal extensively from a technical perspective. I would like to say a few words about the reasons why we believe this modest reform of part of the MTCR framework is both necessary today and an important part of keeping the MTCR relevant and effective in the years ahead.

It almost goes without saying that the MTCR is and remains a valuable nonproliferation instrument, and one that we are committed to preserving …

Yet for all its accomplishments in slowing such proliferation and helping underpin peace and security, the MTCR is an ageing regime. …

As we consider what specific parameters should continue to be enshrined in the MTCR in the years ahead, we must not forget just how extraordinarily long a time this has been in technological terms. …

…[T]he world of the MTCR's birth was also a vastly different place in economic terms.

In technological and economic terms, in other words, the environment in which the MTCR's technological parameters were established was an entirely different universe from the one we inhabit today.

Make no mistake. Nothing was wrong — nor is anything wrong today — with the animating principle of the MTCR: that nonproliferation principles require restraint and

circumspection in transferring systems that could conceivably be used to deliver WMD. This remains as important a principle as ever. What fidelity to this key principle means in practice, however, cannot ignore the whirlwind of technological changes that have been taking place in the world.

Not surprisingly, the MTCR framework is today somewhat outdated. A system that fixed in place technical standards based upon military hardware of the Cold War era, its approach to UAS predates the extraordinary revolution in UAS development that has occurred in recent years. That revolution—which is still underway, and in many respects picking up steam—has seen an explosion in UAS applications and technology that has, among other things, seen the emergence of increasingly broad ranges of systems that *technically* fall within MTCR Category I standards but that are not as significant in terms of WMD-related threats.

Though not threatening in the way that the MTCR aspired to prevent, however, these emerging UAS are very valuable, and increasingly subject to a great range of diverse uses entirely unrelated to WMD, not just for military purposes—e.g., having become essential in intelligence, surveillance, and reconnaissance applications, and having an emerging roles in areas such as logistics—but also throughout the civilian economy, science, industry, commerce, logistics, safety, environmental management, forestry, agriculture, entertainment, recreation, and more. This is a fast-growing sector, and soon to be quite a huge one.

Not surprisingly, the great value of these systems and their growing diversity has led to a growing demand for UAS, including for systems technically within the Category I framework, and this demand has elicited a growing supply.

But MTCR Partners are to an important extent shut out of much of this exploding market, unable to participate fully in the commercial benefits of this booming sector—because of the high hurdle imposed by the MTCR's reflexive presumption of denial for all Category I systems—and with their governments unable to reap the full benefits of the relationships that UAS engagement can bring as countries around the world seek to expand their capabilities into these diverse new, non-WMD-related areas.

But *other* suppliers—and in particular those outside the MTCR framework, who are not bound by its strictures and who may feel no special obligation to scrutinize proposed transfers from a rigorous nonproliferation perspective as we do—are not shut out in this way. Indeed, for them the MTCR is a tool of competitive advantage *against* MTCR Partners. Against all of us. Such other suppliers are increasingly stepping in where MTCR Partners find it difficult to tread because even non-WMD-relevant UAS systems are covered by strict Category I rules with their associated presumption of denial. Under the right circumstances and with appropriate nonproliferation assurances, of course, it is not impossible to overcome a presumption of denial, but having to overcome such hurdles for the modest subset of Category I UAS that are in reality not a WMD-related threat represents a considerable impediment—and, we think, an unnecessary one.

This situation harms not just the competitiveness of MTCR Partners, but also the MTCR itself—and the cause of nonproliferation. It puts needless pressure upon the MTCR and could threaten its long-term integrity, for institutions that do not know how to be appropriately flexible in a changing world risk shattering. Nor does continuing this rigidity stop the spread of UAS, because non-MTCR supplies are stepping into this market.

Indeed, the system's current rigidity fails to provide real nonproliferation benefits either, because the growing sources of foreign supply for increasingly capable UAS mean that these systems are spreading anyway. And because non-MTCR suppliers of such equipment seldom

feel the need to approach their transfer-related decision-making with the nonproliferation-focused scrupulousness that we and other MTCR Partners display, even for non-Category-I systems, allowing such non-MCTR suppliers to occupy this competitive terrain essentially uncontested means that nonproliferation equities will get less and less respect over time—unless, that is, we do something to fix this problem.

In reaction to all this, the United States has proposed a way out of the trap caused by the MTCR's rigidity in the face of UAS-related technological change.

We have proposed to carve out a carefully-selected subset of Category I UAS for treatment as if they were Category II systems. This subset is based upon a maximum speed value—which would, in effect, update the MTCR framework to allow more permissive treatment of run-of-the-mill, basically non-WMD-related modern UAS that are useful, and indeed in today's world all but essential, for a range of non-WMD military and an exploding universe of peaceful civilian applications.

This change, however, is carefully limited, and would avoid relaxing MTCR rules on the sorts of WMD-related systems that it has *always* been the great virtue of the MTCR to restrict. Things such as ordinary, slow, fixed-wing UAS—along with rotary wing systems and lighter-than-air craft—would be subject to somewhat more flexible Category II rules. But cruise missiles, advanced unmanned combat aerial vehicles, and hypersonic aerial vehicles would still be covered as Category I items, as they should be.

Our proposed MTCR reform would continue to ensure that transfers of any covered UAS—including the ones for which we propose to relax some Category I restrictions—remain subject to careful nonproliferation considerations, pursuant to well-established MTCR principles. They would also be covered by the new standards of international conduct that are currently being negotiated to cover the *uses* of UAS, an important additional project that is important to the future of the nonproliferation regime, and that I hope all of you will also support.

Under the new approach, however, the MTCR would no longer rigidly apply its strong presumption of denial under the strictest, Category I rules to a subset of UAS that in reality have essentially nothing to do with WMD but a great deal of potential in the growing global UAS market. This would facilitate commerce in less threatening systems, and ease the worrying pressure that is building upon the MTCR regime, but it would do so without causing proliferation harm—and indeed while helping preserve the MTCR's integrity.

In fact, by helping preserve or increase the market share and international engagements of MTCR partners who *do* approach all such questions with real nonproliferation integrity—at the expense of unscrupulous suppliers who have hitherto been benefiting from overly rigid MTCR rules and unless the system is reformed will continue to do so—the more flexible approach we propose would likely have net nonproliferation *benefits* rather than costs.

The United States first suggested this approach in a concept paper over a year ago, and we have presented technical explanatory papers on multiple occasions to walk our MTCR partners through the details. We have also modified our proposal on the basis of these very helpful discussions.

It is now time, we believe, to move this proposal forward, before the damage done by the MTCR's UAS-related rigidity gets any worse. A regime that sets its standards on the basis of technological parameters cannot long ignore whirlwinds of technological change, and the bough that does not flex in such a gale risks breaking.

This is a reasonable idea, and a prudent one, and we believe its time has come. We will continue to work to seek MTCR Partners' support to modernize controls on UAVs.

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3. New START Treaty

The Seventeenth Session of the Bilateral Consultative Commission under the New START Treaty was held in Geneva from April 3-12, 2019. See April 12, 2019 State Department media note, available at https://www.state.gov/on-the-seventeenth-session-of-the-bilateral-consultative-commission-under-the-new-start-treaty/. The delegations to the BCC discuss practical issues related to the implementation of the Treaty. The Eighteenth Session of the BCC was held in Geneva from November 6–13, 2019. See November 14, 2019 State Department media note, available at https://www.state.gov/on-the-eighteenth-session-of-the-bilateral-consultative-commission-under-the-new-start-treaty/.

4. INF Treaty

As discussed in *Digest 2018* at 117-18 and 769-74, the United States provided notice in late 2018 that it would suspend its obligations under the Intermediate-Range Nuclear Forces ("INF") Treaty in 60 days, should Russia not return to full compliance with the treaty. The United States followed through on that notification by suspending its obligations effective February 2, 2019. On the same day, the United States provided six months' notice of its withdrawal from the treaty. See Chapter 4 of this *Digest* for the text of that notification. Secretary Pompeo briefed members of the press on February 1, 2019 on the U.S. actions. Secretary Pompeo's remarks are excerpted below and available at https://www.state.gov/remarks-to-the-press-12/.

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For years, Russia has violated the terms of the Intermediate-Range Nuclear Forces Treaty without remorse. To this day, Russia remains in material breach of its treaty obligations not to produce, possess, or flight-test a ground-launched intermediate-range cruise missile system with a range between 500 and 5,500 kilometers. In spite of this violation, for almost six years the United States has gone to tremendous lengths to preserve this agreement and to ensure security for our people, our allies, and our partners. We have raised Russia's noncompliance with Russian officials, including at the highest levels of government, more than 30 times, yet Russia continues to deny that its missile system is noncompliant and violates the treaty.

Russia's violation puts millions of Europeans and Americans at greater risk. It aims to put the United States at a military disadvantage, and it undercuts the chances of moving our bilateral relationship in a better direction. It's our duty to respond appropriately. When an agreement is so brazenly disregarded and our security is so openly threatened, we must respond. We did that last December when the United States, with strong support from all of our NATO allies, formally declared Russia in material breach of the treaty. I also then provided notice that unless Russia returned to full and verifiable compliance within 60 days, we would suspend our obligation under that treaty. We provided Russia an ample window of time to mend its ways and

for Russia to honor its commitment. Tomorrow that time runs out. Russia has refused to take any steps to return real and verifiable compliance over these 60 days.

The United States will therefore suspend its obligations under the INF Treaty effective February 2nd. We will provide Russia and the other treaty parties with formal notice that the United States is withdrawing from the INF Treaty effective in six months, pursuant to Article 15 of the treaty.

Russia has jeopardized the United States security interest, and we can no longer be restricted by the treaty while Russia shamelessly violates it. If Russia does not return to full and verifiable compliance with the treaty within this six-month period by verifiably destroying its INF-violating missiles, their launchers, and associated equipment, the treaty will terminate.

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On February 2, 2019, the State Department issued a press statement from Secretary Pompeo on the U.S. suspension of obligations under the INF Treaty and the U.S. notice of withdrawal from the INF Treaty. That statement is excerpted below and available at https://www.state.gov/u-s-intent-to-withdraw-from-the-inf-treaty-february-2-2019/.

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On December 4, 2018, the United States announced that the Russian Federation is in material breach of the Intermediate-Range Nuclear Forces (INF) Treaty, an assessment shared by all NATO Allies. The United States also provided notice that unless Russia returned to full and verifiable compliance in 60 days, the United States would suspend its obligations under the Treaty as a consequence for Russia's material breach.

Russia has not taken the necessary steps to return to compliance over the last 60 days. It remains in material breach of its obligations not to produce, possess, or flight-test a ground-launched, intermediate-range cruise missile system with a range between 500 and 5,500 kilometers. The United States has gone to tremendous lengths to preserve the INF Treaty, engaging with Russian officials more than 30 times in nearly six years to discuss Russia's violation, including at the highest levels of government. Despite our efforts, Russia continues to deny that its noncompliant missile system—the SSC-8 or 9M729—violates the Treaty. In accordance with customary international law, the United States has suspended its obligations under the INF Treaty, effective today, in response to Russia's material breach.

In addition, today the United States provided Russia and other Treaty Parties with formal notice that the United States will withdraw from the INF Treaty in six months, pursuant to Article XV of the Treaty. The United States has concluded that extraordinary events related to the subject matter of the Treaty arising from Russia's continued noncompliance have jeopardized the United States' supreme interests, and the United States can no longer be restricted by the Treaty while Russia openly violates it. If Russia does not return to full and verifiable compliance with the Treaty by eliminating all 9M729 missiles, their launchers, and associated equipment in this six-month period, the Treaty will terminate.

The United States takes its treaty obligations seriously and will not stand idle when others flout their obligations. Violations of treaty obligations must have consequences. The United States remains committed to effective arms control that advances U.S., allied, and partner security; is verifiable and enforceable; and includes partners that comply responsibly with their

obligations. The United States stands ready to engage with Russia on arms control negotiations that meet these criteria. Regrettably, the INF Treaty is no longer effective due to Russia's ongoing material breach. Today's actions are to defend U.S. national security and interests and those of our allies and partners.

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On July 30, 2019, the State Department released a fact sheet responding to Russian propaganda regarding the INF Treaty. The "INF Myth Busters" fact sheet is available at https://www.state.gov/inf-myth-busters-pushing-back-on-russian-propaganda-regarding-the-inf-treaty and excerpted below.

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Russian Myth: *Russia's demonstration of the 9M729 on January 23, 2019, proved that the system is INF Treaty compliant and showed that Russia is being transparent.*

Fact: Russia's so-called "demonstration" on January 23, 2019, of what it claimed was the 9M729 launcher and canister did not change the fact that the system is a violation of the INF Treaty, because it has been flight-tested to distances prohibited under the treaty. The United States and most of our NATO Allies did not attend this briefing, because we all saw it for what it was—another attempt to obfuscate while giving the appearance of transparency. The "demonstration" was completely controlled by Russia. There is nothing that Russia can say or show to change the fact that Russia has already tested the 9M729 cruise missile to ranges beyond 500 kilometers in violation of the INF Treaty. The United States provided to Russia in writing an illustrative framework of the steps it would need to take to return to compliance and save the INF Treaty. Only the complete and verifiable destruction of Russia's 9M729 missiles, launchers, and associated equipment will resolve U.S. concerns.

Russian Myth: *Russia is interested in dialogue about the treaty, while the United States is not.*

Fact: The United States has spent over six years in dialogue with the Russian Federation to try to resolve Russia's non-compliance. Prior to the U.S. suspension of its obligations on February 2, the United States raised Russia's INF violation in more than 30 engagements, including at the highest levels of government. The United States has convened six meetings of technical experts to discuss Russia's INF Treaty violation since 2014. This included two meetings of the Special Verification Commission, the treaty body responsible for addressing compliance concerns, in November 2016 and December 2017, and four bilateral U.S.-Russia meetings of technical experts, in September 2014, April 2015, June 2018, and January 2019. At each of these meetings, the United States pressed Russia on its violating missile, urged it to come back into compliance, and highlighted the critical nature of our concerns. However, we were met only with obfuscation, falsehoods, and denials. During the past six months, senior U.S. officials continued to discuss the INF issue with their Russian counterparts, including Secretary of State Pompeo in Sochi on May 14, 2019 and at the July 17, 2019 Strategic Security Dialogue, where Deputy Secretary of State Sullivan led the U.S. interagency delegation.

Russian Myth: *We gave the Americans fully detailed information about when and at what distance tests of this missile had been conducted.*

Fact: For over four years Russia denied the existence of the missile and provided no information about it, despite the United States providing Russia the location of the tests and the

names of the companies involved in the development and production of the missile. Only after we publicly announced the missile system's Russian designator did Russia admit that the missile exists, and it has since changed its story by claiming that the missile is incapable of ranges beyond 500 kilometers. Russia claims that it is not obligated to provide the United States any more information about the missile, its capability, or its testing history to support Russia's contention that the missile is treaty-compliant. Despite such obfuscation, Russia claims that it wants to preserve the treaty.

The United States has presented Russia many sets of questions over the last six years—always addressing the same set of facts regarding the ongoing violation that Russia refuses to discuss. Russia has refused to answer key U.S. questions about its violating missile. First, the Russians claimed they could not identify the missile of concern to the United States, despite the United States having provided extensive information about its characteristics and testing history. Only later, when the United States forced Russia to acknowledge the existence of the missile by publicly releasing its Russian designator, did the Russians claim the missile was not captured under the INF Treaty because its range did not exceed 500km. Russia now claims it is not obligated to provide any additional information about this missile.

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Russian Myth: *The United States is cheating, not Russia.*

Fact: The United States is in compliance with its obligations under the INF Treaty, and Allies affirmed this most recently in a statement issued by NATO Foreign Ministers on December 4, 2018. Russia is not in compliance and has ignored calls for transparency from the United States and Europe. In contrast to Russia's refusal to answer substantively key U.S. questions about the SSC-8/9M729, the United States has provided Russia with detailed information explaining why the United States is in compliance with the INF Treaty. The United States has even presented some of this information publicly, including in a fact sheet on the State Department webpage.

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Russian Myth*: The United States is manufacturing its allegations against Russia as an excuse to exit the treaty.*

Fact: The Russian Federation is producing and fielding a new offensive capability prohibited by the INF Treaty. The Russian Federation created this problem, not the United States. The United States has long maintained that an INF Treaty that all parties comply with contributes to global security and stability. The United States has discussed this violation with Russia for over six years in an effort to convince Russia to return to compliance with the treaty. We also have long stated that the status quo is untenable and our patience is not unlimited. Unfortunately, Russia has taken no significant steps toward resolving this problem.

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On August 2, 2019, the State Department issued a press statement from Secretary Pompeo announcing that U.S. withdrawal from the INF Treaty was effective as of that date. The statement is excerpted below and available at https://www.state.gov/u-s-withdrawal-from-the-inf-treaty-on-august-2-2019/.

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On February 2, 2019, the United States provided its six-month notice of withdrawal from the Intermediate-Range Nuclear Forces (INF) Treaty due to the Russian Federation's continuing violation of the treaty.

The U.S. withdrawal pursuant to Article XV of the treaty takes effect today because Russia failed to return to full and verified compliance through the destruction of its noncompliant missile system—the SSC-8 or 9M729 ground-launched, intermediate-range cruise missile.

Russia is solely responsible for the treaty's demise. Dating back to at least the mid-2000s, Russia developed, produced, flight tested, and has now fielded multiple battalions of its noncompliant missile. The United States first raised its concerns with Russia in 2013. Russia subsequently and systematically rebuffed six years of U.S. efforts seeking Russia's return to compliance. With the full support of our NATO Allies, the United States has determined Russia to be in material breach of the treaty, and has subsequently suspended our obligations under the treaty. Over the past six months, the United States provided Russia a final opportunity to correct its noncompliance. As it has for many years, Russia chose to keep its noncompliant missile rather than going back into compliance with its treaty obligations.

The United States will not remain party to a treaty that is deliberately violated by Russia. Russia's noncompliance under the treaty jeopardizes U.S. supreme interests as Russia's development and fielding of a treaty-violating missile system represents a direct threat to the United States and our allies and partners. The United States greatly appreciates the steadfast cooperation and resolve NATO allies have shown in responding to Russia's violation.

The United States remains committed to effective arms control that advances U.S., allied, and partner security; is verifiable and enforceable; and includes partners that comply responsibly with their obligations. President Trump has charged this Administration with beginning a new chapter by seeking a new era of arms control that moves beyond the bilateral treaties of the past. Going forward, the United States calls upon Russia and China to join us in this opportunity to deliver real security results to our nations and the entire world.

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D. CHEMICAL AND BIOLOGICAL WEAPONS

1. Organization for the Prohibition of Chemical Weapons ("OPCW")

a. Conference of States Parties

On November 25, 2019, Thomas Dinanno, deputy assistant secretary for defense policy, emerging threats, and outreach, delivered remarks at the OPCW Conference of States Parties in The Hague on strengthening the CWC and raising the cost of non-compliance. Deputy Assistant Secretary Dinanno's remarks, which are available in full at https://www.state.gov/strengthening-the-cwc-and-raising-the-cost-of-non-compliance/, are also excerpted below.

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The United States is encouraged by the overwhelming support of States Parties through their votes and voluntary funding contributions to prevent further CW use and restore CW deterrence,

including critical voluntary funding to the new OPCW Centre for Technology and Chemistry and to the OPCW's Syria Trust Fund, which includes funding for the Investigation and Identification Team. If we are to succeed in restoring deterrence against CW use and driving chemical weapons use down to zero, we must continue to support the tireless, brave and noble efforts of the Technical Secretariat.

The United States believes that it is imperative to support new OPCW initiatives; to call out States Parties for their non-compliance; and to push for States Parties to be held accountable for non-compliance. In doing so, we seek to dissuade and prevent other States Parties from violating the Convention.

It is essential to support new initiatives to strengthen the Convention, and the United States is taking active steps to do so. In response to the Salisbury and Amesbury incidents, the United States, Canada, and the Netherlands jointly submitted a proposal (known as the Joint Technical Change Proposal) to add two chemical families to Schedule 1 of the CWC Annex of Chemicals. I call on States Parties to adopt the draft CSP decision by consensus, so that implementation can begin. The United States also can join consensus in the adoption of the Russian set of proposals to add chemicals to the CWC Annex of Chemicals. We believe these two proposals can be adopted at this CSP in parallel, by consensus, with "a single bang of the gavel." By their addition, further development and use of deadly novichok weapons will be deterred and prevented.

A second initiative that the United States recently has undertaken is not new, but it is necessary. The United States, Australia, Switzerland and 21 additional co-sponsors have spearheaded an initiative to adopt a set of decisions making clear States Parties' understanding that under the CWC the aerosolized use of CNS-acting chemicals is inconsistent with law enforcement as a "purpose not prohibited." This set of decisions neither imposes new obligations on States Parties nor requires any changes to the Convention; instead it makes clear States Parties' understanding that such use is impermissible under the CWC. I call on States Parties who have not yet cosponsored this initiative to join us and together, we can work to ensure that there is no use of CNS-acting chemicals as chemical weapons.

It is also crucial to call out non-compliance with the Convention to make clear such behavior is not acceptable, and to prevent further malign behavior. Last year, the United States announced its assessment of lran's non-compliance with the CWC in its national statement to the CWC's Fourth Review Conference. The United States highlighted its assessment that the Russian Federation violated the CWC when it used a military grade nerve agent in an assassination attempt in the UK. Further, we remind States Parties that the Syrian regime has used chemical weapons systematically and repeatedly against the Syrian people every year since acceding to the Convention. The United States will not allow these violations to go unchallenged.

This year, the United States believes it is important to raise issues regarding Myanmar's CWC compliance to States Parties' attention. Based on available information, the United States certifies that Myanmar is in non-compliance with the CWC due to its failure to declare its past chemical weapons program and destroy its CW production facility. The United States assesses Myanmar had a CW program in the 1980s that included a sulfur mustard development program and chemical weapons production facility. The United States has serious concerns that a CW stockpile may remain at Myanmar's historical CW facility.

Beginning in February 2019, the United States held bilateral discussions with Myanmar to ensure that the civilian government and its military were aware of U.S. concerns regarding its

past CW program. The United States urges Myanmar to declare its past program to the OPCW, remove this potential proliferation issue, and come into compliance with the CWC. Doing so provides an opportunity for Myanmar to deepen international engagement, meet its Convention obligations, and uphold international nonproliferation efforts. The United States stands ready to assist Myanmar in its efforts, including through the provision of technical expertise. We call on others in this room to also assist in this effort.

It is essential for all of us to continue to work together and push for accountability for CW use. As such, I call on all States Parties to agree to the proposed OPCW 2020 Programme and Budget, which includes the work of the Investigation and Identification Team. This team has been tasked, by States Parties, to "identify the perpetrators of the use of chemical weapons in the Syrian Arab Republic." Once the IIT has finished its work and releases its findings, it will be up to States Parties to review the findings and to take action, both here and at the United Nations.

The United States is proud of what States Parties and the OPCW together have accomplished. I think we all agree there is more to do to try to move toward a world free of chemical weapons and to drive chemical weapons use to zero. In this way, we strengthen the Convention.

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b. OPCW Adds Novichok to CWC Annex on Chemicals

In a December 6, 2019 State Department media note, the United States announced that it had succeeded in leading an effort at the OPCW to add to Schedule 1 of the Chemical Weapons Convention Annex on Chemicals two families of chemicals called novichoks, including the nerve agent used by the Russian Federation in an assassination attempt in the United Kingdom on March 4, 2018. As explained in the media note, available at https://www.state.gov/under-the-chemical-weapons-convention-nations-act-to-prevent-further-use-of-deadly-novichok-nerve-agents/,

> On November 27, the OPCW CSP agreed by consensus to adopt two decisions to add novichoks, including the specific nerve agent used by Russia in Salisbury, and other highly toxic chemicals, to the CWC's "Annex on Chemicals" targeted for rigorous verification.
>
> These landmark decisions reaffirm the international community's resolve to deter and prevent the use of chemical weapons—and preserve the norm against such use—strengthening international peace and security.

2. Chemical Weapons in Syria

a. Fact-finding mission report on chemical weapons use in Douma in 2018

On March 7, 2019, the State Department issued a press statement on the release of the OPCW fact-finding mission report on investigation into chemical weapons use in Douma, Syria, on 7 April 2018. The press statement is available at https://www.state.gov/release-of-the-opcw-fact-finding-mission-report-on-investigation-into-chemical-weapons-use-in-douma-syria-on-7-april-2018/ and excerpted below.

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The Organization for the Prohibition of Chemical Weapons Fact-Finding Mission (FFM) released its final report on March 1, 2019, regarding its investigation into chemical weapons use in Douma, Syria, on April 7, 2018. The report concluded that there were reasonable grounds that chlorine was used as a chemical weapon in the attack. The FFM found that the weaponized chlorine was not manufactured at the sites, as alleged by the regime, and that it is possible that the chlorine was released by cylinders that had been dropped from the air, as indicated by their condition and surroundings.

The conclusions in the FFM report support what the United States determined in our assessment of the attack last April—that the regime is responsible for this heinous chemical weapons attack that killed and injured civilians. The Assad regime's use of chlorine as a chemical weapon is a violation of its obligations under the Chemical Weapons Convention, to which it is a party, as well as UNSCR 2118.

The United States commends the FFM for its independent and impartial work undertaken in difficult and dangerous circumstances. We also welcome the full implementation of OPCW's mandate to identify perpetrators of chemical weapons attacks in Syria. The victims of this barbaric attack and their families deserve justice and this is an important step in holding those responsible to account.

Further, the United States rejects the efforts of the Assad regime and its supporters—Russia chief among them—to sow disinformation about alleged chemical weapons attacks. We remain deeply concerned about such disinformation. As noted in our own assessment in April 2018, after the CW attack in Douma, the regime falsely accused opposition groups of perpetrating the chemical weapons attack in Douma; and regime and Russia forces delayed inspectors from entering Douma in an expedited manner with appropriate access consistent with their mandate.

Unfortunately, this is just the latest case where chemical weapons use in Syria has been confirmed by the FFM, an impartial outside investigator. Once again, the United States calls upon the Assad regime to fully cooperate with the OPCW, verifiably destroy its remaining chemical weapons program and completely disclose its activities related to chemical weapons. These are all obligations Syria accepted when it became party to the Chemical Weapons Convention in 2013, but has failed to honor.

The United States continues to condemn the use of chemical weapons anywhere, by anyone, under any circumstances. Those who resort to the use of chemical weapons must be held to account. We call on all responsible nations to help us bring an end to the use of chemical weapons.

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b. Anniversary of Attack in Ghouta

On August 21, 2019, the State Department issued a press statement recognizing the six-year anniversary of the Assad regime's chemical attack using the nerve agent sarin on the Ghouta district of Damascus; an attack that killed more than 1,400 Syrians including many children. The press statement, available at https://www.state.gov/syria-anniversary-of-the-ghouta-chemical-weapons-attack/, further states:

We reiterate our resolve to prevent further use of these deadly weapons and to hold the Assad regime accountable for these heinous crimes.

The regime's barbaric history of using chemical weapons against its own people cannot and will not be forgotten or tolerated. Assad and others in his regime who believe they can continue using chemical weapons with impunity are mistaken. The United States remains determined to hold the Assad regime accountable for these heinous acts and will continue to pursue all efforts alongside partner countries to ensure that those involved in chemical attacks face serious consequences. We will continue to leverage all of the tools available to us to prevent any future use.

We condemn in the strongest possible terms the use of chemical weapons anywhere, by anyone, under any circumstances.

3. Finding of Non-Compliance with CWC: Burma

On November 27, 2019, the State Department published a report finding Burma in non-compliance with the CWC due to its failure to declare its past chemical weapons program and destroy its CW production facility. The report is available at https://www.state.gov/finding-of-non-compliance-with-the-chemical-weapons-convention-burma/.

4. Biological Weapons

On April 11, 2019, Assistant Secretary Ford spoke at the U.S. National Defense University on biosecurity and biological weapons nonproliferation. His remarks are available at https://www.state.gov/biosecurity-biological-weapons-nonproliferation-and-their-future/.

Cross References

UN International Impartial and Independent Mechanism (Syria), **Ch. 3.C.3.b.**
U.S. withdrawal from the INF Treaty, **Ch. 4.B.1.**
Arms Trade Treaty, **Ch. 4.B.4.**
Preventing an arms race in outer space, **Ch. 12.B.2.**
Iran sanctions, **Ch. 16.A.1.**
Nonproliferation sanctions relating to Iran, **Ch. 16.A.1.c.(3)**
DPRK sanctions, **Ch. 16.A.6.**
Russia sanctions, **Ch. 16.A.7.**
Nonproliferation sanctions, **Ch. 16.A.8.**
Conventional weapons, **Ch. 18.B.**