DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW

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Introduction

The 2021 edition of the *Digest of United States Practice in International Law* reflects the work of the U.S. Department of State's Office of the Legal Adviser as well as 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.

The COVID-19 pandemic continued to affect the practice of public international law. Many international organizations developed procedures for holding meetings virtually or in hybrid form. The United States cosponsored a decision at a special session of the World Health Assembly ("WHA") on December 1, 2021 to launch negotiations of an international instrument on pandemic prevention, preparedness, and response.

Whether virtual, written, or in-person, U.S. officials provided views and positions on critical topics in 2021. The State Department unveiled a new policy to permit passport applicants to select the gender marker on their passport without presenting medical documentation of gender transition and added a third gender marker, "X," for applicants identifying as non-binary, intersex, and/or gender non-conforming. The Biden Administration released an updated National Action Plan to Combat Human Trafficking. The United States joined others in condemning the forced landing of a Ryanair flight in Minsk, Belarus, through U.S. and joint statements, by imposing sanctions, and by suspension of the discretionary application of the U.S-Belarus Air Transport Agreement. The U.S. submitted its contribution on international law in response to the draft report of the Group of Government Experts ("GGE") on responsible State behavior in cyberspace before the report was finalized.

There were further developments in 2021 relating to U.S. international agreements, treaties, and other arrangements. The United States expressed support for negotiation of a UN cybercrime treaty and engaged in the annual negotiating session in 2021 on a treaty on business and human rights. Canada and the United States held the first negotiation session regarding Line 5 under the 1977 U.S.-Canada Agreement Concerning Transit Pipelines. The United States rejoined the Paris Agreement and fully engaged on climate change in the UN Framework Convention on Climate Change and other fora, with a host of domestic and international actions and initiatives. The President transmitted to the Senate, for advice and consent to ratification, the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer. Australia, the United Kingdom, and the United States announced an enhanced trilateral security partnership called "AUKUS" for Australia to acquire conventionally armed, nuclear-powered submarines. The United States and the Russian Federation agreed to a five-year extension of the New START Treaty.

In its relations with other nations, the United States responded to developments with appropriate measures and alterations. In response to numerous crises around the globe, the Biden Administration determined to rebuild and expand the U.S. Refugee Admissions Program and

other humanitarian programs. In response to the February 2, 2021 military coup in Burma, the United States designated Burma for temporary protected status ("TPS"); participated in a special session at the Human Rights Council ("HRC"); applied the recurring military coup restriction on assistance outlined in the annual appropriations act; and President Biden issued Executive Order ("E.O.") 14014, "Blocking Property With Respect to the Situation in Burma." With respect to Russia: the United States took multiple sanctions measures in response to Russian malign activities, including the poisoning of Aleksey Navalny; and issued E.O. 14024, "Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation."

With respect to Afghanistan, after months of efforts by the United States and its allies to encourage a political solution to the decades-long war in Afghanistan, the United States announced its military withdrawal, which was completed on August 31. The U.S. Special Immigrant Visa ("SIV") program and the refugee program "Priority 2" designation for Afghans, along with evacuation operations for U.S. citizens, and several agreements and non-binding arrangements with other countries, all helped to facilitate the relocation of individuals at risk due to the situation on the ground in Afghanistan. The United States suspended operations at Embassy Kabul and Qatar agreed to serve as protecting power. The United States considered Afghanistan's request under Article 9 of the 1970 UNESCO Convention for U.S. import restrictions on archaeological and ethnological material.

With regard to the People's Republic of China ("PRC"), the United States joined a cross-regional joint statement on Xinjiang at the HRC; President Biden signed the Uyghur Forced Labor Prevention Act; the United States imposed sanctions and other measures, such as business advisories, withhold release orders, and additions to the Department of Commerce Entity List. As to Hong Kong, the United States agreed on joint statements, including two by the G7, expressing serious concern at mass arrests and the erosion of democratic elements of the electoral system. Statements by Secretary Blinken condemned the assault by the PRC on democratic institutions in Hong Kong and the sentencing of Hong Kong pro-democracy leaders for unlawful assembly. The Biden Administration issued the annual Hong Kong Policy Act Report and the Hong Kong Autonomy Act Report to Congress, imposed additional sanctions, and issued a Hong Kong business advisory. The United States also conducted several freedom of navigation operations in the South China Sea in 2021.

International law was the subject of several cases litigated in U.S. courts in 2021. The Supreme Court decided Alien Tort Statute ("ATS") cases brought against *Nestlé* and *Cargill*, alleging that their cocoa arrangements in the Ivory Coast aided and abetted child slavery; the Court found that "generic allegations" of corporate activity in the United States are not sufficient to support domestic application of the ATS. In *Germany v. Philipp*, the Supreme Court held that the expropriation exception under the Foreign Sovereign Immunities Act does not cover domestic takings, even in the context of an alleged human rights violation. The United States filed an amicus brief in the Supreme Court in *Servotronics, Inc. v. Rolls-Royce PLC, et al.*, asserting that 28 U.S.C. 1782(a), which refers to proceedings "in a foreign or international tribunal," does not authorize a district court to order the production of materials for use in a private commercial arbitration. In *Al-Hela v. Biden*, the July 9, 2021, the U.S. brief did not include the prior administration's argument that due process cannot apply at Guantanamo and argued that the court need not determine the overall applicability question to deny al-Hela's specific due process claims.

The *Digest* discusses other forms of U.S. participation in international organizations, institutions, and initiatives. The United States retracted its notice of withdrawal and stated that it "intends to remain a member of the World Health Organization." The United States expressed support for work of the International Criminal Court ("ICC") in some of the long-running situations involving national governments that invited the ICC to act; terminated sanctions on the ICC prosecutor and other personnel; while it remained critical of some actions, such as the ICC investigation into the Palestinian situation. The United States was also supportive of other international accountability proceedings and mechanisms. In the area of human rights, 2021 saw the conclusion of the Universal Periodic Review ("UPR") process for the United States; the U.S. filing of its fifth periodic report with the Human Rights Committee on the measures the U.S. has adopted to give effect domestically to the rights contained in the International Covenant on Civil and Political Rights ("ICCPR"); U.S. reengagement with the Human Rights Council; U.S. submission of its combined tenth, eleventh, and twelfth periodic reports to the Committee on the Elimination of Racial Discrimination ("CERD"); and submission to the Committee Against Torture of the U.S. Sixth Periodic Report on the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. At the International Law Commission ("ILC"), the United States provided a statement and an explanation of position on the ILC draft articles on the prevention and punishment of crimes against humanity.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2021 volume, attorneys whose early contributions to the *Digest* were particularly significant include Jay Bischoff, Trent Buatte, Jeremy Freeman, Monica Jacobsen, Brian Kelly, and Annalise Nelson. I express thanks to our law librarian, Camille Majors, as well as librarian Kera Winburn, and their colleagues in the Bunche Library. Office of the Legal Adviser interns Diana Kenealy and Emma Svoboda also assisted in ensuring the accuracy of the *Digest.* Rickita Grant once again offered her expertise in formatting the *Digest* for final publication. Finally, I express special thanks this year to CarrieLyn Guymon, editor of the *Digest* since 2011, for her leadership and commitment in ensuring that this, her last *Digest* before handing over the reins as editor, is comprehensive, accurate and informative—like the ten annual volumes she successfully brought to publication before it.

Richard C. Visek
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Note from the Editor

The official version of the *Digest of United States Practice in International Law* for calendar year 2021 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 2021 volume follows the general organization and approach of past volumes, with one change. We are no longer posting full text source documents on the State Department website. 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.

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 lengthy excerpts (in Times New 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 June 2022) 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 2022 where they relate to the discussion of developments in 2021.

Updates on most other 2022 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*.

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://documents.un.org/prod/ods.nsf/home.xsp. For UN-related information generally, the UN's home page at https://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 Publishing 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 makes government materials available online at https://www.govinfo.gov.

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/internet/opinions.nsf/OpinionsByRDate?OpenView&count=100;

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/search-opinions;

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:
https://cafc.uscourts.gov/home/case-information/opinions-orders.

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/supreme-court-briefs. 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, https://pacer.uscourts.gov/. 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. *Fitisemanu v. United States*

As discussed in *Digest 2020* at 1-9, the U.S. brief on appeal in *Fitisemanu v. United States* urged the U.S. Court of Appeals for the Tenth Circuit to reverse the district court's holding that American Samoa is "in the United States" for purposes of the Citizenship Clause of the Fourteenth Amendment to the U.S. Constitution. On June 15, 2021, the Court of Appeals issued its opinion, reversing the district court, holding that the citizens of American Samoa are not birthright citizens of the United States under the Fourteenth Amendment. 1 F.4th 862. Excerpts follow from the opinion. On December 27, 2021, the Court of Appeals denied a request for rehearing *en banc*.[*]

* * * *

For over a century, the land of American Samoa has been an American territory, but its people have never been considered American citizens. Plaintiffs, three citizens of American Samoa, asked the district court in Utah to upend this longstanding arrangement and declare that American Samoans have been citizens from the start. The district court agreed and so declared. Appellants, the United States federal government joined by the American Samoan government and an individual representative acting as intervenors, ask us to reverse the district court's decision. We conclude that neither constitutional text nor Supreme Court precedent demands the district court's interpretation of the Citizenship Clause of the Fourteenth Amendment.

We instead recognize that Congress plays the preeminent role in the determination of citizenship in unincorporated territorial lands, and that the courts play but a subordinate role in the process. We further understand text, precedent, and historical practice as instructing that the prevailing circumstances in the territory be considered in determining the reach of the Citizenship Clause. It is evident that the wishes of the territory's democratically elected representatives, who remind us that their people have not formed a consensus in favor of

[*] Editor's note: Petitioners filed their petition for a writ of certiorari to the U.S. Supreme Court on April 27, 2022.

American citizenship and urge us not to impose citizenship on an unwilling people from a courthouse thousands of miles away, have not been taken into adequate consideration. Such consideration properly falls under the purview of Congress, a point on which we fully agree with the concurrence. These circumstances advise against the extension of birthright citizenship to American Samoa. We reverse.

* * * *

No circumstance is more persuasive to me than the preference against citizenship expressed by the American Samoan people through their elected representatives.

In the context of citizenship, there can hardly be a more compelling practical concern than that it is not wanted by the people who are to receive it. To impose citizenship in such a situation would violate a basic principle of republican association: that "governments ... deriv[e] their [ ] powers from the consent of the governed." *Kennett v. Chambers*, 55 U.S. (14 How.) 38, 41, 14 L.Ed. 316 (1852). This is a principle that animated the Founders' rejection of their status as colonial subjects of the British empire. … This history undergirds what is a fundamental and timeless truth: a people's incorporation into the citizenry of another nation ought to be done with their consent or not done at all.

Respect for this principle should be at its zenith in the case of territories born from American imperial expansion, a project that was always in significant tension with our aspirations toward representative democracy. "The fabric of American empire ought to rest on the solid basis of the consent of the People." *The Federalist No. 22* (Alexander Hamilton). We have sometimes failed to live up to Hamilton's admonition. It is for this reason "that sovereignty and membership need to be reconceptualized in less rigid terms if we are to establish a political regime that overcomes historical subordination and justly rules over the territory and inhabitants of the United States." T. Alexander Aleinikoff, *Semblances of Sovereignty* 183 (2002). Recognizing consent as a cornerstone of a flexible approach to the extension of citizenship to the unincorporated territories is a step toward rectifying those mistakes.

Though consent to citizenship is important among the "objective factors and practical concerns" that must be considered, Boumediene, 553 U.S. at 764, 128 S.Ct. 2229, it need not be dispositive. Contrary to the dissent, my analysis certainly does not "require" a change in outcome for "every change in the popular will" of American Samoa. Dissent at ——. The Insular framework demands a holistic review of the prevailing circumstances in a territory; any future case would consider the totality of the relevant factors and concerns in the territory. "Ping-ponging" judicial outcomes are neither a necessary nor even a likely consequence of my reasoning. *Id*. I likewise would not expect such oscillation in congressional consideration of the will of American Samoans. The nature of citizenship makes consent an important consideration for application of the "impracticable and anomalous" standard, but nothing in this opinion suggests consent must eclipse other factors.

I agree with the representatives of the American Samoan government that "an extension of birthright citizenship without the will of the governed is in essence a form of 'autocratic subjugation' of the American Samoan people." While I am sympathetic to Plaintiffs' desire for citizenship, to accept their position would be to impose citizenship over the expressed preferences of the American Samoan people. Such a result would be anomalous to our history and our understanding of the Constitution.

A further concern of extending birthright citizenship to American Samoa is the tension between individual constitutional rights and the American Samoan way of life (the *fa'a Samoa*). Fundamental elements of the *fa'a Samoa* rest uneasily alongside the American legal system. Constitutional provisions such as the Equal Protection Clause, the Takings Clause, and the Establishment Clause are difficult to reconcile with several traditional American Samoan practices, such as the *matai* chieftain social structure, communal land ownership, and communal regulation of religious practice. "In American Sāmoa's case, 'partial membership' works to protect the customary institutions and traditions, and so a push for full equality [as American citizens] is not readily embraced by the American Sāmoan citizenry." Kruse, *supra*, at 79.

Plaintiffs, the dissent, and the amicus brief filed by the governments of other unincorporated territories question whether any of these harms are likely to befall American Samoa upon the extension of citizenship. They point out that, for example, the First Amendment and the Equal Protection Clause already apply to the unincorporated territories, regardless of anyone's citizenship status. See *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 331 n.1, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986); *Flores de Otero*, 426 U.S. at 600, 96 S.Ct. 2264. The amicus brief filed by other unincorporated territories asserts that, in their experience, American citizenship need not result in the undermining of local culture and autonomy. Because the American Samoan aversion to citizenship is not founded on plausible concerns, they argue, it should receive less weight. The dissent echoes this argument. …

Citizenship's legal consequences for American Samoa are less certain than Plaintiffs and the dissent suggest, and the American Samoans' cautious approach should be respected regardless. There is simply insufficient caselaw to conclude with certainty that citizenship will have no effect on the legal status of the *fa'a Samoa*. The constitutional issues that would arise in the context of America Samoa's unique culture and social structure would be unusual, if not entirely novel, and therefore unpredictable. Citizenship status has often been an important factor in determining how the Constitution applies to the unincorporated territories. For example, the "most common interpretation of *Reid*," the 1957 case that introduced the "impracticable and anomalous" standard, was that "citizenship [was] the fundamental variable" in determining the constitutional rights afforded to inhabitants of unincorporated territories. *Raustiala*, *supra*, at 150. Citizenship simply cannot be confidently declared irrelevant to how the Constitution will affect American Samoa. And even if the contrary conclusion were tenable, it is not the role of this court to second-guess the political judgment of the American Samoan people. As stated throughout, the considerations discussed in this section belong most properly to Congress at the initial stage, not to us.

Required by the Insular framework to weigh the practical considerations concerning the extension of the constitutional right to birthright citizenship to American Samoa, I would hold that the extension of United States birthright citizenship is impracticable and anomalous.

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2. Indication of Sex on U.S. Passports

As discussed in *Digest 2020* at 9-15, *Digest 2019* at 7, and *Digest 2018* at 5-12, Dana Zzyym ("Zzyym") filed suit seeking a passport with an "X" in the sex field, rather than "M" or "F." *Zzyym v. Pompeo*, 958 F.3d. 1014 (10th Cir. 2020). As discussed in *Digest 2020* at 15-17, Oliver Bruce Morris filed suit seeking a passport in the sex of male

without a certificate from a licensed physician certifying transition from female (which was indicated on the birth certificate). *Morris v. Pompeo*, No. 19-cv-00569 (D. Nev. Nov. 23, 2020). In the *Morris* case, the United States filed a protective notice of appeal in February 2021 but subsequently filed a voluntary dismissal of that appeal in March 2021. The Department of Justice February 2021 notice to Congress, required under 28 U.S.C. § 530D, includes the determination not to appeal, and is available at https://www.justice.gov/oip/letters-submitted-congress-pursuant-28-usc-%C2%A7-530d.

On June 30, 2021, the State Department issued a press statement, available at https://www.state.gov/proposing-changes-to-the-departments-policies-on-gender-on-u-s-passports-and-consular-reports-of-birth-abroad/, announcing proposed changes to the Department's policies on gender on U.S. passports and Consular Reports of Birth Abroad ("CRBA"). The statement includes the following:

> Most immediately, we will be updating our procedures to allow applicants to self-select their gender as "M" or "F" and will no longer require medical certification if an applicant's self-selected gender does not match the gender on their other citizenship or identity documents. The Department has begun moving towards adding a gender marker for non-binary, intersex, and gender non-conforming persons applying for a passport or CRBA. We are evaluating the best approach to achieve this goal. The process of adding a gender marker for non-binary, intersex, and gender non-conforming persons to these documents is technologically complex and will take time for extensive systems updates. The Department will also be working closely with its interagency partners to ensure as smooth a travel experience as possible for the passport holder. As we work towards this longer-term goal of making available a gender marker for non-binary, intersex, and gender non-conforming persons seeking a passport or CRBA, the Department will provide updates on the process and any interim solutions via our website, at https://travel.state.gov/content/travel/en/passports/need-passport/selecting-your-gender-marker.html.

In Public Notices 11487, 11488, and 11489, 86 Fed. Reg. 51,434-35 (Sept. 15, 2021), the State Department published 60-day Notices of Proposed Information Collection pursuant to the Paperwork Reduction Act of 1995 requesting public comment on proposed amendments to U.S. passport application forms based on the change in Department policy announced on June 30, 2021. The new policy would permit passport applicants to select the gender marker on their passport without presenting medical documentation of gender transition. This policy change would also include updating forms to add a third gender marker, "X," for applicants identifying as non-binary, intersex, and/or gender non-conforming (in addition to the existing "M" and "F" gender markers).

On October 27, 2021, the State Department announced the issuance of the first U.S. passport with an X gender marker. The October 27, 2021 State Department press statement, available at https://www.state.gov/issuance-of-the-first-u-s-passport-with-an-x-gender-marker/, is excerpted below.

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The Department of State continues the process of updating its policies regarding gender markers on U.S. passports and Consular Reports of Birth Abroad (CRBAs) to better serve all U.S. citizens, regardless of their gender identity. As the Secretary **announced** in June, the Department is moving towards adding an X gender marker for non-binary, intersex, and gender non-conforming persons applying for a U.S. passport or CRBA.

The Department has issued the first U.S. passport with an X gender marker. We look forward to offering this option to all routine passport applicants once we complete the required system and form updates in early 2022. We will provide updates and information on our website: **travel.state.gov/gender**.

The Department also continues to work closely with other U.S. government agencies to ensure as smooth a travel experience as possible for all passport holders, regardless of their gender identity.

I want to reiterate, on the occasion of this passport issuance, the Department of State's commitment to promoting the freedom, dignity, and equality of all people – including LGBTQI+ persons.

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

As discussed in *Digest 2019* at 7-9, and *Digest 2020* at 17-22, the U.S. government was involved in litigation relating to the transmission of citizenship to children conceived using assisted reproductive technology ("ART"). On January 15, 2021, the U.S. Court of Appeals for the Ninth Circuit denied the petition for rehearing *en banc* in *Dvash-Banks United States Dep't of State*, No. 19-555174 (9th Cir.), in which the court held that State Department policy requiring a biological connection between a transmitting parent and the child did not comport with the plain reading of Section 301(g) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1401(g).

On May 18, 2021, the State Department announced a new policy regarding transmission of citizenship and ART. The Department updated its interpretation of Section 301 of the INA to accommodate modern families and the use of ART and surrogacy by allowing transmission of U.S. citizenship to children born abroad to parents who are married to each other at the time of the child's birth, when the child has a genetic or gestational connection to at least one of the parents in the marriage, and one of the parents in the marriage is a U.S. citizen. The announcement, available at

https://www.state.gov/u-s-citizenship-transmission-and-assisted-reproductive-technology/, is excerpted below.

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Recognizing the advances in assisted reproductive technology (ART), the State Department is updating our interpretation and application of Section 301 of the Immigration and Nationality Act (INA), which establishes the requirements for acquisition of U.S. citizenship at birth.

Children born abroad to parents, at least one of whom is a U.S. citizen and who are married to each other at the time of the birth, will be U.S. citizens from birth if they have a genetic or gestational tie to at least one of their parents and meet the INA's other requirements. Previously, the Department's interpretation and application of the INA required that children born abroad have a genetic or gestational relationship to a U.S. citizen parent.

This updated interpretation and application of the INA takes into account the realities of modern families and advances in ART from when the Act was enacted in 1952.

This change will allow increased numbers of married couples to transmit U.S. citizenship to their children born overseas, while continuing to follow the citizenship transmission requirements established in the INA. Requirements for children born to unmarried parents remain unchanged.

At the same time, we remain vigilant to the risks of citizenship fraud, exploitation, and abuse. As with all citizenship and immigration benefits we examine, the Department will implement this policy in a manner that addresses these concerns.

* * * *

The Department conveyed the updated interpretation to all diplomatic and consular posts and revised the Foreign Affairs Manual ("FAM") and relevant websites accordingly. See, e.g., "Acquisition of U.S. Citizenship at Birth by a Child Born Abroad," at https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Acquisition-US-Citizenship-Child-Born-Abroad.html; "Birth of U.S. Citizens and Non-Citizen Nationals Abroad," at https://travel.state.gov/content/travel/en/international-travel/while-abroad/birth-abroad.html; and "Assisted Reproductive Technology and Surrogacy Abroad," at https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Assisted-Reproductive-Technology-ART-Surrogacy-Abroad.html.

Due to this policy change, the Department moved to dismiss or otherwise conclude all pending ART-related litigation, including *Dvash-Banks*, No. 19-55517 (9th Cir.), *Fielden v. Pompeo*, No. 20-cv-00409 (D.D.C.), and *Blixt v. Pompeo*, No. 20-cv-02102 (D.N.J.). In *Dvash-Banks*, resolution came in the form of the Department recommending against further action after the Ninth Circuit's January 15, 2021 denial of the U.S. government's request for en banc review.

4. *Vazquez v. Blinken*

On December 16, 2021, the U.S. Court of Appeals for the Fifth Circuit issued its opinion in *Vazquez v. Blinken*, No. 21-40062. The district court had dismissed the complaint challenging the denial of Vazquez's passport application based on a determination that he had failed to submit sufficient evidence of citizenship. Vazquez argued that a claim can only be brought under § 1503(a) of the INA if the Department has made an affirmative finding of non-citizenship, and not when a passport application is denied for insufficient proof of citizenship. Under Plaintiff's theory, if § 1503 were not available, residual jurisdiction would be available under the Administrative Procedure Act ("APA") (along with the APA's longer statute of limitations). The Fifth Circuit held that when the Department denies a passport application for insufficient evidence of U.S. citizenship, § 1503(a), "supplies an adequate remedy for challenges to failed passport applications," thereby foreclosing a cause of action under the APA.[**] Excerpts follow from the opinion.

* * * *

Section 1503(a) of the INA states that an individual who "claims a right or privilege as a national of the United States and is denied such right or privilege . . . upon the ground that he is not a national of the United States" can seek judicial review in a declaratory judgment action within five years of a final administrative denial. 8 U.S.C. § 1503(a). On appeal, Vazquez reiterates that the plain language of Section 1503(a) limits jurisdiction to cases where a benefit is denied on the grounds that an individual is affirmatively not a U.S. national. According to Vazquez, his APA claim should proceed because the APA provides for judicial review of a final agency action for which there is no adequate remedy, and Section 1503(a) did not provide him an adequate remedy for challenging his passport application denial based on insufficient evidence. We disagree.

It is well-established that we are bound by the rule of orderliness, which requires that "one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court." *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) …

Here, we conclude that this court's opinion in *Martinez* controls and compels dismissal. According to the panel in that case, Section 1503(a) supplies an adequate remedy for challenges to failed passport applications when the statute of limitations has passed, foreclosing APA relief. See *Martinez*, 977 F.3d at 460; see also *id*. ("The time bar did not make Martinez's § 1503 remedy inadequate and hence did not require the district court to reinstate his APA claims."). The panel "agree[d] with our sister circuits' uniform conclusion that '[a] legal remedy is not inadequate for purposes of the APA because it is procedurally inconvenient for a given plaintiff, or because plaintiffs have inadvertently deprived themselves of the opportunity to pursue that remedy.'" *Id*. at 458 … Thus, under *Martinez*, Vazquez had an adequate remedy in Section 1503(a) that foreclosed APA relief. And it remained adequate even though he would have been time-barred under Section 1503(a)'s five-year statute of limitations had he not forfeited his INA

[**] Editor's note: The Fifth Circuit denied rehearing en banc in *Vazquez* on February 14, 2022.

claim. See *id*. at 460–61 ("Martinez's § 1503 claim is time-barred under *Gonzalez*. Therefore, the district court properly dismissed it.").

Although the panel in Martinez did not address the precise statutory issue that Vazquez raises here, its decision remains binding. The fact that the court may have not considered his textual argument does not allow him to circumvent precedent, and he makes no attempt to distinguish *Martinez*'s factual or legal issues. Moreover, while Vazquez's argument is colorable, it is not conclusive. As Vazquez himself observes:

> Numerous (mostly unpublished) cases hold that an APA action cannot be brought to challenge the denial of a passport application. They rest on the theory that a § 1503(a) cause of action would provide an adequate remedy. In most cases, the denials are based on insufficient evidence, rather than affirmative findings that the applicant was not a U.S. citizen.

It is unlikely that Congress would have remained silent if courts were deciding most cases involving this widely used statute incorrectly. …

* * * *

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

As discussed in *Digest 2017* at 7, *Digest 2018* at 12, *Digest 2019* at 9, and *Digest 2020* at 22, U.S. passports were declared invalid for travel to, in, or through the Democratic People's Republic of Korea ("DPRK"), pursuant to 22 CFR § 51.63(a)(3), since September 1, 2017. On August 30, 2021, the Deputy Secretary of State extended the restriction until August 31, 2022 unless extended or revoked. 86 Fed. Reg. 49,408 (Sept. 2, 2021).

B. IMMIGRATION AND VISAS

1. Nonreviewability

a. Bautista-Rosario v. Mnuchin

As discussed in *Digest 2020* at 22-28, the United States filed a brief in support of its motion to dismiss claims brought by persons designated ineligible to enter the United States under Section 7031(c) of the annual State Department appropriations act. See Chapter 16 for discussion of Section 7031(c) designations. On September 22, 2021, the district court granted the motion to dismiss. *Bautista-Rosario v. Mnuchin*, No. 20-cv-02782 (D.D.C.). Excerpts follow from the court's opinion.

_____

* * * *

The Supreme Court has long held that Congress and the Executive control "the admission and exclusion of foreign nationals." *Trump v. Hawaii*, —— U.S. ——, 138 S. Ct. 2392, 2418, 201 L.Ed.2d 775 (2018). And that control is largely—even presumptively—immune from judicial oversight. *See Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543, 70 S.Ct. 309, 94 L.Ed. 317 (1950). The Supreme Court has reasoned that immigration policy and decisions to admit or exclude aliens are inherently political, implicating "the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89, 72 S.Ct. 512, 96 L.Ed. 586 (1952). Courts are neither well-structured nor authorized to make such policies, and thus it is well-established that "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." *Knauff*, 338 U.S. at 543, 70 S.Ct. 309; *see also Kerry v. Din*, 576 U.S. 86, 86–87, 135 S.Ct. 2128, 192 L.Ed.2d 183 (2015). Absent such affirmative congressional authorization, judicial review of an alien's exclusion is ordinarily unavailable.

As a general matter, Congress has not authorized judicial review of visa denials, *see, e.g.*, 6 U.S.C. § 236(f) ("Nothing in this section shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa."), nor visa revocations for aliens abroad, *see* 8 U.S.C. § 1201(i) ("[T]he consular officer or the Secretary of State may at any time, in his discretion, revoke" a visa and "[t]here shall be no means of judicial review ... of a revocation under this subsection."). And while Section 7031(c) designations are not merely visa denials or revocations, Plaintiffs have pointed to no other statute specifically authorizing judicial review of the designations.

Plaintiffs nonetheless argue that the Court may review their Section 7031(c) designations under the APA. *See* Compl. ¶¶ 38–42. Under the APA, judicial review of agency action is the norm. *See, e.g.*, 5 U.S.C. § 702; *Lincoln v. Vigil*, 508 U.S. 182, 190, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993). But by its own terms the APA does not apply "to the extent that ... [other] statutes preclude judicial review." 5 U.S.C. § 701(a)(1). The Supreme Court has interpreted this preclusion broadly, concluding that a statute may preclude APA review "not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984); *see also Sackett v. EPA*, 566 U.S. 120, 128, 132 S.Ct. 1367, 182 L.Ed.2d 367 (2012).

Here, APA review is precluded because of the statutory scheme and the nature of the administrative action. No statutory presumption specifically identifies Section 7031(c) designations and expressly exempts them from the APA. But Congress has expressly prohibited judicial review of visa denials and revocations—actions with much the same effect as Section 7031(c) designations. And the presumption of non-reviewability of alien exclusion determinations is well-established. Just as the Court of Appeals has "infer[red] that the immigration laws preclude judicial review of consular visa decisions" under the APA, *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999), so too this Court concludes the immigration laws preclude judicial review of Section 7031(c) designations.

* * * *

b. Consular Nonreviewability

Several cases were dismissed in 2021 by courts on the basis of consular nonreviewability, a doctrine well-established by Supreme Court precedent such as *Kerry v. Din*, 576 U.S. 86 (2015). See *Digest 2015* at 15-20. Examples include *Baan Rao Thai Restaurant v. Pompeo*, 985 F.3d 1020 (D.C. Cir.); *Khachatryan v Blinken*, 4 F. 4th 841 (9th Cir.); *Del Valle v. Sec'y of State*, 16 F.4th 832 (11th Cir.); *Polyzopoulos v. Garland*, No. 20-cv-00804 (D.D.C.), *Aslam v. DHS*, No. 19-cv-02132 (D.D.C.), *Santos Vicente v. Barr*, No. 20-cv-06211 (N.D. Cal.), and *Chheng v. DHS*, No. 21-cv-03223 (N.D. Cal.).

Excerpts follow from the opinion of the U.S. Court of Appeals for the D.C. Circuit in *Baan Rao Thai Restaurant*, 985 F.3d 1020.

* * * *

Consular nonreviewability shields a consular official's decision to issue or withhold a visa from judicial review, at least unless Congress says otherwise. *Saavedra Bruno*, 197 F.3d at 1159. Decisions regarding the admission and exclusion of noncitizens "may implicate 'relations with foreign powers,' or involve 'classifications [...] defined in the light of changing political and economic circumstances' " and, accordingly, "such judgments 'are frequently of a character more appropriate to either the Legislature or the Executive.' " *Trump v. Hawaii*, —– U.S. ——, 138 S. Ct. 2392, 2418–19, 201 L.Ed.2d 775 (2018) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976)).

The Congress has partially delegated to the Executive its power to make rules for the admission and exclusion of noncitizens. The Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq*., grants consular officers "exclusive authority to review applications for visas, precluding even the Secretary of State from controlling their determinations." *Saavedra Bruno*, 197 F.3d at 1156. A consular officer, then, has the authority to grant, deny or revoke any visa. *Id*. at 1156–57. Nevertheless, courts have held that claims otherwise barred by the consular nonreviewability doctrine are subject to judicial review in two narrow circumstances. First, an American citizen can challenge the exclusion of a noncitizen if it burdens the citizen's constitutional rights. See *Trump v. Hawaii*, 138 S. Ct. at 2416 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 762, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972)). The second occurs whenever the "Congress says otherwise." *Saavedra Bruno*, 197 F.3d at 1159. In other words, an exception to the doctrine exists if a "statute expressly authoriz[es] judicial review of consular officers' actions." *Id*. Neither exception applies here.

Here, both claims seek review of a consular officer's visa decisions. To avoid consular nonreviewability, Baan Rao, Phomson and Suksai assert the U.S.-Thailand Treaty includes an express authorization for judicial review. Their argument takes two steps. First, Article I, Clause 1 of the Treaty establishes a "qualified right of entry" for Thai and U.S. nationals to one another's country, provided they meet certain requirements. Second, Article II, Clause 2's "free access" provision is the Congress's "express authorization by law" that allows judicial review of visa decisions in order for Thai and U.S. nationals to enforce their Article I rights. According to Baan Rao, Phomson and Suksai, citizens would have no way to enforce Article I rights if Article II did not provide access to courts. Whether Article I, Clause 1 establishes a "qualified right" is

of no issue because the "free access" provision argument fails regardless. We cannot read a well understood treaty provision related to procedural matters as an exception to the broad doctrine of consular nonreviewability that courts have recognized for almost a century. See *Saavedra Bruno*, 197 F.3d at 1159–60.

* * * *

These [types of] treaties…make clear that their access provisions relate to procedural matters. And consular reviewability is no procedural matter. It is a longstanding judicial principle recognizing that the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers." *Saavedra Bruno*, 197 F.3d at 1159 (quoting *Mandel*, 408 U.S. at 765, 92 S.Ct. 2576). Accordingly, it is " 'a power to be exercised exclusively by the political branches of government' and not 'granted away or restrained on behalf of anyone.' " *Id.* (quoting *Mandel*, 408 U.S. at 765, 92 S.Ct. 2576; *The Chinese Exclusion Case*, 130 U.S. 581, 609, 9 S.Ct. 623, 32 L.Ed. 1068 (1889)). If the U.S.-Thailand Treaty intended to depart from this longstanding principle, one would expect some mention of such a change somewhere in the Treaty's enactment history. Instead, the Treaty's enactment history suggests it is one in a long line of standard-form commercial treaties.

When President Lyndon Johnson submitted the U.S.-Thailand Treaty to the Senate for its advice and consent, he described it as "of the short, simplified type that the United States has negotiated with a number of countries, but it contains the general substance of the typical treaty of friendship, commerce and navigation." Lyndon B. Johnson, Message from the Pres. of the U.S. Transmitting the Treaty of Amity and Economic Relations Between the United States of America and the Kingdom of Thailand, 89th Cong. Executive P. No. 89-2, at 1. Then-Secretary of State Dean Rusk stated that the Treaty was "another in the series of treaties of friendship, commerce and navigation," was "generally similar to treaties concluded with Ethiopia and Iran" and "contains the usual provisions covering such subjects as ... access to courts." Dean Rusk, Report to the President, 89th Cong. Executive P. No. 89-2, at 2 (citations omitted). Leonard Meeker, the State Department's then-legal advisor, testified before the Senate Foreign Relations Committee, describing the Treaty as "a shorter version of our standard treaties of friendship, commerce, and navigation" "similar to others that are now in effect." 90th Cong., Sen. Exec. Rep. No. 14, at 3–4. Meeker stated "[t]he provisions of the new treaty with Thailand are based upon existing treaty practices" and "introduce no new types of commitments affecting domestic law." *Id.* Then-Senator Mike Mansfield introduced the Treaty in the Senate and was the only Senator to speak during Senate consideration of the Treaty. 113 Cong. Rec. 24,375 (1967). He noted the Treaty "is the 21st in a series of commercial treaties which have been negotiated since 1946" and "contains the usual provisions found in other commercial treaties to which the United States is a party" including "access to courts." *Id.* That the record is devoid of any indication that those involved with the Treaty's creation understood it to be anything other than a standard treaty of friendship, commerce and navigation indicates that it was not meant to abrogate a broad and important limit on judicial review.

Simply put, the U.S.-Thailand Treaty's "free access" provision ensures uniform procedural protections to the Treaty's nationals. Access provisions were longstanding and well understood at the time the U.S.-Thailand Treaty was entered into—and that understanding was that the provisions relate to procedural rights. Had the President or the Senate meant otherwise,

we would expect to see an indication of that in the Treaty's enactment history. None exists. Accordingly, we conclude the doctrine of consular nonreviewability bars review of Baan Rao's, Phomson's and Suksai's claims and no exception to the doctrine applies.

* * * *

Excerpts below are from the opinion of the Ninth Circuit in *Khachatryan v. Blinken*, 4 F. 4th 841.

* * * *

Decisions regarding the admission and exclusion of foreign nationals are a " 'fundamental sovereign attribute exercised by the Government's political departments.' " *Trump v. Hawaii*, —– U.S. ——, 138 S. Ct. 2392, 2418, 201 L.Ed.2d 775 (2018) (citation omitted); see also *Ventura-Escamilla v. INS*, 647 F.2d 28, 30 (9th Cir. 1981) ("[T]he power to exclude or expel aliens, as a matter affecting international relations and national security, is vested in the Executive and Legislative branches of government."). Given this broad authority of the political branches over the admission and exclusion of foreigners, we "have long recognized" and applied the "doctrine of consular nonreviewability," under which " 'ordinarily, a consular official's decision to deny a visa to a foreigner is not subject to judicial review.' " *Allen v. Milas*, 896 F.3d 1094, 1104–05 (9th Cir. 2018) (citation omitted). Although Congress could conceivably create by statute some mechanism for review of individual consular decisions, it has not seen fit to take any such action to displace the rule of consular nonreviewability. See *id*. at 1108 (holding that "the APA provides no avenue for review of a consular officer's adjudication of a visa on the merits").

Nonetheless, the Supreme Court has recognized a "circumscribed judicial inquiry" for review of consular decisions that involve a violation of constitutional rights. *Trump v. Hawaii*, 138 S. Ct. at 2419 (tracing this exception to *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972)); see also *Allen*, 896 F.3d at 1097 ("[T]he only standard by which we can review the merits of a consular officer's denial of a visa is for constitutional error."). However, as a "foreign national[ ] seeking admission" into the United States, Khachatryan has "no constitutional right to entry," and so he personally has no ability to bring a cause of action challenging his denial of admission. *Trump v. Hawaii*, 138 S. Ct. at 2419; see also *Kerry v. Din*, 576 U.S. 86, 88, 135 S.Ct. 2128, 192 L.Ed.2d 183 (2015) (plurality) ("[B]ecause Berashk is an *unadmitted* and *nonresident* alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission." (emphasis added)); *Mandel*, 408 U.S. at 762, 92 S.Ct. 2576 ("It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise."). Accordingly, where, as here, the denial of a visa to an unadmitted and nonresident alien is at issue, the exception to consular reviewability involving constitutional claims only applies "when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen." *Trump v. Hawaii*, 138 S. Ct. at 2419 (emphasis added).

It follows that the rule of consular nonreviewability bars all of Khachatryan's claims and that it also bars Danuns's claims except to the extent that his claims are based on a cognizable violation of his own constitutional rights. Indeed, Plaintiffs do not meaningfully contest these points in their briefs in this court. Instead, they contend only that Danuns adequately pleaded that

the denial of a visa to his father was done in bad faith and that, as a result, the visa denial violated his rights under the Due Process Clause, which he asserts protects his interest in being reunited with his father in the United States. The Government contests both of these points, arguing that Danuns failed to plead bad faith and that, in any event, Danuns is not entitled to due process here because he has no constitutionally protected interest in having his father immigrate to the United States.

The Supreme Court addressed a similar set of questions in *Kerry v. Din*, in which a U.S. citizen (Fauzia Din) asserted that her due process rights were violated in connection with the denial of a visa to her husband, an Afghan citizen living in Afghanistan. 576 U.S. at 88, 135 S.Ct. 2128 (plurality). A plurality of three Justices held that the denial of a visa to Din's husband did not implicate any "fundamental liberty interest" of Din and that, as a result, "there is no process due to her under the Constitution" with respect to that denial. *Id*. at 97, 101, 135 S.Ct. 2128. However, two concurring Justices—Justice Kennedy and Justice Alito—found it unnecessary to reach the constitutional question of whether Din "has a protected liberty interest in the visa application of her alien spouse," because they concluded that, "even assuming she has such an interest, the Government satisfied due process" in denying the visa. *Id*. at 102, 135 S.Ct. 2128 (Kennedy, J., concurring in the judgment).

Confronted with the novel constitutional question of whether Danuns has a protected liberty interest in his father's visa application, we conclude that we should follow the same approach as Justice Kennedy's Din concurrence, and that we should first address whether, assuming that Danuns has such a protected interest, he has sufficiently alleged a violation of due process under the standards set forth by that concurrence. See *Cardenas v. United States*, 826 F.3d 1164, 1167 (9th Cir. 2016) (holding that, under *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), "Justice Kennedy's concurrence in *Din* is the controlling opinion"). Only if we conclude that Danuns has alleged a failure of due process would we then need to address the Government's broader contention that persons such as Danuns lack an underlying liberty interest that is protected by due process.

* * * *

2. Diversity Visa Lottery

In 2021, the Department was named as a defendant in more than 30 cases challenging aspects of its management of the Diversity Visa program. The suits involve more than 25,000 individual plaintiffs who challenged the Department's interpretation that Presidential Proclamations suspending entry of noncitizens under section 212(f) of the Immigration and Nationality Act ("INA"), 8 USC 1182(f), require visa denial, unless the Proclamation states that it does not apply to visas. There were multiple proclamations that applied to diversity visa applicants in effect from the beginning of the fiscal year, October 1, 2020, until April 8, 2021. Plaintiffs also challenged the Department's prioritization guidance that gave a higher priority to immigrant visa cases that promoted family reunification over diversity visa lottery winners while post's operational capacity was limited by the pandemic. Plaintiffs claimed that the interpretation was not supported by law, the prioritization guidance was arbitrary and capricious, and that the Department unreasonably delayed and unlawfully withheld adjudication of their visa

applications. While most courts denied Plaintiffs relief under these claims, two judges in three 2021 cases and one case from 2020 granted sweeping relief, ordering the State Department to process the cases of diversity visa applicants during September 2021, and to reserve a certain number of DVs from the 2020 and 2021 program year for issuance in Fiscal Year 2022 despite clear statutory provisions that limits eligibility of DV applicants to the fiscal year for which they were selected. In one case, the judge granted relief to non-parties and the plaintiffs did not seek to certify a class; in another the judge granted relief to parties who he determined did not have standing. The cases include *Gomez v. Biden*, No. 20-cv-01419 (D.D.C.), *Goh v. Dep't of State*, No. 21-cv-00999 (D.D.C.), *Rai v. Biden*, No. 21-cv-00863 (D.D.C.), and *Goodluck v. Biden*, No. 21-cv-01530 (D.D.C.). The four cases have been consolidated into a single appeal to the U.S. Court of Appeals for the District of Columbia Circuit, *Goodluck v. Biden*, No. 21-5263 (D.C. Cir.). The lower courts stayed the portion of their orders that required visa adjudication until the issuance of an opinion by the Court of Appeals.

3. *Cuthill v. Pompeo*

As discussed in *Digest 2020* at 36-37, the issue in *Cuthill v. Pompeo*, No. 19-3138 (2d. Cir.) is whether, under the Immigration and Nationality Act ("INA"), the unmarried adult child beneficiary of an immigrant petition should be considered under 21, and therefore eligible for an immediately available visa, because she was under 21 at the time the original petition was filed by her parent as a lawful permanent resident ("LPR"). On March 9, 2021 the U.S. Court of Appeals for the Second Circuit ruled to affirm the district court, finding that while neither side's reading of the statute was in total harmony with the surrounding provisions, the "legislative history shows a clear desire by Congress to fix the age-out problem for all minor beneficiaries, and there is nothing to suggest that Congress intended to exclude beneficiaries like the plaintiff." *Cuthill v. Blinken*, 990 F.3d 272 (2d. Cir. 2021).

4. Litigation regarding the EB-5 Immigrant Investor Program (*Wang*)

As discussed in *Digest 2020* at 37-41, the district court dismissed claims by investors that the Department of State's policy of counting derivatives toward the limit on investor visas violates the APA. *Wang v. Pompeo*, No. 18-cv-01732 (D.D.C. 2020). On July 9, 2021, the U.S. Court of Appeals for the D.C. Circuit affirmed the dismissal. *Wang v. Blinken*, 3 F.4th 479 (D.C. Cir. 2021), reh'g en banc denied. Excerpts follow from the opinion of the court.

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* * * *

"An alien needs an immigrant visa to enter and permanently reside in the United States." *Scialabba v. Cuellar de Osorio,* 573 U.S. 41, 46, 134 S.Ct. 2191, 189 L.Ed.2d 98 (2014) (plurality opinion). The Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537, governs how immigrants obtain those visas. It prioritizes U.S. citizens' immediate relatives.…

For others hoping to reside in the United States, the Act outlines three immigrant visa categories:

1) "family-sponsored immigrants": other relatives of U.S. citizens …;

2) "employment-based" immigrants: foreigners with marketable skills…

3) "diversity" immigrants: citizens of "countries with historically low immigration to the United States," …

Job-creating investors qualify for a subcategory of employment-based visas. …

Although the Act places no cap on visas for U.S. citizens' immediate relatives, *id.* § 1151(b)(2)(A)(i), it caps the other three visa categories: family-sponsored, employment-based, and diversity. With some nuances that don't matter here, the annual cap on employment-based visas is 140,000. *Id.* § 1151(d)(1)(A). Within that 140,000, the cap on investor visas is just under 10,000. *Id.* § 1153(b)(5)(A).

Finally, we arrive at the provision of the Act at issue here. After listing the three visa categories, the Act says:

> **A spouse or child** ... **shall**, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a) [family-sponsored], (b) [employment-based], or (c) [diversity], **be entitled to the same status, and the same order of consideration provided in the respective subsection**, if accompanying or following to join, the spouse or parent.

Id. § 1153(d) (emphases added).

In other words, if you receive an employment-based visa, you may bring your spouse and children with you to the United States. So too if you receive a family-sponsored visa or a diversity visa. No matter your visa category, your spouse and children are "entitled to the same status, and the same order of consideration" as you.

Under that provision, the Department of State counts the family members of an employment-based visa holder when it totals the number of employment-based visas it may issue. And more specifically, it also counts the family members of investors when it totals the number of investor visas it may issue. That matters here because, in recent years, the demand for investor visas has exceeded the supply.

Among those understandably frustrated by that imbalance are the Plaintiffs. They include immigrant investors unable to enter the United States because of the employment-based visa cap and the specific cap on investor visas. They argue that the Department should not count investors' spouses and children against the cap on investor visas.

The district court granted the Department's motion to dismiss. …. Because the Immigration and Nationality Act requires the Department to count investors' spouses and children toward the cap on investor visas, we affirm.

* * * *

Same status means that when an immigrant receives an employment-based visa, the immigrant's spouse and children also receive an employment-based visa. Likewise, when an investor gets an investor visa, the investor's family members get that same kind of visa. And because they get the same kind of visa, the investor's family members also count against the investor visa cap.

The phrase "same order of consideration provided in the respective subsection" resolves any doubt. *Id*. That's because "the respective subsection" for employment-based visas, § 1153(b), expressly refers to the worldwide cap on those visas specified in § 1151(d). …

Thus, because spouses and children receive "the same order of consideration provided in the" employment-based visas subsection, which specifically caps employment-based visas, spouses and children are also subject to the 140,000-person cap on employment-based visas. In the same way, because investors' spouses and children receive "the same order of consideration provided in the" investor visas subsubsection, and that subsection specifically caps investor visas, spouses and children are also subject to the 10,000-person cap on investor visas.

* * * *

The Plaintiffs counter that Congress altered the provision's meaning by moving it in 1990 when Congress made substantial changes to other parts of the Act. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. Before 1990, the "same status, and the same order of consideration" provision about immigrants' family members was in a section describing which immigrants "are subject to the numerical limitations." Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 203, 79 Stat. 911, 911 & 914.

Then, in 1990, Congress created the three capped visa categories described above and placed the "same status, and the same order of consideration" provision in that new section below its description of the three categories. Congress titled the new provision "Treatment of Family Members." 104 Stat. 5009.

According to the Plaintiffs, because the 1990 Version no longer links spouses and children to the Act's numerical limitations, spouses and children are no longer subject to the cap's "numerical limitations." Appellants' Br. at 29. They add that Congress intended investor visas to go to investors, who must meet certain requirements that their spouses and children usually do not meet. …

The Plaintiffs' arguments, though inventive, conflict with the plain meaning of § 1153(d), … and the larger statutory context…. In addition, in matters of immigration policy, where deference to the political branches is high, we require clearer legislative direction than just the relocation of unaltered statutory text before adopting a reading of the statute that effects the type of sweeping and monumental change in immigration policy that the Plaintiffs' reading of the statute would cause. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) ("we have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context"). Their arguments also conflict with the presumption that we understand the reenacted text in the same way the Department of State did before 1990. *Forest Grove School District v. T.A.*, 557 U.S. 230, 239-40, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) ("If a statute uses words or phrases that have already received authoritative construction by ... a responsible administrative agency, they are to be understood according to that construction.") (emphasis omitted); *see also id.* at 324 & 324 n.8 (citing *FDIC v. Philadelphia Gear Corp.*, 476

U.S. 426, 437, 106 S.Ct. 1931, 90 L.Ed.2d 428 (1986); *NLRB v. Bell Aerospace*, 416 U.S. 267, 275, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974)).

* * * *

5. Visa Regulations and Restrictions

a. Measures in response to the COVID-19 pandemic

(1) Measures suspending and limiting entry due to risk of transmission

On January 18, 2021, President Trump issued Proclamation 10138, terminating suspensions of entry into the United States of aliens who had been present in the Schengen Area, the United Kingdom, the Republic of Ireland, and the Federative Republic of Brazil. 86 Fed. Reg. 6799 (Jan. 22, 2021). See *Digest 2020* at 42-43 regarding the measures suspending the entry of aliens from certain countries and regions and the legal challenges to these measures. On January 25, 2021, President Biden issued Proclamation 10143, imposing restrictions on entry of aliens who had been present in the Schengen Area, the United Kingdom (excluding overseas territories outside of Europe), the Republic of Ireland, the Federative Republic of Brazil, and the Republic of South Africa. 86 Fed. Reg. 7467 (Jan. 28, 2021).

On October 25, 2021, the President issued "A Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic." The proclamation, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/25/a-proclamation-on-advancing-the-safe-resumption-of-global-travel-during-the-covid-19-pandemic/, ends the country-by-country restrictions previously imposed and relies on vaccination to resume international air travel, suspending entry "of unvaccinated noncitizen nonimmigrants, except in limited circumstances."

(2) Measures limiting entry due to risk to the U.S. labor market

Proclamation 10014 of April 22, 2020 ("Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak") was rescinded on February 24, 2021. 86 Fed. Reg. 11,847 (Mar. 1, 2021). See also https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/a-proclamation-on-revoking-proclamation-10014/. Rescission moots pending legal challenges to the order. See also February 25, 2021 State Department press briefing, available at https://www.state.gov/briefings/department-press-briefing-february-25-2021/ ("yesterday President Biden rescinded presidential proclamation 10014…. The President also suspended the sections of presidential proclamation 10052 and 10131 which continued presidential proclamation 10014 past its original expiration. These

proclamations restricted the issuance of certain immigrant visas. We recognize the impact on families and individuals affected by these proclamations.").

In *National Association of Manufacturers v. DHS*, 491 F. Supp. 3d 549 (N.D. Cal. 2020), discussed in *Digest 2020* at 45, after Presidential Proclamation 10052 was allowed to expire on March 31, 2021, the parties agreed the case was moot and the appeal to the U.S. Court of Appeals for the Ninth Circuit was voluntarily dismissed.

(3) Other measures

Effective December 13, 2021, the State Department issued a temporary final rule ("TFR"), responding to the ongoing COVID-19 pandemic, authorizing consular officers to waive the personal appearance of certain repeat immigrant visa applicants and to allow those applicants to affirm the accuracy of the contents of their application without appearing in person before a consular officer. This TFR expires after 24 months. 86 Fed. Reg. 70,735 (Dec. 13, 2021).

In October, the CDC began requiring that immigrant visa applicants be vaccinated against COVID-19, with limited exceptions. See "CDC Requirements for Immigrant Medical Examinations: COVID-19 Technical Instructions for Panel Physicians," available at https://www.cdc.gov/immigrantrefugeehealth/panel-physicians/covid-19-technical-instructions.html.

(4) Travel restrictions applicable at U.S. ports of entry

Temporary limits on non-essential travel of individuals from Canada and individuals from Mexico into the United States at land ports of entry (and ferry services) along the U.S.-Canada and U.S.-Mexico borders were renewed monthly in 2021. See, *e.g.*, 86 Fed. Reg. 52,609 (Sept. 22, 2021) (Canada); 86 Fed. Reg. 52,611 (Sept. 22, 2021) (Mexico). On October 21, 2021, these limits on non-essential travel were extended, but the restrictions were lifted for individuals who are fully vaccinated. 86 Fed. Reg. 58,218 (Oct. 21, 2021) (Canada); 86 Fed. Reg. 58,216 (Oct. 21, 2021) (Mexico).

b. Rescission of Prior Bans on Entry into the United States

On January 20, 2021, President Biden signed Proclamation 10141 ("Ending Discriminatory Bans on Entry into the United States"), which revokes Executive Order 13780, and Proclamations 9645, 9723, and 9983. 86 Fed. Reg. 7005 (Jan. 25, 2021). On March 8, 2021, the State Department announced the conclusion of the 45-day review and submission of its report called for in Proclamation 10141. The March 8, 2021 State Department press statement about the review and report, available at https://www.state.gov/the-departments-45-day-review-following-the-revocation-of-proclamations-9645-and-9983/, is excerpted below.

* * * *

…President Biden has made clear that the now-rescinded Proclamations 9645 and 9983 were a stain on our national conscience, contravened our values, jeopardized our alliances and partnerships, separated loved ones, and undermined our national security.

Applicants from the affected countries may no longer be denied on the basis of nationality, and the Department has taken a number of steps to ensure that applicants previously refused visas under Proclamations 9645 and 9983 will not have future visa applications prejudiced in any way by those prior decisions.

As part of Proclamation 10141, President Biden directed the State Department, within 45 days, to provide a report including a proposal for individuals whose immigrant visa applications were denied due to Proclamations 9645 or 9983 and seek to have their applications reconsidered. The Department has provided the results of our review to the White House.

The Department explored every possible avenue under the law for providing relief to affected individuals. Those whose immigrant visa applications received a final refusal on or after January 20, 2020 due to the Proclamations may seek re-adjudication without resubmitting their application forms or paying any additional fees, provided the underlying visa petitions remain valid. Under current regulations, those whose immigrant visa applications were denied prior to January 20, 2020 may also be reconsidered, but these individuals must submit new applications and pay a new application fee.

FY 2017 – FY 2020 Diversity Visa applicants who were not issued visas are statutorily barred from being issued visas based on their selection as Diversity Visa applicants in those fiscal years, as the deadlines for visa issuance in those fiscal years have expired.

As the Department works to serve affected applicants as quickly as possible, the health and safety of our workforce and customers remains paramount. The COVID-19 pandemic, and the health safeguards it has necessitated, continue to severely impact the number of visas our embassies and consulates abroad are able to process. Our team in Washington and around the world continue to work tirelessly to find ways to increase the number of immigrant visa appointments, and will continue to do so in the coming months.

* * * *

c. Visa Restrictions

See Chapter 16 for discussion of visa restrictions under section 212(a)(3)(C) of the INA.

d. E.O. 14013

Section 3 of Executive Order 14013, "Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration," 86 Fed. Reg. 8839 (Feb. 9, 2021), relates to the Special Immigrant Visa ("SIV") program for Iraqi and Afghan allies. Section 3 is excerpted below. Other provisions of E.O. 14013 are discussed in section C.3, *infra*.

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* * * *

(a) Within 180 days of the date of this order, the Secretary of State, in consultation with the Secretary of Defense and the Secretary of Homeland Security, shall complete a review of the Iraqi and Afghan SIV programs and submit a report to the President with recommendations to address any concerns identified. The report shall include:

(i) an assessment of agency compliance with existing law governing the SIV programs, including program eligibility requirements and procedures for administrative review;

(ii) an assessment of whether there are undue delays in meeting statutory benchmarks for timely adjudication of applications, including due to insufficient staffing levels;

(iii) a plan to provide training, guidance, and oversight with respect to the National Visa Center's processing of SIV applications;

(iv) a plan to track the progress of the Senior Coordinators as provided under section 1245 of the Refugee Crisis in Iraq Act of 2007 (RCIA), subtitle C of title XII of Public Law 110-181, and section 602(b)(2)(D)(ii)(II) of the Afghan Allies Protection Act of 2009 (AAPA), title VI of division F of Public Law 111-8, as amended; and

(v) an assessment of whether adequate guidelines exist for reconsidering or reopening applications in appropriate circumstances and consistent with applicable law.

(b) The Secretary of State, in consultation with the Secretary of Defense, shall also direct a review of the procedures for Chief of Mission approval of applications with the aim of, as appropriate and consistent with applicable law:

(i) ensuring existing procedures and guidance are sufficient to permit prospective applicants a fair opportunity to apply and demonstrate eligibility;

(ii) issuing guidance that would address situations where an applicant's employer is unable or unwilling to provide verification of the applicant's "faithful and valuable service," and provide for alternative forms of verification;

(iii) revising requirements to facilitate the ability of applicants to demonstrate the existence of a qualifying contract with the United States Government and require that the supervisor verifying the applicant's "faithful and valuable service" be a United States citizen or national;

(iv) ensuring that applicants are not prejudiced by delays in verifying their employment; and

(v) implementing anti-fraud measures to ensure program integrity.

(c) Within 180 days of the date of this order, the Secretary of State shall submit to the President the results of the review described in subsection (b) of this section.

(d) Within 180 days of the date of this order, the Secretary of State, in consultation with the Secretary of Defense and the Secretary of Homeland Security, shall conduct a review and submit a report to the President identifying whether additional populations not currently provided for under section 1059 of the National Defense Authorization Act for Fiscal Year 2006, Public Law 109-163, section 1244 of the RCIA, or section 602 of the AAPA are at risk as a result of their faithful and valuable service to the United States Government. The review should also evaluate whether it would be appropriate to seek legislation that would create a SIV program for individuals, regardless of nationality, who faithfully assisted the United States Government in

conflict areas for at least 1 year or made exceptional contributions in a shorter period and have experienced or are experiencing an ongoing serious threat as a result of their service.

(e) Within 180 days of the date of this order, the Secretary of State and the Secretary of Homeland Security shall ensure that appropriate policies and procedures related to the SIV programs are publicly available on their respective agency's websites, and that any revisions to such policies and procedures in the future are made publicly available on those websites within 30 days of issuance.

* * * *

e. Special Immigrant Visa ("SIV") Program

Sections 401-404 of the Emergency Security Supplemental Appropriations Act (Public Law No. 117-31), enacted on July 30, 2021, address the Afghan and Iraqi SIV program, including by amending the Afghan Allies Protection Act of 2009 ("AAPA") and the Refugee Crisis in Iraq Act of 2007 ("RCIA"). The Act authorizes 8,000 additional SIVs for Afghan principal applicants, for a total of 34,500 visas allocated since December 19, 2014. The Department of State's authority to issue SIVs to Afghan nationals under the AAPA, as amended, will continue until all visa numbers allocated under the Act are issued. The Act also amended the requirements for employment that would qualify a principal alien under this program, such that the required period of service is one year for all qualified applicants, and removed the requirement for a principal alien under this program who was employed by ISAF or a successor mission to have performed "sensitive and trusted" activities for U.S. military personnel. Furthermore, the Act established that all steps of the SIV process, including the COM application process, must be completed within 9 months, with the exception of high-risk cases for which satisfaction of national security concerns requires additional time. The Act also permitted written appeal of a COM denial more than 120 days after that denial at the discretion of the Secretary of State. The Act also authorizes waiver of the pre-admission medical examination requirement. Additionally, the Act provides for Afghan and Iraqi SIV eligibility for Afghan and Iraqi SIV eligibility for surviving spouses and children of Afghan and Iraqi principals who had submitted an application for COM approval prior to their death.

Information on the Afghan SIV program is available at https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov.html. Information on the Iraqi SIV program is available at https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visas-iraqis-employed-us-gov.html.

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

On May 14, 2021, President Biden issued Presidential Proclamation 10209, revoking President Trump's Proclamation 9945 on the "Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System," which had been the

subject of litigation and a preliminary injunction. See *Digest 2020* at 60-61. 86 Fed. Reg. 27,015 (May 19, 2021).

g. Visa Ineligibility on Public Charge Grounds

As discussed in *Digest 2020* at 61, regulations regarding visa eligibility determinations based on the likelihood the alien would become a public charge ("the public charge rule") were subject to multiple court challenges and injunctions. In 2021, after a court order vacating the public charge final rule went into effect, U.S. Citizenship and Immigration Services ("USCIS") stopped applying the public charge rule to all pending applications and petitions. See U.S. Citizen and Immigration Services webpage, "Injunction of the Inadmissibility on Public Charge Grounds Final Rule," at https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/injunction-of-the-inadmissibility-on-public-charge-grounds-final-rule.

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 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; *Digest 2018* at 38-44 *Digest 2019* at 30-31, and *Digest 2020* at 62-70. In 2021, the United States designated Venezuela, Burma, and Haiti for TPS and extended TPS designations for Syria, Somalia, and Yemen.

a. Venezuela

At a March 9, 2021 State Department press briefing, the State Department previewed Secretary of Homeland Security Alejandro Mayorkas's announcement that day of Venezuela's designation for TPS. See briefing transcript, available at https://www.state.gov/briefings/department-press-briefing-march-9-2021/. The briefing conveyed the following further information:

> To date, nearly 5.5 million Venezuelans have fled their homeland, while another seven million remain in chronic need of humanitarian aid. Nicolas Maduro's repression, his corruption, and economic mismanagement have victimized these Venezuelans and produced this political and humanitarian crisis. Maduro's willful neglect of his people, in a bid to remain in power, has created one of the hemisphere's worst refugee and migration crises.
>
> With this designation, we proudly join Colombia in their recent announcement to provide a similar status for vulnerable Venezuelans. The United States continues our leadership in the international effort to alleviate the suffering of the Venezuelan people. We provided nearly $529 million in regional humanitarian assistance in Fiscal Year 2020 in crisis response, and we welcome Spain's recent financial commitment for the same. We encourage others to contribute.

Notice of the designation of Venezuela for TPS for 18 months, effective March 9, 2021, through September 9, 2022, was published in the Federal Register on March 9, 2021. 86 Fed. Reg. 13,574 (Mar. 9, 2021). The overview of the explanation for Venezuela's TPS designation follows:

> Venezuela is currently facing a severe humanitarian emergency. Under Nicolas Maduro's influence, the country "has been in the midst of a severe political and economic crisis for several years." Venezuela's crisis has been marked by a wide range of factors, including: Economic contraction; inflation and hyperinflation; deepening poverty; high levels of unemployment; reduced access to and shortages of food and medicine; a severely weakened medical system; the reappearance or increased incidence of certain communicable diseases; a collapse in basic services; water, electricity, and fuel shortages; political polarization; institutional and political tensions; human rights abuses and repression; crime and violence; corruption; increased human mobility and displacement (including internal migration, emigration, and return); and the impact of the COVID–19 pandemic, among other factors.

b. Syria

On March 19, 2021, DHS provided notice of an 18-month extension of the designation of Syria, through September 30, 2022. 86 Fed. Reg. 14,946 (Mar. 19, 2021). 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. Burma

On May 25, 2021, DHS announced that the Secretary of Homeland Security is designating Burma for TPS for 18 months, effective May 25, 2021, through November 25, 2022. 86 Fed. Reg. 28,132 (May 25, 2021). The notice of the designation includes the following overview of the basis for the designation:

> On February 1, 2021, the Burmese military perpetrated a coup, deposing the democratically elected government and declaring a temporary one-year state of emergency, after which it has said it will hold elections. The military is responding with increasing oppression and violence to demonstrations and protests, resulting in large-scale human rights abuses, including arbitrary detentions and deadly force against unarmed individuals. The coup has triggered a humanitarian crisis, including the disruption of communications and limited access to medical care. The Burmese military has a clear and well-documented history of committing atrocities against the people of Burma, and again, the military is committing brutal violence against the Burmese people, including young children.

d. Somalia

On July 22, 2021, DHS provided notice of an 18-month extension of the designation of Somalia for TPS, from September 18, 2021 through March 17, 2023. 86 Fed. Reg. 38,744 (July 22, 2021). The extension is based on the determination that "the ongoing armed conflict and extraordinary and temporary conditions supporting Somalia's 2012 TPS redesignation persist." *Id*.

e. Yemen

On July 9, 2021, DHS provided notice of the extension of the designation of Yemen for TPS for 18 months, from September 4, 2021, through March 3, 2023, and the redesignation of Yemen for 18 months, effective September 4, 2021, through March 3, 2023. 86 Fed. Reg. 36,295 (July 9, 2021). DHS found the extension warranted "because the armed conflict is ongoing, and the extraordinary and temporary conditions that prompted the 2017 redesignation of Yemen persist." *Id*.

f. Haiti

On May 22, 2021, DHS announced the designation of Haiti for TPS for 18 months, which became effective August 3, 2021, through February 3, 2023. 86 Fed. Reg. 41,863 (Aug. 3, 2021). TPS beneficiaries whose TPS has been continued pursuant to court orders were

instructed to reapply. *Id*. The notice also summarizes why Haiti was newly designated for TPS:

> Haiti is grappling with a deteriorating political crisis, violence, and a staggering increase in human rights abuses. Within this context, as noted by the United Nations Children's Fund (UNICEF), Haiti faces the challenges of "rising food insecurity and malnutrition, [. . .] waterborne disease epidemics, and high vulnerability to natural hazards, all of which have been further exacerbated by the coronavirus disease 2019 (COVID-19) pandemic."

g. Ramos v. Nielsen *and other litigation*

As discussed in *Digest 2018* at 40-44, *Digest 2019* at 31, and *Digest 2020* at 63-70, several U.S. courts enjoined the termination of TPS for Sudan, Nicaragua, Nepal, Haiti, Honduras, and El Salvador. On September 10, 2021, DHS announced continued compliance with the orders of the courts in *Ramos, et al.* v. *Nielsen, et. al.,* No. 18–cv–01554 (N.D. Cal. Oct. 3, 2018) ("*Ramos*") and *Saget, et. al.,* v. *Trump, et. al.,* No. 18–cv–01599 (E.D.N.Y. Apr. 11, 2019) ("*Saget*"), and *Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019) ("*Bhattarai*"). 86 Fed. Reg. 50,725 (Sept. 10, 2021). As explained in the "summary" section of the Federal Register Notice:

> Beneficiaries under the Temporary Protected Status (TPS) designations for El Salvador, Nicaragua, Sudan, Honduras, and Nepal will retain their TPS while the preliminary injunction in *Ramos* and the *Bhattarai* orders remain in effect, provided that their TPS is not withdrawn because of individual ineligibility. Beneficiaries under the TPS designation for Haiti will retain their TPS while either of the preliminary injunctions in *Ramos* or *Saget* remain in effect, provided that their TPS is not withdrawn because of individual ineligibility. However, on August 3, 2021, DHS issued a new designation for Haiti TPS, and in order to secure TPS pursuant to the new Haiti designation, eligible individuals must apply before the close of the registration period on Feb. 3, 2023.

2. Deferred Enforced Departure

In a January 19, 2021 memorandum, the President directed the deferred enforced departure ("DED") of Venezuelans present in the United States. 86 Fed. Reg. 6845 (Jan. 25, 2021).

In a January 20, 2021 memorandum, the President ordered the deferral of enforced departure from the United States, through June 30, 2022, of Liberians presently residing in the United States who were under a grant of DED as of January 10, 2021, as well as continued work authorization for these Liberians. 86 Fed. Reg. 7055 (Jan. 25, 2021). The memorandum provides the following background:

> Since 1991, the United States has provided safe haven for Liberians who were forced to flee their country as a result of armed conflict and widespread civil strife, in part through the grant of Temporary Protected Status (TPS). The armed conflict ended in 2003, and TPS for affected Liberian nationals ended effective October 1, 2007. President Bush then deferred the enforced departure of those Liberians originally granted TPS. President Obama, in successive memoranda, extended that grant of Deferred Enforced Departure (DED) to March 31, 2018. President Trump then determined that conditions in Liberia did not warrant a further extension of DED, but that the foreign policy interests of the United States warranted affording an orderly transition period for Liberian DED beneficiaries. President Trump later extended that DED transition period through March 30, 2020.
>
> In December 2019, the Congress enacted the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116–92) (NDAA), which included, as section 7611, the Liberian Refugee Immigration Fairness (LRIF) provision. The LRIF provision, with limited exceptions, makes Liberians who have been continuously present in the United States since November 20, 2014, as well as their spouses and children, eligible for adjustment of status to that of United States lawful permanent resident (LPR). The NDAA gave eligible Liberian nationals until December 20, 2020, to apply for this adjustment of status. After the enactment of the LRIF provision, President Trump further extended the DED transition period through January 10, 2021, to ensure that DED beneficiaries would continue to be eligible for employment authorization during the LRIF application period.

In an August 5, 2021 memorandum, the President directed deferred enforced departure for Hong Kong residents. 86 Fed. Reg. 43,587 (Aug. 10, 2021). The memorandum explains:

> By unilaterally imposing on Hong Kong the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (NSL), the PRC has undermined the enjoyment of rights and freedoms in Hong Kong, including those protected under the Basic Law and the Sino-British Joint Declaration. Since the imposition of the NSL in June 2020, Hong Kong police have continued a campaign of politically motivated arrests, taking into custody at least 100 opposition politicians, activists, and protesters on NSL-related charges including secession, subversion, terrorist activities, and collusion with a foreign country or external elements. Over 10,000 individuals have been arrested for other charges in connection with anti-government protests. Over the last year, the PRC has continued its assault on Hong Kong's autonomy, undermining its remaining democratic processes and institutions, imposing limits on academic freedom, and cracking down on freedom of the press.
>
> There are compelling foreign policy reasons to defer enforced departure for Hong Kong residents presently in the United States. The United States is

> committed to a foreign policy that unites our democratic values with our foreign policy goals, which is centered on the defense of democracy and the promotion of human rights around the world. Offering safe haven for Hong Kong residents who have been deprived of their guaranteed freedoms in Hong Kong furthers United States interests in the region. The United States will not waver in our support of people in Hong Kong.

3. Refugee Admissions and Resettlement

In a February 4, 2021 press statement, available at https://www.state.gov/rebuilding-and-enhancing-u-s-refugee-resettlement-programs/, Secretary Blinken committed to implementing President Biden's executive order on restoring the U.S. refugee admissions program. Excerpts follow from the Secretary's statement.

> Over the coming months and years, we will rebuild and expand the U.S. Refugee Admissions Program and other humanitarian programs so they reflect our values as a nation and are commensurate with global need, consistent with our domestic laws and international obligations, as well as our fundamental responsibility for the safety and security of the American people.
>
> This Order will spur innovation and draw on technological expertise to enhance the effectiveness of security vetting and fraud detection, streamline application processing, and strengthen data-driven decision-making. The concrete steps in the Order will also improve senior-level engagement and coordination, and fill significant staffing gaps in essential positions responsible for the refugee admissions process and other humanitarian programs. The United States will address processing backlogs and pursue security vetting processes that are effective, fair, and efficient, consistent with the humanitarian goals of our programs as well as the national security and foreign policy interests of the United States.
>
> …
>
> Nor would the U.S. Refugee Admissions Program be where it is today without sustained bipartisan support from Congress, over decades. President Biden's Order formally revokes executive actions that defied the spirit of the 1980 Refugee Act with restrictions that undermined the U.S. Refugee Admissions Program.

On February 12, 2021, the State Department provided the Report to Congress on the Proposed Emergency Presidential Determination on Refugee Admissions for Fiscal Year 2021, available at https://www.state.gov/proposed-emergency-presidential-determination-on-refugee-admissions-for-fy21/. The introduction to the report follows:

> This report to the Committees on the Judiciary of the House of Representatives and of the Senate is being sent in advance of the appropriate consultation pursuant to the statutory requirements of Sections 207(b) and (e) of the INA, 8

U.S.C. § 1157(b) and (e). The report provides the information required in Section 207(e)(1) through (7) where relevant to the President's proposal to increase the refugee admissions target.

I. Description of the nature of the unforeseen emergency refugee situation and why the admission of certain additional refugees is justified by grave humanitarian concerns and is otherwise in the national interest.

The number of forcibly displaced people worldwide is unprecedented and continues to climb, including over 20 million refugees under UNHCR's mandate. Unforeseen developments including new political violence, humanitarian crises, and growing threats to refugees in countries of asylum all support a need to increase the refugee admissions number for FY 2021 since Presidential Determination No. 2021-02 (PD 2021-02) was signed on October 27, 2020. Furthermore, the ongoing and changing circumstances of the COVID-19 pandemic, such as the increasing distribution of recently developed COVID-19 vaccines in the United States and increased ability to use testing and other safety measures here and abroad, means that more refugees in the U.S. Refugee Admissions Program (USRAP) are expected to be able to come to the United States in this fiscal year. With new categories and nationalities to be made eligible, an increased admissions target will allow for those refugees in our pipeline who have been processed to completion or near completion to travel. The unforeseen emergency refugee situation includes, but is not limited to, the following circumstances, many of which are rapidly emerging or deteriorating.

In Emergency Presidential Determination 2021–05 of April 16, 2021, President Biden issued a Memorandum for the Secretary of State on Refugee Admissions for Fiscal Year 2021 that revised the allocations for refugee admissions within the annual refugee ceiling. 86 Fed. Reg. 21,159 (Apr. 22, 2021). The opening paragraphs of that Memorandum follow.

By the authority vested in me as President by the Constitution and the laws of the United States of America, in accordance with section 207(b) of the Immigration and Nationality Act (the "Act") (8 U.S.C. 1157(b)), and after appropriate consultation with the Congress, I have determined that subsequent to the signing of Presidential Determination 2021-02 on October 27, 2020 (Presidential Determination on Refugee Admissions for Fiscal Year 2021) (PD 2021-02), an unforeseen emergency refugee situation now exists due to new or increasing political violence, repression, atrocities, or humanitarian crises in countries including Burma, the Democratic Republic of the Congo, Ethiopia, Hong Kong and Xinjiang (China), South Sudan, Syria, and Venezuela, as well as changing conditions caused by the coronavirus disease 2019 pandemic. I have further determined that the allocation of admissions among refugees of humanitarian concern set forth in PD 2021-02 prevents the United States Refugee Admissions Program from responding to this unforeseen emergency

> refugee situation. I hereby make the following determinations and direct the following actions:
>
> (a) In response to the emergency refugee situation, the Fiscal Year (FY) 2021 allocation of admissions among refugees of humanitarian concern to the United States shall be revised as set forth in section (b) of this determination. This action is justified by grave humanitarian concerns and is otherwise in the national interest. Further, the admission of refugees affected by the emergency refugee situation cannot be accomplished under section 207(a) of the Act.

In Presidential Determination 2021-06 of May 3, 2021, President Biden increased the target for number of refugee admissions for FY 2021 from 15,000 to 62,500. 86 Fed. Reg. 24,475 (May 7, 2021). The determination includes the following:

> The number of refugee admissions authorized by this determination under section 207(b) of the Immigration and Nationality Act (8 U.S.C. 1157(b)) sends the important message that the United States remains a safe harbor for some of the most vulnerable people in the world. This number also sets a goal for USRAP and the non-governmental and international organizations with whom USRAP partners to resettle refugees. Given the gravity of the global refugee crisis, the number of authorized refugee admissions must be ambitious enough to challenge the United States Government and its partners to build their capacity to serve more refugees. In my judgment, a refugee admissions determination of 62,500 reflects these values, is justified by grave humanitarian concerns, and is otherwise in the national interest of the United States.

See also May 3, 2021 State Department press statement, available at https://www.state.gov/the-presidents-emergency-presidential-determination-on-refugee-admissions-for-fiscal-year-2021/.

On July 28, 2021, Secretary Blinken issued a statement, commemorating the 70th anniversary of the 1951 Refugee Convention. The statement, available at https://www.state.gov/commemorating-the-70tth-anniversary-of-the-refugee-convention/, includes the following:

> …At this time of historic global forced displacement, the COVID-19 pandemic and climate change have exacerbated the challenges refugees face, making the international commitments in the 1951 Refugee Convention and its 1967 Protocol more vital than ever. We are committed to supporting refugees globally with our humanitarian leadership, diplomatic efforts to uphold refugee protection, advocacy for and support to durable solutions for refugees, and by upholding our international non-refoulement obligations.
>
> …
>
> More broadly, the Convention and Protocol, as well as the principle of non-refoulement, continue to guide the international community in its approach to refugee crises around the world. They help to guide the international

> community in ensuring refugees' access to services while displaced, and the United States continues to support broader responsibility-sharing and assistance to refugee-hosting countries.

On September 20, 2021, the State Department announced the transmission of the President's report to Congress proposing an increase in the refugee admissions target from 62,500 in Fiscal Year 2021 to 125,000 in Fiscal Year 2022 to address needs generated by humanitarian crises around the globe. See September 20, 2021 press statement, available at https://www.state.gov/transmission-of-the-presidents-report-to-congress-on-the-proposed-presidential-determination-on-refugee-admissions-for-fiscal-year-2022/. The Report to Congress is available at https://www.state.gov/documents-for-congress/.

On October 8, 2021, President Biden issued Presidential Determination 2022–02 on refugee admissions, raising the refugee admissions target to 125,000 for Fiscal Year 2022. 86 Fed. Reg. 57,527 (Oct. 18, 2021). The October 8, 2021 State Department press statement on the subject, available at https://www.state.gov/the-presidential-determination-on-refugee-admissions-for-fiscal-year-2022/, includes the following:

> …the State Department is committed to rebuilding our U.S. Refugee Admissions Program in line with our long tradition of offering hope and safe haven to those fleeing persecution. We are diligently working to rebuild the infrastructure of the program, including by strengthening our refugee processing systems, providing for new funding at the local and state levels to enhance the capacity of our domestic resettlement partners, and expanding community sponsorship programs.

In *HIAS, Inc. v. Trump*, 985 F.3d 309, in the U.S. Court of Appeals for the Fourth Circuit, the court issued its opinion on January 8, 2021, ruling that the district court did not abuse its discretion in issuing a preliminary injunction against enforcement of President Trump's order requiring states and localities to consent prior to refugee resettlement in their jurisdictions. Excerpts follow from the court's opinion.

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* * * *

In 2019, President Donald Trump issued Executive Order 13,888 (the Order), which drastically alters the system by which the federal government resettles refugees across the United States. Rather than consulting with states and localities regarding their ability to accept refugees, the Order creates an "opt-in" system requiring that both a state and a locality provide their affirmative consent before refugees will be resettled there. Order § 2. In the funding notice (the Notice) implementing the Order, the Department of State imposed on private resettlement agencies, who provide social services for newly arrived refugees, the burden of seeking the consent of every state and locality where a refugee might be resettled. Three of these resettlement agencies have filed suit challenging the Order and Notice, asserting that they violate

the Refugee Act, 8 U.S.C. § 1522 (the Refugee Act, or the Act), principles of federalism, and the Administrative Procedure Act, 5 U.S.C. § 706(2). The district court issued a preliminary injunction prohibiting enforcement of the Order and Notice, and the government filed this interlocutory appeal.

Upon our review, we conclude that the plaintiffs have demonstrated that they are likely to succeed on their claim that the Order and Notice violate the carefully crafted scheme for resettling refugees that Congress established in the Refugee Act. We also conclude that the record supports the district court's award of preliminary injunctive relief under the remaining factors of *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008) (the *Winter* factors). Accordingly, we hold that the district court did not abuse its discretion in granting the preliminary injunction, and we affirm the district court's judgment.

I.

In 1980, Congress passed the Refugee Act as an amendment to the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*. (the INA). *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (current version codified at 8 U.S.C. § 1522). The Act establishes the refugee resettlement program…

Prospective refugees seeking resettlement in the United States must obtain a determination of their refugee status before entering the country. 8 U.S.C. § 1101(a)(42). Upon approval, refugees are sponsored by a private, non-profit resettlement agency, also referred to as a voluntary agency. § 1522(b)(1)(A). …

The Refugee Act includes detailed provisions defining the relationship of the federal government, the resettlement agencies, the states, and the localities. Primarily at issue in this case is the Act's requirement that the federal government "consult regularly" with the other interested parties regarding the "sponsorship process and the [federal government's] intended distribution of refugees" around the country. § 1522(a)(2)(A). The Act requires that the federal government consult with these parties to develop policies governing the refugee resettlement program. …

Before the issuance of Executive Order 13,888, the federal government fulfilled its obligation to consult with states and localities by engaging in regular outreach to state and local governments and attempting to address any concerns. This outreach included officials from the Department of State and the Department of Health and Human Services traveling to those jurisdictions to evaluate state and local concerns, in order to develop a comprehensive, nationwide plan for placing refugees throughout the country. The federal government addressed concerns raised by states or localities subject to the understanding that the states and localities could not reject resettlement of refugees in their jurisdictions. The resettlement agencies, in turn, conducted local refugee forums in which state and local government officials and community stakeholders participated in planning for refugee resettlement. The resettlement agencies reported the results of their outreach efforts to the federal government.

In September 2019, the provisions governing these procedures changed when the President issued Executive Order 13,888. …

The Order directed that the Secretary of State and the Secretary of Health and Human Services create a process by which the consent of state and local governments "is taken into account to the maximum extent consistent with law." *Id.* § 2(b). Under that process, if "*either*" a state or a locality does not consent, refugees will not be resettled within the non-consenting jurisdiction 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. *Id.* (emphasis added).

To implement the Order, the Department of State issued a "FY 2020 Notice of Funding Opportunity for Reception and Placement Program" in November 2019 (the Notice). …

Shortly after the Notice was issued, the plaintiffs, three resettlement agencies, filed suit against the Secretaries of State, Health and Human Services, and Homeland Security, as well as the President (collectively, the government) in federal district court in Maryland.

* * * *

The complaint contains three claims: (1) that the Order and its implementation violate the Refugee Act, 8 U.S.C. § 1522, because refugee resettlement under the Act "may not be conditioned on either the state or the local government's approval, much less both"; (2) that the Secretaries' implementation of the Order violates the Administrative Procedure Act (APA), 5 U.S.C. § 706(2); and (3) that the Order and its implementation are unconstitutional in violation of principles of federalism.

The district court granted the plaintiffs' motion for a preliminary injunction. The court concluded that the consent requirement amounted to a veto given to states and localities over refugee resettlement within their borders. The court therefore held that the consent requirement was contrary to the Refugee Act's language, purpose, and history of imposing a uniform process for resettling refugees nationwide. The court also found that the plaintiffs would suffer irreparable harm in the absence of a preliminary injunction, citing the extreme difficulties that the resettlement agencies would face. The court accordingly issued an order preliminarily enjoining nationwide the implementation of the Order and Notice. The government now appeals.

II.

We review the district court's issuance of a preliminary injunction for abuse of discretion. *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013). A party seeking a preliminary injunction must show that: (1) the party is likely to succeed on the merits of the claim; (2) the party is likely to suffer irreparable harm in the absence of an injunction; (3) the balance of hardships weighs in the party's favor; and (4) the injunction serves the public interest. *Id.* at 320 (citing *Winter*, 555 U.S. at 20). We will address each factor in turn.

* * * *

We first review the Refugee Act's text and structure, giving the statutory terms their ordinary meaning. …

As noted above, this appeal centers on the question whether the opt-in system established by the Order and implemented by the Notice conflicts with the Act's requirement that the federal government "consult" with resettlement agencies, states, and localities (the consultation requirement). The Act includes several provisions that collectively comprise the consultation requirement. First, the Act includes an express statement of Congress' intent that in providing refugee resettlement assistance, resettlement agency "activities should be conducted in *close cooperation and advance consultation with State and local governments*." 8 U.S.C. § 1522(a)(1)(B)(iii) (emphasis added). The Act also requires that the Secretary "*consult regularly* (not less often than quarterly) with State and local governments and private nonprofit voluntary

agencies concerning the sponsorship process and the intended distribution of refugees among the States and localities before their placement in those states and localities." § 1522(a)(2)(A) (emphasis added).

The Act further directs that the Secretary "develop and implement, *in consultation with representatives of voluntary agencies and State and local governments*, policies and strategies for the placement and resettlement of refugees within the United States." § 1522(a)(2)(B) (emphasis added). With respect to administration of the resettlement program, the Act mandates that:

* * * *

In addition to the consultation requirement, the Refugee Act requires that policies and strategies adopted by the Secretary "take into account" enumerated factors bearing on the likelihood of successful resettlement of refugees in a particular jurisdiction. …

* * * *

The terms of the Order, however, do not require states and localities, before withholding consent, to engage in *any* deliberation with other interested parties. Thus, on its face, the consent requirement in the Order is inconsistent with the ordinary meaning of the term "consultation" as expressed in the Act.

Moreover, our interpretation of the terms "consult" and "consultation" is consistent with the broader context of the Refugee Act, which describes in detail the nature of the relationship of the federal government, the resettlement agencies, and the states and localities in making initial resettlement decisions. Enacted by Congress in 1980, the Act was designed "to provide *comprehensive and uniform provisions* for the effective resettlement and absorption" of refugees. Pub. L. No. 96-212, § 101, 94 Stat. 102 (emphasis added). The Act thus places ultimate decision-making authority in the Secretary, by empowering her to make refugee resettlement determinations based on her assessment of the resources available to refugees in jurisdictions across the country. *See* 8 U.S.C. § 1522(a)(3) ("[T]he [Secretary] shall make a periodic assessment, based on refugee population and other relevant factors, of the relative needs of refugees for assistance and services under this subchapter and the resources available to meet such needs."); § 1522(a)(2)(B) ("*The [Secretary] shall develop and implement*, [in consultation with resettlement agencies, states, and localities], policies and strategies for the placement and resettlement of refugees within the United States." (emphasis added)). The consultation requirement enables the Secretary to discern whether states and localities can resettle refugees successfully according to the factors enumerated in the statute. *See* § 1522(a)(2)(C)(iii) (listing factors that the Secretary's policies must "take into account").

In contrast, the Order's opt-in procedure shifts the decision-making center of gravity from the federal government to states and localities. Without the Act's required dialogue *before* jurisdictions grant or withhold consent, the Secretary cannot timely evaluate what resources states and localities could devote to refugee resettlement or whether a particular jurisdiction might be suitable for resettlement. Thus, the Order's consent requirement does not implement, but effectively overrides, the Act's directive that resettlement decisions be made by the Secretary based on an exchange of information among all interested parties.

Nor does the Order require that states and localities base their consent decisions on the resettlement criteria specified in the Refugee Act, namely, (1) the population of refugees already

in the area, (2) the availability of employment, housing, and other resources in the area, (3) the likelihood that refugees placed in the area will become self-sufficient, and (4) the likelihood of secondary migration to and from the jurisdiction in question (the statutory criteria, or the enumerated factors). § 1522(a)(2)(C)(iii). To the contrary, states and localities may withhold consent for any reason or for no reason at all, and need not provide any explanation for their decision. Accordingly, by replacing the flexible consultation process with an opt-in system, the Order effectively supplants the statutory criteria that Congress chose to guide resettlement decisions made at the federal level.

As discussed below, this provision does nothing more than impose on resettlement agencies the obligation to lobby local and state governments to obtain their consent.

As a result, a locality could be well-suited to receive refugees under the statutory criteria, but nevertheless decline to opt-in to the resettlement program. Such a decision withholding consent would be entirely divorced from the resettlement criteria set forth by Congress in the statute. Conversely, a local jurisdiction could determine that it was able to accept refugees according to the statutory factors yet be impeded from receiving refugees if the state decided to withhold its consent. Again, the state's decision in contravention of the locality's wishes could be based on reasons entirely unrelated to the criteria set forth in the Act. This license to ignore the statutory criteria plainly is at odds with the careful sequencing process established by Congress.

* * * *

On February 4, 2021, President Biden issued Executive Order 14013 on "Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration." Section 2 of the order revokes Executive Order 13815 of October 24, 2017 (Resuming the United States Refugee Admissions Program With Enhanced Vetting Capabilities); Executive Order 13888 of September 26, 2019 (Enhancing State and Local Involvement in Refugee Resettlement); and the Presidential Memorandum of March 6, 2017 (Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry Into the United States, and Increasing Transparency Among Departments and Agencies of the Federal Government and for the American People).

In Presidential Determination No. 2021–08 of June 11, 2021 ("Unexpected Urgent Refugee and Migration Needs"), the President determined, pursuant to section 2(c)(1) of the Migration and Refugee Assistance Act of 1962 (22 U.S.C. 2601(c)(1)) ("MRAA"), that it is important to the national interest to furnish assistance under the MRAA in an amount not to exceed $46 million from the United States Emergency Refugee and Migration Assistance Fund for the purpose of meeting unexpected urgent refugee and migration needs related to the humanitarian needs of vulnerable refugees and migrants in Central America and third countries in the region. 86 Fed. Reg. 32,631 (June 22, 2021). Presidential Determination No. 2021-09 of July 23, 2021 supersedes the June 11, 2021 determination of the same name and subject, authorizing an amount of up to $100 million from the United States Emergency Refugee and Migration Assistance Fund for the purpose of meeting unexpected urgent refugee and migration needs, victims of conflict, and other persons at risk as a result of the situation in Afghanistan,

including applicants for Special Immigrant Visas ("SIVs"). 86 Fed. Reg. 40,915 (July 29, 2021).

4. Migration

See Chapter 7.D.2 for discussion of U.S. participation in thematic hearings regarding migration at the Inter-American Commission on Human Rights ("IACHR").

a. Executive Order 14010

President Biden issued a new executive order on migration on February 2, 2021, Executive Order 14010, entitled, "Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border." 86 Fed. Reg. 8267 (Feb. 5, 2020). Section 3 of the order ("*Expansion of Lawful Pathways for Protection and Opportunity in the United States")* includes a direction to the Departments of State and Homeland Security to consider *"*taking all appropriate actions to reverse the 2017 decision rescinding the Central American Minors (CAM) parole policy and terminating the CAM Parole Program." Section 4 relates to "*Restoring and Enhancing Asylum Processing at the Border.*"

b. Central American Minors ("CAM")

On March 10, 2021, the State Department announced in a media note, available at https://www.state.gov/restarting-the-central-american-minors-program/, that the United States was resuming the Central American Minors ("CAM") program. The media note explains:

> As directed by President Biden, the Departments of State and Homeland Security (DHS) have initiated the first phase of reinstituting and improving the CAM program to reunite qualified children from El Salvador, Guatemala, and Honduras with their parent or parents who are lawfully present in the United States. This program provides a safe, legal, and orderly alternative to the risks incurred in the attempt to migrate to the United States irregularly. The U.S. southern border remains closed to irregular migration, and we reiterate our warning that people not attempt that dangerous journey.
>
> The State Department's Bureau of Population, Refugees, and Migration (PRM) is working closely with DHS's U.S. Citizenship and Immigration Services (USCIS) to reopen the program in two phases: the first will process eligible applications that were closed when the program was terminated in 2017, and the second will begin to accept new applications with updated guidance to follow.

On June 15, 2021, Secretary Blinken and U.S. Department of Homeland Security Secretary Mayorkas issued a joint statement about the expansion of the Central American Minors ("CAM") program, which provides certain Guatemalan, Honduran, or Salvadoran children access to the U.S. Refugee Admissions Program. See June 15, 2021 State Department press briefing, available at https://www.state.gov/briefings/department-press-briefing-june-15-2021/. The joint statement was issued as a State Department media note, available at https://www.state.gov/joint-statement-by-the-u-s-department-of-state-and-u-s-department-of-homeland-security-on-the-expansion-of-access-to-the-central-american-minors-program/. The joint statement includes the following.

> The Department of Homeland Security's U.S. Citizenship and Immigration Services and Department of State's Bureau of Population, Refugees, and Migration have been making progress toward reinstituting and improving the Central American Minors (CAM) program since our agencies launched the first phase of its reopening on March 10. As part of this focus on a responsible, phased approach, we continue to reopen cases that were closed when CAM was terminated in 2018. This is just one component of the President's multi-pronged approach to address the challenges of irregular migration throughout North and Central America.
>
> Today, we are proud to announce the second phase of the CAM reopening, which will expand access to the program to a greater number of qualifying individuals. Eligibility to petition will now be extended to include legal guardians (in addition to parents) who are in the United States pursuant to any of the following qualifying categories: lawful permanent residence; temporary protected status; parole; deferred action; deferred enforced departure; or withholding of removal. In addition, this expansion of eligibility will now include certain U.S.-based parents or legal guardians who have a pending asylum application or a pending U visa petition filed before May 15, 2021. It will allow them to petition for access to the U.S. Refugee Admissions Program on behalf of their children who are nationals of El Salvador, Guatemala, or Honduras for potential resettlement in the United States. These new changes will dramatically expand access to the CAM program.
>
> We are firmly committed to welcoming people to the United States with humanity and respect, as well as providing a legal alternative to irregular migration. We are delivering on our promise to promote safe, orderly, and humane migration from Central America through this expansion of legal pathways to seek humanitarian protection in the United States.

c. Comprehensive Approach to Migration

On July 29, 2021, the State Department issued a press statement, available at https://www.state.gov/contributing-to-the-united-states-comprehensive-approach-to-migration/, on the launch of the U.S. comprehensive approach to migration from

Central America, including $4 billion in funding to improve people's lives in the region. The U.S. Government's complete "Root Causes Strategy" is available at https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf .

The comprehensive strategy also includes:

> a comprehensive approach to humanely manage migration and strengthen asylum processes throughout North and Central America. This collaborative focus will encourage greater responsibility sharing among regional governments and a broader range of international donors. It will also expand access to legal pathways to protection, family reunification, and temporary labor opportunities. The Collaborative Migration Management Strategy is the first U.S. government strategy to focus on strengthening cooperative efforts across North and Central America to humanely manage migration.

The U.S. Government's complete Collaborative Migration Management Strategy is available here: https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf .

d. Global Compact on Migration

In December 2021, the United States issued a new National Statement on the Global Compact on Migration. The National Statement is available at https://www.state.gov/wp-content/uploads/2021/12/GCM.pdf. The Global Compact on Migration ("GCM") is a negotiated outcome document that was adopted at an intergovernmental conference in November 2018, without U.S. participation. The Biden Administration reviewed the previous U.S. position and endorsed the vision of the GCM in the new National Statement.

5. Afghanistan

On August 2, 2021, Secretary Blinken delivered remarks to the press on the announcement of a U.S. Refugee Program Priority 2 ("P-2") designation for Afghan nationals. Secretary Blinken's remarks are excerpted below and available at https://www.state.gov/secretary-antony-j-blinken-remarks-to-the-press-on-the-announcement-of-a-u-s-refugee-admissions-program-priority-2-designation-for-afghan-nationals/.

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* * * *

Afghans who worked with the United States or the International Security Assistance Force at some point since 2001 are facing acute fears of persecution or retribution that will likely grow as coalition forces leave the country.

We have a special responsibility to these individuals.

They stood with us.

We will stand with them.

Over the past 13 years, the State Department has issued more than 73,000 Special Immigrant Visas to eligible Afghans who have helped the United States and also to their families.

Last year alone, we issued nearly 8,000 of those visas.

Now we have accelerated and expanded the program. Congress recently increased the cap by another 8,000 visas.

The first flight of Operation Allies Refuge arrived in the United States on Friday, the second flight arrived early this morning, together transporting around 400 people, and those flights will continue.

We're now focused on relocating a group of more than 1,000 applicants and their families who have nearly completed processing – around 4,000 people in total.

Additionally, we're pursuing third-country agreements, so eligible Afghans can be quickly relocated to wait safely in another country while we finish elements of this rigorous vetting process.

Getting to this point was not a simple matter.

Earlier today, I visited the interagency task force located here at the State Department responsible for executing this 24/7 operation. I conveyed to them how grateful we are that they're giving their all to this tremendously important and also meaningful mission.

Now, as you know, the Special Immigrant Visa Program is defined carefully by statute.

And we know that there are Afghans who don't qualify but who helped us and deserve our help.

Some may not have the qualifying employment for the special immigrant visa – for example, they worked for a project funded by the U.S. Government, but not for the government itself.

Some may not have met the minimum time-in-service requirement – for example, employees who began working for us more recently.

And some were employed by American media organizations or NGOs, doing vital work to support democratic progress in Afghanistan.

So today, the State Department is announcing a new resettlement program for Afghans who assisted the United States but who do not qualify for Special Immigrant Visas.

We've created a Priority-2, or P-2, designation, granting access to the U.S. Refugee Admissions Program for many of these Afghans and their family members.

A great deal of hard work has gone into this already, but even more lies ahead.

There is a significant diplomatic, logistical, and bureaucratic challenge.

We take our responsibility to our Afghan partners deeply seriously, and we know the American people do as well.

We have a long history in the United States of welcoming refugees into our country.

And helping them resettle into new homes and new communities is the work of a huge network of state and local governments, NGOs, faith-based groups, advocacy groups, tens of thousands of volunteers.

* * * *

So with regard to Afghans who may fear persecution, may fear violence, and who may not qualify either for the Special Immigrant Visa Program or what I just announced today, the P-2 program, they can also avail themselves of their right to seek refugee status in the United States and apply for that. Now, to be clear, you have to do that from outside of Afghanistan, from a third country. But they can go to the UNHCR, for example, and seek refugee status.

We've seen the reports of atrocities being committed by the Taliban in various places where they are on the offensive, and these reports are deeply disturbing and totally unacceptable. And I think it speaks to a larger issue, which is this: The Taliban has repeatedly said that they seek in the future a number of things – international recognition, international support; they want their leaders to be able to travel freely around the world; they would like sanctions lifted on them. And none of those things are going to be possible if the Taliban seeks to take the country by force and commits the kind of atrocities that have been reported. An Afghanistan, as I've said before, that does not respect the basic rights of its people, that does not have a representative and inclusive government, that does not abide by the main gains of the last 20 years is an Afghanistan that will be a pariah state, certainly for the United States, and I believe for the international community.

* * * *

On August 2, 2021, the State Department held a special briefing with senior officials on the P-2 designation for Afghan nationals. The briefing transcript is available at https://www.state.gov/briefing-with-senior-state-department-officials-on-the-u-s-refugee-admissions-program-priority-2-p-2-designation-for-afghan-nationals/ and excerpted below.

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* * * *

…[T]oday, the State Department is announcing a Priority 2, or as we call it, a P-2 designation granting U.S. Refugee Admissions Program access to certain Afghan nationals and their eligible family members.

The U.S. objective remains a peaceful and secure Afghanistan. As part of the President's efforts to assist Afghans who have supported the U.S. Government's efforts in Afghanistan, we are working to provide certain Afghans, including those who worked with and for the United States, the opportunity for refugee resettlement in the United States. Cases referred to this program will be processed in third countries, once the applicants are outside of Afghanistan.

Those eligible for referral include:

One: U.S. Government, including U.S. Forces Afghanistan employees and contractors, including interpreters and translators, who do not have the minimum time in service to qualify for a Special Immigrant Visa or SIV.

Second: International Security Assistance Force employees, including interpreters and translators, who do not have the minimum time in service for an SIV.

Resolute Support employees and contractors, including interpreters and translators, who do not have the minimum time in service for an SIV.

Four: Afghans who work or worked for a U.S. Government-funded program or project in Afghanistan supported through a U.S. Government grant or cooperative agreement.

And lastly, Afghans who are or were employed in Afghanistan by a U.S.-based nongovernmental or media organization that does not require U.S. Government funding.

Many thousands of Afghans and their immediate family members are at risk due to these U.S. affiliations and are not eligible for a Special Immigrant Visa because either they did not have qualifying employment, or they have not met the time-in-service requirement to become eligible; however, they may be eligible for a P-2 referral, and thus, to the U.S. Refugee Admissions Program.

As noted, this P-2 designation also expands eligibility to Afghans who are or were employed in Afghanistan by a U.S.-based media organization or nongovernmental organization. Referral information for how these U.S.-based media organizations or NGOs can be found at WRAPSNET.org. …

Once we begin processing these cases, we will work with our resettlement partners in the United States to welcome these Afghan refugees to their new communities. Refugee resettlement would not be possible without the support of state and local governments, our resettlement partners and affiliates, nongovernmental organizations, faith-based organizations, advocacy groups, and the tens of thousands of volunteers across the United States who participate in this program.

Similar to the Afghans who are eligible for or have received a Special Immigrant Visa, the P-2 designation expands the United States commitment to honor those who served alongside our military and diplomats on the ground. Their support was essential to our operations. Our continued support for and humanitarian assistance to Afghanistan includes offering this unique form of protection to those who are particularly vulnerable as a result of their affiliation with the United States, and maintains our promise to show our gratitude for their extraordinary service.

* * * *

… There is an existing program as part of the U.S. Refugee Resettlement Program that is known as our Priority 1, or P-1, program …. There are two ways in which somebody can access the U.S. Refugee Resettlement Program through its – the P-1 referral. One is if they are well-known to our embassy; our embassy can refer them directly. The other option is for anyone who is fleeing the country and outside the country. They can present themselves to UNHCR, the UN High Commissioner for Refugees, for referral to the U.S. Refugee Admissions Program. So there are options for other Afghans at risk through the P-1 referral process.

I think I neglected to answer a question about family members. I will say the whole family doesn't have to leave all at once, but they – the family needs to be outside the country for us to process them. …

* * * *

…[W]e've already been in discussions with neighboring countries as well as UNHCR to be prepared for potential outflows. So in a place like Pakistan, it'll be important that their borders remain open. Obviously, if people go north or if they go via Iran to Turkey – we've already seen

some arrivals in Turkey – that people have an opportunity both to enter the country as well as to register with either the government or with UNHCR.

* * * *

On October 22, 2021, the President issued Presidential Determination No. 2022-03, "Unexpected Urgent Refugee and Migration Needs." 86 Fed. Reg. 60,749 (Nov. 4, 2021). The order includes the following:

> By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 2(c)(1) of the Migration and Refugee Assistance Act of 1962 (22 U.S.C. 2601(c)(1)) (MRAA), I hereby determine, pursuant to section 2(c)(1) of the MRAA, that it is important to the national interest to furnish assistance under the MRAA in an amount not to exceed $976.1 million from the United States Emergency Refugee and Migration Assistance Fund for the purpose of meeting unexpected urgent refugee and migration needs to support Operation Allies Welcome and related efforts by the Department of State, including additional relocations of individuals at risk as a result of the situation in Afghanistan and related expenses. Such assistance may be provided on a bilateral or multilateral basis as appropriate, including through contributions to international organizations and through funding to other nongovernmental organizations, governments, and United States departments and agencies.

6. Migration Protection Protocols ("MPP")

As discussed in *Digest 2019* at 37-38 and *Digest 2018* at 46-47, the Migrant Protection Protocols ("MPP"), also known as the "remain in Mexico" policy, directed (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.

In *Wolf v. Innovation Law Lab*, No. 19-1212, the Supreme Court granted the petition for certiorari on October 19, 2020. On February 3, 2021, the Supreme Court granted the U.S. government's motion (consented to by respondents) to hold further briefing in abeyance and remove the case from the February 2021 argument calendar due to the new administration's decision to suspend new enrollments in the MPP, pending further review.

On February 18, 2021, the State Department issued a fact sheet regarding the draw down of the MPP program, available at https://www.state.gov/public-health-and-the-draw-down-of-the-migrant-protection-protocols-program/. The fact sheet explains the process for conducting medical screening and protecting public health with regard to migrant populations prior to their arrival at U.S. ports of entry due to the COVID pandemic (such as wearing of face masks, testing, and the like).

On June 1, 2021, the Secretary of the Department of Homeland Security ("DHS") determined that MPP should be terminated. Information on the termination is available on the DHS website at https://www.dhs.gov/sites/default/files/2022-02/21_0601_termination_of_mpp_program.pdf. The States of Texas and Missouri brought suit in U.S. district court in the Northern District of Texas, arguing that the termination violates the Administrative Procedures Act ("APA") and the Immigration and Nationality Act ("INA"). On August 13, 2021, the court issued a nationwide permanent injunction requiring DHS to implement MPP in good faith. *See Texas v. Biden*, No. 2:21-cv-067. DHS appealed to the Fifth Circuit Court of Appeals, which affirmed the district court ruling on December 21, 2021. *See Biden v. Texas*, No. 21-10806. The Supreme Court granted *certiorari* and heard oral argument on April 26, 2022.

While pursuing appeal of the district court order, DHS engaged in good faith negotiations with the Government of Mexico regarding the implementation of the order, which culminated in the reimplementation of MPP in December 2021. Policy guidance on the reimplementation is available on the DHS website at https://www.dhs.gov/sites/default/files/2022-01/21_1202_plcy_mpp-policy-guidance_508.pdf. Concurrently, the DHS Secretary conducted an extensive and comprehensive review of MPP and issued a new memorandum terminating MPP on October 29, 2021. The memorandum is available at https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-memo.pdf. The new memorandum clarifies that DHS would continue to comply in good faith with the Texas court order while it remains in effect.

7. Eligibility for Asylum

As discussed in *Digest 2020* at 86-93 and *Digest 2019* at 38-39, Department of Homeland Security ("DHS") and Department of Justice ("DOJ") rules restricting eligibility for asylum in the United States were the subject of multiple court challenges and orders invalidating or enjoining the rules. See *Capital Area Immigrants' Rights Coalition ("CAIR") v. Trump*, 471 F. Supp. 3d 25, 45–57 (D.D.C. 2020) and *East Bay Sanctuary Covenant*, 964 F.3d. 832 (9th Cir. 2020). DOJ rescinded and canceled policy memoranda providing guidelines regarding the asylum bars for certain individuals entering the United States at the southern border, consistent with the courts' vacatur and injunction, as well as Executive Order 14010 (discussed *supra*). The Ninth Circuit issued a further opinion in *East Bay Sanctuary Covenant*, excerpted below. 993 F.3d. 640 (9th Cir. 2021).

* * * *

Forty years ago, Congress recognized that refugees fleeing imminent persecution do not have the luxury of choosing their escape route into the United States. It mandated equity in its treatment of all refugees, however they arrived.

This principle is embedded in the Refugee Act of 1980, which established an asylum procedure available to any migrant, "irrespective of such alien's status," and irrespective of whether the migrant arrived "at a land border or port of entry." Pub. L. No. 96-212, § 208(a), 94 Stat. 102, 105 (1980). Today's Immigration and Nationality Act ("INA") preserves that principle. It states that a migrant who arrives in the United States—"whether or not at a designated port of arrival"—may apply for asylum. *See* 8 U.S.C. § 1158(a).

In November 2018, the Departments of Justice and Homeland Security jointly adopted an interim final rule ("the Rule") which, coupled with a presidential proclamation issued the same day ("the Proclamation"), strips asylum eligibility from every migrant who crosses into the United States between designated ports of entry. In this appeal, we consider whether, among other matters, the Rule unlawfully conflicts with the text and congressional purpose of the INA. We conclude that it does.

I.

The Rule announces a new bar to asylum eligibility. It makes migrants who enter the United States in violation of "a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico" categorically ineligible for asylum. ... Migrants who are ineligible for asylum under the Rule will also automatically receive negative credible-fear determinations in expedited-removal proceedings. ... Typically, a migrant in expedited-removal proceedings who demonstrates a "credible fear" of persecution must be allowed to present her asylum claim before an immigration judge. *See* 8 U.S.C. § 1225(b)(1)(A)(ii), (B)(v). A migrant who enters the United States in contravention of a proclamation will instead need to demonstrate a "reasonable fear" of persecution or torture—which is more difficult than establishing a credible fear of persecution—to obtain other forms of relief. *See* 83 Fed. Reg. at 55,936, 55,952; *see also* 8 C.F.R. § 208.31(c); 8 U.S.C. § 1225(b)(1)(B)(v).

The same day the Departments of Justice ("DHS") and Homeland Security ("DHS") adopted the Rule, President Trump issued the Proclamation. The Proclamation suspends the entry of all migrants along the southern border of the United States for ninety days, except for any migrant who "enters the United States at a port of entry and properly presents for inspection." *See* Presidential Proclamation No. 9,822, Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661, 57,663 (Nov. 9, 2018).

Individually, the Rule and Proclamation have little effect. The Proclamation does not have the force of law, and the Rule only effectuates proclamations. But together, the Rule and Proclamation make asylum entirely unavailable to migrants who enter the country between ports of entry. The magnitude of the Rule's effect is staggering: its most direct consequence falls on "the more than approximately 70,000 aliens a year (as of FY 2018) estimated to enter between the ports of entry [who] then assert a credible fear in expedited-removal proceedings." 83 Fed. Reg. at 55,948. These migrants would typically proceed to an asylum hearing before an immigration judge but will now be unable to do so because they have entered the country at a place other than a port of entry.

The day the Proclamation and Rule issued, four legal services organizations that represent current and future asylum-seekers sued to prevent enforcement of the Rule. East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and Central American Resource Center

of Los Angeles (collectively, "the Organizations") argued that the Rule was likely unlawful because it was issued without public notice and comment or complying with the thirty-day grace period required by the Administrative Procedure Act ("APA"), *see* 5 U.S.C. § 553(b)–(d). The Organizations also argued that the Rule conflicts with the plain text of the INA and is arbitrary and capricious because it constitutes a severe departure from the Board of Immigration Appeals's and the Ninth Circuit's interpretation of asylum practices in the United States.

The district court agreed that the Rule "irreconcilably conflicts with the INA and the expressed intent of Congress" and entered a temporary restraining order enjoining the Rule's enforcement and ordering the government "to return to the pre-Rule practices for processing asylum applications." *See E. Bay Sanctuary Covenant v. Trump* (*EBSC I*), 349 F. Supp. 3d 838, 844, 868–69 (N.D. Cal. 2018). Eight days after the court's order, the government filed an appeal and an emergency motion in the district court to stay the temporary restraining order pending appeal. The court denied the stay motion three days later.

The following day, the government sought an immediate stay in our court of the district court's order pending appeal. In a lengthy published order, a motions panel of this court denied the government's request to stay enforcement of the court's order. *See E. Bay Sanctuary Covenant v. Trump* (*EBSC II*), 932 F.3d 742, 755, 762 (9th Cir. 2018). …

While the government's stay application was pending before the Supreme Court, the Organizations filed a motion for a preliminary injunction in the district court. The arguments presented during the second round of litigation were "nearly identical" to those made during the first. *See E. Bay Sanctuary Covenant v. Trump* (*EBSC III*), 354 F. Supp. 3d 1094, 1102 (N.D. Cal. 2018). Relying heavily on the motions panel's published order, the district court again issued an injunction barring enforcement of the Rule. *See id.* at 1121.

The government again appeals, arguing that the district court erred when it entered the injunction or that the injunction should at least be narrowed. We consolidated the government's appeal from the temporary restraining order with the appeal from the preliminary injunction. For the reasons explained below, we agree with the district court that the Rule is inconsistent with the INA, and we affirm the district court's orders granting preliminary injunctive relief.

* * * *

We turn to the merits of the preliminary injunction entered by the district court. …

* * * *

A.

The likelihood of the Organizations' success on the merits depends on the substantive and procedural validity of the Rule. *See EBSC III*, 354 F. Supp. 3d at 1111–12. …

1.

The APA requires that we "hold unlawful and set aside agency action, findings, and conclusions found to be...an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Presidential action is not ordinarily "agency action," and is typically unreviewable under the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 796, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992). But the Proclamation and Rule together create an "operative rule of decision" for asylum eligibility that is reviewable by this court. ...

To determine whether the Rule is "not in accordance with law," we apply the framework established in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). …

a.

We consider, then, whether the Rule conflicts with Congress's intent. The only section of the INA implicated by the Rule is section 1158 ("Asylum"). That section begins by stating that an undocumented migrant may apply for asylum when she is "physically present in the United States" or "arrives in the United States (whether or not at a designated port of arrival...)[.]" 8 U.S.C. § 1158(a)(1). DOJ and DHS adopted the Rule under section 1158(b)(2)(C)'s grant of authority to the Attorney General to "establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum[.]"

We agree with the district court that the Rule is "not in accordance with law." 5 U.S.C. § 706(2)(A). Section 1158(a) provides that migrants arriving anywhere along the United States's borders may apply for asylum. The Rule requires migrants to enter the United States at ports of entry to preserve their eligibility for asylum. It is effectively a categorical ban on migrants who use a method of entry explicitly authorized by Congress in section 1158(a). As the district court stated, "[i]t would be hard to imagine a more direct conflict" than the one presented here. *EBSC III*, 354 F. Supp. 3d at 1112.

The government argues that the structure of section 1158 mandates a different result. Critical to the government's argument is that section 1158 splits asylum applications (§ 1158(a)) and eligibility (§ 1158(b)) into two different subsections; therefore, the government explains, Congress intended to allow DOJ to promulgate limitations on asylum eligibility without regard to the procedures and authorizations governing asylum applications. The text in section 1158(a) requires only that migrants arriving between ports of entry be permitted to "apply for *asylum*," and the Rule does not prevent migrants from submitting futile asylum applications. (emphasis added).

This argument is unconvincing. We avoid absurd results when interpreting statutes. *Rowland v. Cal. Men's Colony, Unit II Men's Adv. Council*, 506 U.S. 194, 200–01, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993). Explicitly authorizing a refugee to file an asylum application *because* he arrived between ports of entry and then summarily denying the application for the same reason borders on absurdity. The consequences of denial at the application or eligibility stage are, to a refugee, the same. *See EBSC II*, 932 F.3d at 771. Had Congress intended to allow DOJ and DHS to override this provision, it could have said so in its delegation of authority to the Attorney General or in the statutory provisions governing asylum applications. And Congress signaled its desire that any eligibility limitations be consistent with application requirements; limitations promulgated under the eligibility subsection of the statute must be "consistent with this *section*"—meaning the entirety of section 1158—not just consistent with this *subsection*.

The other categorical bars to asylum in section 1158(b) of the INA do not meaningfully inform our reading of the statute and the Rule. *See EBSC II*, 932 F.3d at 771 n.12. The INA contains various provisions making ineligible asylum applicants who committed a serious, nonpolitical crime outside the United States prior to arrival (8 U.S.C. § 1158(b)(2)(A)(iii)), assisted or otherwise participated in the persecution of another person (8 U.S.C. § 1158(b)(2)(A(i)), or were firmly resettled in another country prior to arriving in the United States (8 U.S.C. § 1158(b)(2)(A)(vi)), among other things. The government suggests that the existence of these eligibility bars in the INA demonstrates that Congress intended certain categories of migrants to be permitted to apply for asylum even though they are categorically

ineligible. A migrant who was firmly resettled in another country, for example, is still free to complete an asylum application, even though she will be barred from seeking asylum under section 1158(b)(2)(A)(vi).

But—unlike the eligibility bar effected by the Rule—the statutory asylum bars in the INA do not separately conflict with explicit text in section 1158(a). There is no provision in section 1158(a), for example, that affirmatively requires that migrants who were firmly resettled in another country be permitted to apply for asylum. The Rule creates the only bar to eligibility under section 1158(b) that directly conflicts with language in section 1158(a). The statutory eligibility bars noted above do not suggest Congress intended that migrants who are subject to them be permitted to apply for asylum. *See also EBSC II*, 932 F.3d at 772 (" '[t]o say that one may *apply* for something that one has no right to *receive* is to render the right to apply a dead letter.' ") (quoting *EBSC I*, 349 F. Supp. 3d at 857). The district court correctly concluded that the Rule is substantively invalid because it conflicts with the plain congressional intent instilled in 8 U.S.C. § 1158(a), and is therefore "not in accordance with law," 5 U.S.C. § 706(2)(A).

b.

But even if the text of section 1158(a) were ambiguous, the Rule fails at the second step of *Chevron* because it is an arbitrary and capricious interpretation of that statutory provision. …

The Board of Immigration Appeals ("BIA") and this court have long recognized that a refugee's method of entering the country is a discretionary factor in determining whether the migrant should be granted humanitarian relief. *EBSC II*, 932 F.3d at 772. More than thirty years ago, the BIA stated that "an alien's manner of entry or attempted entry is a proper and relevant discretionary factor" to adjudicating asylum applications under section 1158(a), but "it should not be considered in such a way that the practical effect is to deny relief in virtually all cases." …

Especially where a migrant may be eligible only for asylum and cannot establish the more stringent criteria for withholding-of-removal, the discretionary factors—including method of entry—should be "carefully evaluated in light of the unusually harsh consequences which may befall an alien[.]" …

We have supported the BIA's understanding of section 1158(a). The most vulnerable refugees are perhaps those fleeing across the border through the point physically closest to them. That a refugee crosses a land border instead of a port-of-entry says little about the ultimate merits of her asylum application; …

The Attorney General's interpretation of section 1158(a) is also unreasonable, as the district court discussed, in light of the United States's treaty obligations. *See EBSC III*, 354 F. Supp. 3d at 1112–13. The United States agreed to comply with Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees ("1951 Convention") and the 1967 United Nations Protocol Relating to the Status of Refugees ("1967 Protocol") in 1968. H.R. Rep. 96-781 (Conf. Rep.), at 19-20 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 160, 160–62 …. To streamline the United States's refugee procedures and implement the country's new treaty commitments, Congress passed the Refugee Act of 1980, which amended the INA and created the country's first codified rules governing asylum. S. Rep. No. 96-256, at 1 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 141–42, 144; H.R. Doc. No. 96-608, at 17–18 (1979); *see also* Negusie v. Holder, 555 U.S. 511, 535–36, 129 S.Ct. 1159, 173 L.Ed.2d 20 (2009).

As the United Nations High Commissioner of Refugees ("UNHCR") explains, the Rule runs afoul of three of these codified rules: the right to seek asylum, the prohibition against penalties for irregular entry, and the principle of non-refoulement embodied in Article 31(1) of the 1951 Convention. Neither the 1967 Protocol nor the 1951 Convention require countries to

accept refugees, but they do ensure that refugees at each signatory's borders have legal and political rights and protections. *See* Cong. Research Serv. S522-10, Review of U.S. Refugee Resettlement Programs and Policies 15–16 (1980).

The definition of "refugee" used in the 1951 Convention is "virtually identical" to the one adopted by Congress in the INA. Cardoza-Fonseca, 480 U.S. at 437, 107 S.Ct. 1207. Under both the INA and the 1951 Convention, refugees are all individuals who—because of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion"—are "unable," or, because of such fear, "unwilling to return" to their home countries. *See* 8 U.S.C. § 1101(a)(42); 1951 Convention, Art. 1(A)(2). Once individuals meet the statutory definition of a "refugee," they may be granted asylum under the INA. *See* 8 U.S.C. § 1158(b)(1)(A).

Both the INA and the 1951 Convention acknowledge that individuals may be stripped of their refugee status even when they meet the other eligibility criteria for asylum. The refugee provisions of the 1951 Convention "shall not apply" to "any person with respect to whom there are serious reasons for considering" that such a person has committed a crime against peace, a war crime, a crime against humanity, a non-political crime outside of the country of refuge, prior to their admission as a refugee, or has been "guilty of acts contrary to the purposes and principles of the United Nations." 1951 Convention, Art. 1(F)(a)–(c). The statutory bars for eligibility in the INA are similarly severe. Individuals who are otherwise refugees may not apply for asylum if the Attorney General determines that they "ordered, incited, assisted, or otherwise participated" in the persecution of another, based on a trait protected by the INA; "constitute[ ] a danger to the community of the United States"; committed a "serious nonpolitical crime" outside the country; are a "danger to the security" of the country; have engaged in terrorist activities; or were "firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(i)–(vi).

The exceptions listed in the 1951 Convention "require individualized assessments and 'must be [interpreted] restrictive[ly].'" Br. for UNHCR as Amicus Curiae at 14 n.6 (quoting Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 149 (Geneva, 1979)). So too the categorical bars on eligibility in the INA are interpreted with lenience toward migrants to avoid infringing on the commitments set forth in the 1951 Convention and 1967 Protocol. *See, e.g., Ali v. Ashcroft*, 394 F.3d 780, 790 (9th Cir. 2005) (A "narrow interpretation of the firm resettlement bar would limit asylum to refugees from nations contiguous to the United States or to those wealthy enough to afford to fly here in search of refuge. The international obligation our nation agreed to share when we enacted the Refugee Convention into law knows no such limits."); *Cardoza-Fonseca*, 480 U.S. at 449, 107 S.Ct. 1207.

The asylum bars in the INA and in the 1951 Convention appear to serve either the safety of those already in the United States or, in the case of the firm-resettlement bar, the safety of refugees. The Rule ensures neither. Even a broad interpretation of these eligibility bars does not naturally encompass a refugee's method of entry. Illegal entry is not ordinarily considered a "serious crime." *See* *Pena-Cabanillas v. United States*, 394 F.2d 785, 788 (9th Cir. 1968) (stating that the statute criminalizing entry into the United States "is not based on any common law crime, but is a regulatory statute enacted to assist in the control of unlawful immigration by aliens" and "is a typical mala prohibita offense"). Nor does a migrant's method of entry per se create a danger to the United States, serve as a useful proxy for terrorist activity, or suggest the persecution of another.

And the Rule surely does not suggest that the migrant has received protection in a third country. Many migrants enter between ports of entry out of necessity: they "cannot satisfy regular exit and entry requirements and have no choice but to cross into a safe country irregularly prior to making an asylum claim." Br. for UNHCR as Amicus Curiae at 15 (citing *Memorandum by the Secretary-General,* Ad Hoc Comm. on Statelessness, Status of Refugees & Stateless Persons, at Annex Art. 24, cmt. ¶ 2, U.N. Doc. E/AC.32/2 (Jan. 3, 1950); UNHCR Executive Committee Conclusion No. 58 (XL) ¶ (i) (Oct. 13, 1989)). This was well recognized when the Refugee Act of 1980 was drafted. *See* Pub. L. No. 96-212, § 208(a), 94 Stat. 102, 105 (1980). Prior to the passage of the Act, migrants who arrived at a port of entry were "given an opportunity to have their [asylum] applications heard in a hearing before an immigration judge," but refugees arriving "at a land border of the United States [we]re not given this right." *Refugee Act of 1979: Hearing on H.R. 2816 before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary*, 96th Cong. 190 (1979) (testimony of David Carliner, American Civil Liberties Union). In its attempt to streamline the country's refugee and asylum laws, Congress was urged to consider that "persons who seek any benefits under [the INA] should be entitled to a uniform procedure." *Id.* Congress heeded this consideration during the drafting of the Refugee Act, eventually describing it as "establish[ing] a more uniform basis for the provision of assistance to refugees, and [ ] other purposes." Refugee Act of 1980, …. The Rule defies this desire for uniformity and denies refuge to those crossing a land border. The effects of the Rule contravene the United States's commitments in the 1951 Convention.

Article 31(1) of the 1951 Convention also explains that signatories "shall not impose penalties" on account of refugees' "illegal entry or presence," 1951 Convention Art 31(1). Notwithstanding the government's interpretations otherwise, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed" on migrants who are found guilty of specified crimes, or for other reasons are barred from seeking asylum.…

And by categorically denying refugees an opportunity to seek asylum only because of their method of entry, the Rule is also in tension with the United States's commitment to avoid refouling individuals to countries where their lives are threatened. Article 31(1) of the 1951 Convention prohibits signatories from "expel[ling] or return[ing] ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened[.]" The INA's withholding-of-removal, 8 U.S.C. § 1231(b)(1), and Convention Against Torture ("CAT") protections, 8 C.F.R. § 1208.16–18, are not as great as those conferred by the INA's asylum provisions. The evidentiary standard that applicants must meet for either withholding-of-removal or CAT relief is higher than the evidentiary standard for asylum. …

Applicants for asylum instead must demonstrate only that they are "unable or unwilling" to return to their home countries "because of persecution or a well-founded fear of persecution[.]" 8 U.S.C. § 1101(a)(42)(A). "One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place"; it would only be "too apparent," for example, for a refugee to have a "well-founded fear of being persecuted" where "every tenth adult male person is either put to death or sent to some remote labor camp" in the applicant's home country. Cardoza-Fonseca, 480 U.S. at 431, 107 S.Ct. 1207 (citing 1 A. Grahl-Madsen, The Status of Refugees in International Law 180 (1966)). The Rule, then, risks the removal of individuals with meritorious asylum claims who cannot petition for withholding of removal or CAT relief. By doing so, it is inconsistent with our treaty commitment to non-refoulement.

The Rule is "arbitrary, capricious, or manifestly contrary to the statute," Chevron, 467 U.S. at 844, 104 S.Ct. 2778, both because it is contrary to plain congressional intent, and because it is an arbitrary and capricious interpretation of section 1158(a). …

2.

Because we conclude that the Rule is substantively invalid, we only briefly address the procedural arguments raised by the parties. The APA requires public notice and comment and a thirty-day grace period before a proposed rule takes effect. …

The Rule was issued without notice and comment or the grace period. The government argues that the Rule was properly issued because it falls under either the good-cause or the foreign-affairs exceptions to these procedural requirements.

a.

Proper invocation of the good-cause exception is "sensitive to the totality of the factors at play." …

In support of its reliance on the exception, the government now cites a *Washington Post* article …

A citation to this single article is not sufficient to demonstrate that the delay caused by notice-and-comment or the grace period might do harm to life, property, or public safety. … The article does not directly relate to the Rule, the consequences of the Rule, or anything related to asylum eligibility.

Even if it did, that "the very announcement of [the] proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare," Reply Br. of Gov't at 21, is likely often, or even always true. The lag period before any regulation, statute, or proposed piece of legislation allows parties to change their behavior in response. If we were to agree with the government's assertion that notice-and-comment procedures increase the potential harm the Rule is intended to regulate, these procedures would often cede to the good-cause exception. Because the government has failed to demonstrate the existence of an exigency justifying good cause, we hold that the Rule likely does not properly fall under the good cause exception.

b.

For the foreign affairs exception to apply, "the public rulemaking provisions should provoke definitely undesirable international consequences." *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980). Otherwise, the exception "would become distended if applied to INS actions generally, even though immigration matters typically implicate foreign affairs." *Id.* Use of the exception is generally permissible where the international consequences of the rule-making requirements are obvious or thoroughly explained. We have rejected its use where the government has failed to substantiate its reliance on the exception or explain the detrimental effects of compliance with the APA's requirements. *See EBSC II*, 932 F.3d at 776–77.

The government cites to four documents in support of its renewed argument that the foreign-affairs exception is justified: a Memorandum of Understanding ("MOU") between DHS and the Mexican government, the *Washington Post* article, credible-fear origin data published by the Executive Office of Immigration Review ("EOIR"), and a speech by President Trump. The four documents appear to demonstrate that the Rule and Proclamation are related to ongoing changes in the national immigration landscape, but still fail to establish that adhering to notice and comment and a thirty-day grace period will "provoke definitely undesirable international consequences." *Yassini*, 618 F.2d at 1360 n.4.

We agree with the government that the cited MOU does broadly "show[ ] that [immigration] negotiations have happened in the past," Op. Br. of Gov't at 49, but this is insufficient to demonstrate that notice and comment will provoke undesirable international consequences. Indeed, the MOU's substance seems to undermine the "broader diplomatic program involving sensitive and ongoing negotiations with Mexico." Op. Br. of Gov't at 47 (internal quotations omitted). Article 3 of the MOU states that "[l]ocal repatriation agreements should conform to mutually established criteria and principles for the repatriation of Mexican nationals being repatriated from the United States to Mexico." The unilateral repatriation of Mexican nationals set forth by the Rule—without requesting public participation—undermines these terms.

The cited *Washington Post* page discusses an increase in the proportion of families that seek asylum and the EOIR data lists the country of origin of credible-fear cases and summarizes the number of people that attempt to enter the United States with an asylum application, the number of cases completed in 2018, and the outcome of credible fear cases. It is unclear how these data "reflect[ ] motivations for crossing the border illegally," Op. Br. of Gov't at 49, and even less clear how they demonstrate the consequences of requesting public notice-and-comment on foreign policy. And the speech by President Trump, as the district court noted, discusses the *domestic* consequences of foreign immigration, not the foreign policy consequences of immigration into the United States. *See EBSC III*, 354 F. Supp. 3d at 1114. The speech—like the MOU, the article, and the EOIR data—does not suggest that the APA's rulemaking provisions might trigger or even shape immediate consequences in foreign affairs.

The evidence relied on by the government here is largely the same as the evidence previously before the motions panel and the district court. While we remain "sensitive to the fact that the President has access to information not available to the public, and...[are] cautious about demanding confidential information," the connection between negotiations with Mexico and the immediate implementation of the Rule is still "not apparent." *EBSC II*, 932 F.3d at 776. …

In sum, the government has not established that DOJ and DHS properly invoked the foreign-affairs exception to the notice-and-comment requirement and thirty-day grace period.

B.

We next consider whether the Organizations have established that, in the absence of a preliminary injunction, they are likely to suffer irreparable harm. *See Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). Irreparable harm is "harm for which there is no adequate legal remedy, such as an award for damages." Id. For this reason, economic harm is not generally considered irreparable. But where parties cannot typically recover monetary damages flowing from their injury—as is often the case in APA cases—economic harm can be considered irreparable. …

We agree with the district court that the Organizations have established that they will suffer a significant change in their programs and a concomitant loss of funding absent a preliminary injunction enjoining enforcement of the Rule. *EBSC II*, 932 F.3d at 767. Both constitute irreparable injuries: the first is an intangible injury, and the second is economic harm for which the Organizations have no vehicle for recovery.

The Rule has already prompted the Organizations to change their core missions. Since the Rule issued, ILL has placed programmatic expansions on hold and has "had to lessen its caseload[.]" Supp. Decl. of Stephen W. Manning at ¶ 14. CARECEN notes that it will "divert significant resources," including "staff time and organizational resources" to respond to the Rule. Decl. of Daniel Sharp at ¶¶ 11–13. EBSC has had to "divert resources away from its core

programs to address the new policy." Decl. of Michael Smith at ¶ 15. And, as discussed in Part III, *supra*, the Organizations each stand to lose funding because of their core changes in mission.

Importantly, the Organizations also filed suit the same day that the Rule and the first proclamation issued; while not dispositive, this suggests urgency and impending irreparable harm. *See Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985). We agree with the district court that the Organizations have demonstrated a sufficient likelihood of irreparable injury to warrant injunctive relief. *EBSC III*, 354 F. Supp. 3d at 1116.

C.

The government next argues that the harms it will suffer because of the preliminary injunction—namely, the harm caused by the injunction "undermin[ing] the Executive Branch's constitutional and statutory authority to secure the Nation's borders," and the "entry of illegal aliens"—outweigh the benefit to the public and the Organizations conferred by the injunction. Op. Br. of Gov't at 51–52. Relevant equitable factors include the value of complying with the APA, the public interest in preventing the deaths and wrongful removal of asylum-seekers, preserving congressional intent, and promoting the efficient administration of our immigration laws at the border.

First, "[t]he public interest is served by compliance with the APA." *Azar*, 911 F.3d at 581. …

Second, the public has an interest in "ensuring that we do not deliver aliens into the hands of their persecutors," *Leiva-Perez*, 640 F.3d at 971, and "preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm," Nken, 556 U.S. at 436, 129 S.Ct. 1749. The Rule will likely result in some migrants being wrongfully denied refugee status in this country. For migrants affected by the Rule, withholding of removal and CAT protection are the only forms of relief available. As discussed, these forms of relief demand a higher burden of proof than an asylum claim. At the initial screening interview with an asylum officer, an applicant seeking asylum need only present a "credible fear" of persecution, while an applicant seeking withholding of removal of CAT protection must demonstrate the higher "reasonable fear" of persecution or torture.

The government's opening brief notes that 17 percent of the 34,158 migrants whose cases were completed in 2018 received asylum. *See* Op. Br. of Gov't at 52. Assuming the number of migrants remains constant, if even just 25 percent of asylum-seekers with meritorious claims are denied asylum because of their method of entry, over 1,000 people will either be returned to home countries where they face "persecution based on 'race, religion, nationality, membership in a political social group, or political opinion,' " *EBSC III*, 354 F. Supp. 3d at 1117 n.15 … or forced to proceed on limited-relief claims that demand more stringent showings. If the rate of migration and the rate of migrants claiming fear during the expedited removal process continues to increase, … the scale of this wrongful removal will only worsen.

Third, the public has an interest in ensuring that the "statutes enacted by [their] representatives are not imperiled by executive fiat." *EBSC II*, 932 F.3d at 779 (internal quotation marks omitted). The INA, and the United States's signatory status to the 1951 Convention, "reflect the balance Congress struck between the public interests in rendering aliens who enter illegally inadmissible and subject to criminal and civil penalties, and...preserving their ability to seek asylum." *EBSC III*, 354 F. Supp. 3d at 1117–18 (citations omitted). The Rule and Proclamation disrupt that balance by overriding plain congressional intent.

Finally, the government and the public have an interest in the "efficient administration of the immigration laws at the border." *EBSC II*, 932 F.3d at 779 (internal quotation marks omitted). …

The role of the judiciary in reviewing such policies is narrow. It is merely to ensure that executive procedures do not violate principles of due process or "displace congressional choices of policy." *Id*. at 35, 103 S.Ct. 321. This executive deference, then, is closely linked with our determination on the substantive validity of the Rule. Essentially, the weight we ascribe to this factor depends on the extent to which we agree that the Rule overrides plain congressional intent. Because the Organizations have established that the Rule is invalid, we do not place much weight on this factor. As the motions panel noted: "[t]here surely are enforcement measures that the President and the Attorney General can take to ameliorate the [immigration] crisis, but continued inaction by Congress is not a sufficient basis under our Constitution for the Executive to rewrite our immigration laws." *EBSC II*, 932 F.3d at 774.

In sum, we agree with the district court that there is a significant basis for concluding that the public interest weighs "sharply" in the Organizations' favor. *See EBSC III*, 354 F. Supp. 3d at 1111.

V.

Finally, we turn to the remedy entered by the district court: an injunction preventing enforcement of the Rule. The injunction enjoins the part of the Rule that removes asylum eligibility from migrants who fail to follow a presidential proclamation. *EBSC III*, 354 F. Supp. 3d at 1121. It does not enjoin the credible-fear amendments, but "they have no independent effect," so they are effectively enjoined as well. *Id*. at 1121 n.22. We conclude that the district court did not abuse its discretion in enjoining enforcement of the Rule.

* * * *

8. Asylum Cooperative Agreements

As discussed in *Digest 2019* at 39-40 and *Digest 2020* at 93, El Salvador, Guatemala, and Honduras signed Asylum Cooperative Agreements ("ACAs") with the United States. In February 2021, after the President issued a new executive order on migration, the United States notified the Governments of El Salvador, Guatemala, and Honduras that it was immediately suspending and initiating the process of terminating the ACAs. See February 6, 2021 State Department press statement, available at https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/.

Cross References

Relocation and evacuation operations in Afghanistan, **Ch. 2.A.2**
UN 3C general statement on international refugee law, **Ch.6.A.4.a**
HRC on Afghanistan, **Ch. 6.A.6.b**
Joint statement on the situation of women and girls in Afghanistan, **Ch.6.B.2.c**
IACHR consideration of asylum, immigration, migration, family separation, **Ch. 7.D.2**
Suspending operations at Embassy Kabul, **Ch. 9.A.8**
Muthana *case (citizenship),* **Ch. 10.C.2.a**
Dual nationality, **Ch. 11.B.1.c&e**
Request for import restrictions on cultural property of Afghanistan, **Ch. 14.A.7**
Afghanistan, **Ch. 17.B.1**
Afghanistan, **Ch. 18.A.2**

CHAPTER 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. Consular Notification and Access

For further background on efforts to facilitate compliance with the provisions in the Vienna Convention on Consular Relations regarding consular notification and access, as well as the decision of the International Court of Justice in *Avena*, 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 15-18; *Digest 2013* at 26-29; and *Digest 2014* at 68-69.

Since April 2020, the State Department's Bureau of Consular Affairs ("CA") has offered its consular notification and access training online to order to continue providing this vital training to U.S. law enforcement officers during the COVID-19 pandemic. Since that time, CA has trained 2,034 officers across the United States. The 2018 Consular Notification and Access Manual continues to be available online and CA's consular notification webpage also provides sample consular notification statements in English and 28 other languages, sample fax sheets for providing notification, sample diplomatic and consular notification cards, and contact information for foreign embassies and consulates in the United States.

2. Afghanistan

On August 15, 2021, the Department of State and the Department of Defense released a joint statement on the situation in Afghanistan. The State Department media note including the joint statement is available at https://www.state.gov/joint-statement-from-the-department-of-state-and-department-of-defense-update-on-afghanistan/. The text follows:

> At present we are completing a series of steps to secure the Hamid Karzai International Airport to enable the safe departure of U.S. and allied personnel from Afghanistan via civilian and military flights. Over the next 48 hours, we will have expanded our security presence to nearly 6,000 troops, with a mission focused solely on facilitating these efforts and will be taking over air traffic control. Tomorrow and over the coming days, we will be transferring out of the country thousands of American citizens who have been resident in Afghanistan, as well as locally employed staff of the U.S. mission in Kabul and their families and other particularly vulnerable Afghan nationals. And we will accelerate the evacuation of thousands of Afghans eligible for U.S. Special Immigrant Visas, nearly 2,000 of whom have already arrived in the United States over the past two weeks. For all categories, Afghans who have cleared security screening will continue to be transferred directly to the United States. And we will find additional locations for those yet to be screened.

On August 30, 2021, Secretary Blinken delivered remarks, available at https://www.state.gov/secretary-of-antony-j-blinken-remarks-on-afghanistan/, on the evacuation and relocation operation in Afghanistan. Those remarks are excerpted below. See Chapter 18 for Secretary Blinken's testimony on Afghanistan before the Senate Foreign Relations Committee on September 14, 2021, which also covers the evacuation and relocation operation.

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* * * *

Eighteen days ago, the United States and our allies began our evacuation and relocation operation in Kabul. As you just heard from the Pentagon, a few hours ago, that operation was completed.

More than 123,000 people have been safely flown out of Afghanistan. That includes about 6,000 American citizens. This has been a massive military, diplomatic, and humanitarian undertaking – one of the most difficult in our nation's history – and an extraordinary feat of logistics and coordination under some of the most challenging circumstances imaginable.

Many, many people made this possible.

* * * *

Now, U.S. military flights have ended, and our troops have departed Afghanistan. A new chapter of America's engagement with Afghanistan has begun. It's one in which we will lead with our diplomacy. The military mission is over. A new diplomatic mission has begun.

So here is our plan for the days and weeks ahead.

First, we've built a new team to help lead this new mission.

As of today, we have suspended our diplomatic presence in Kabul, and transferred our operations to Doha, Qatar, which will soon be formally notified to Congress. Given the uncertain security environment and political situation in Afghanistan, it was the prudent step to take. And let me take this opportunity to thank our outstanding charge d'affaires in Kabul,

Ambassador Ross Wilson, who came out of retirement in January 2020 to lead our embassy in Afghanistan, and has done exceptional, courageous work during a highly challenging time.

For the time being, we will use this post in Doha to manage our diplomacy with Afghanistan, including consular affairs, administering humanitarian assistance, and working with allies, partners, and regional and international stakeholders to coordinate our engagement and messaging to the Taliban. Our team there will be led by Ian McCary, who has served as our deputy chief of mission in Afghanistan for this past year. No one's better prepared to do the job.

Second, we will continue our relentless efforts to help Americans, foreign nationals, and Afghans leave Afghanistan if they choose.

* * * *

Third, we will hold the Taliban to its pledge to let people freely depart Afghanistan.

The Taliban has committed to let anyone with proper documents leave the country in a safe and orderly manner. …

More than half the world's countries have joined us in insisting that the Taliban let people travel outside Afghanistan freely. As of today, more than 100 countries have said that they expect the Taliban to honor travel authorizations by our countries. And just a few hours ago, the United Nations Security Council passed a resolution that enshrines that responsibility – laying the groundwork to hold the Taliban accountable if they renege.

So, the international chorus on this is strong, and it will stay strong. We will hold the Taliban to their commitment on freedom of movement for foreign nationals, visa holders, at-risk Afghans.

Fourth, we will work to secure their safe passage.

This morning, I met with the foreign ministers of all the G7 countries – United Kingdom, France, Germany, Canada, Italy, Japan – as well as Qatar, Turkey, the European Union, and the secretary general of NATO. We discussed how we will work together to facilitate safe travel out of Afghanistan, including by reopening Kabul's civilian airport as soon as possible – and we very much appreciate the efforts of Qatar and Turkey, in particular, to make this happen.

This would enable a small number of daily charter flights, which is a key for anyone who wants to depart from Afghanistan moving forward.

We are also working to identify ways to support Americans, legal permanent residents, and Afghans who have worked with us and who may choose to depart via overland routes.

* * * *

Fifth, we will stay focused on counterterrorism.

The Taliban has made a commitment to prevent terrorist groups from using Afghanistan as a base for external operations that could threaten the United States or our allies, including al-Qaida and the Taliban's sworn enemy, ISIS-K. Here too, we will hold them accountable to that commitment. But while we have expectations of the Taliban, that doesn't mean we will rely on the Taliban. We'll remain vigilant in monitoring threats ourselves. And we'll maintain robust counterterrorism capabilities in the region to neutralize those threats, if necessary, as we demonstrated in the past few days by striking ISIS facilitators and imminent threats in Afghanistan – and as we do in places around the world where we do not have military forces on the ground.

Let me speak directly to our engagement with the Taliban across these and other issues. We engaged with the Taliban during the past few weeks to enable our evacuation operations. Going forward, any engagement with a Taliban-led government in Kabul will be driven by one thing only: our vital national interests.

If we can work with a new Afghan government in a way that helps secure those interests – including the safe return of Mark Frerichs, a U.S. citizen who has been held hostage in the region since early last year – and in a way that brings greater stability to the country and region and protects the gains of the past two decades, we will do it. But we will not do it on the basis of trust or faith. Every step we take will be based not on what a Taliban-led government says, but what it does to live up to its commitments.

The Taliban seeks international legitimacy and support. Our message is: any legitimacy and any support will have to be earned.

The Taliban can do that by meeting commitments and obligations – on freedom of travel; respecting the basic rights of the Afghan people, including women and minorities; upholding its commitments on counterterrorism; not carrying out reprisal violence against those who choose to stay in Afghanistan; and forming an inclusive government that can meet the needs and reflect the aspirations of the Afghan people.

Sixth, we will continue our humanitarian assistance to the people of Afghanistan.

The conflict has taken a terrible toll on the Afghan people. Millions are internally displaced. Millions are facing hunger, even starvation. The COVID-19 pandemic has also hit Afghanistan hard. The United States will continue to support humanitarian aid to the Afghan people. Consistent with our sanctions on the Taliban, the aid will not flow through the government, but rather through independent organizations, such as UN agencies and NGOs. And we expect that those efforts will not be impeded by the Taliban or anyone else.

And seventh, we will continue our broad international diplomacy across all these issues and many others.

* * * *

The United States entered into agreements and non-binding arrangements with several countries to facilitate the relocation of individuals at risk as a result of the situation in Afghanistan. Some of those agreements and arrangements are discussed below. See Chapter 1 for discussion of the P-2 and SIV programs for Afghan nationals and Chapter 9 for discussion of the suspension of operations at U.S. Embassy Kabul.

The United States and Italy effected an agreement on temporary relocation and transit by exchange of notes at Rome on August 20 and 21, 2021, which entered into force August 20, 2021, and is available at https://www.state.gov/italy-21-820.1.

The United States and Kuwait effected an agreement on temporary relocation and transit by exchange of notes at Kuwait City, August 22, 2021. That agreement entered into force August 22, 2021 and is available at https://www.state.gov/kuwait-21-822.

A similar agreement was effected between the United States and Kosovo, also by exchange of notes, at Pristina, August 25, 2021. The Kosovo agreement entered into force August 25, 2021 and is available at https://www.state.gov/kosovo-21-825.

The United States and the Sultanate of Oman signed an agreement on cooperation to relocate individuals at risk due to the situation in Afghanistan. The agreement is available at https://www.state.gov/oman-21-902. The relocation agreement was signed at Muscat on September 2, 2021 and entered into force the same day.

The United States signed a similar relocation transit agreement with Qatar on November 12, 2021. The Memorandum of Understanding Between the United States of America and the State of Qatar on Cooperation in Temporary Hosting of Individuals at Risk Due to the Situation in Afghanistan is available at https://www.state.gov/qatar-21-1112. The preamble and the first two articles of the MOU with Qatar appear below.

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Referring to the United States of America's request pertaining to the need for urgent cooperation concerning individuals who are at risk as a result of the situation in Afghanistan,

The United States of America and the State of Qatar (hereinafter together the "Parties") agree to the following provisions related to such cooperation:

ARTICLE I Temporary Hosting of Individuals Arriving from Afghanistan

1. The State of Qatar agrees to permit individuals who are at risk as a result of the situation in Afghanistan arriving aboard flights for which the United States of America provides notification to the State of Qatar (hereinafter referred to as "Identified Individuals") to transit the territory of the State of Qatar for the purpose of facilitating the resettlement of such individuals on a permanent basis in another location outside of the State of Qatar. The State of Qatar agrees to permit Identified Individuals to be housed at Al Udeid Air Base or such other location as may be mutually agreed for the duration of their temporary transit through the State of Qatar.

2. Except as provided in paragraph 3 of this Article or as otherwise agreed, the United States of America agrees to -relocate Identified Individuals to another location outside the State of Qatar within 30 days of the arrival of such individuals in the State of Qatar.

3. In the event that the United States of America determines that an Identified Individual has applied for a Special Immigrant Visa (SIV) (hereinafter "SIV Applicant"), the United States may transfer temporarily such SIV Applicant and eligible family members through the State of Qatar pending immigration processing by the United States of America and onward travel, as provided in Article II of this Memorandum of Understanding (Memorandum).

ARTICLE II
Temporary Hosting of SIV Applicants to the State of Qatar for United States of America Immigration Processing and Onward Travel

1. The State of Qatar agrees to permit no more than 8,000 SIV Applicants (including eligible family members) at any given time to be temporarily admitted into and hosted in the State of Qatar. The State of Qatar agrees to authorize the United States of America to house SIV Applicants in Camp As Sayliyah and/or Al Udeid Air Base.

2. Temporary hosting in the State of Qatar under this Article is limited to SIV Applicants. The United States of America intends to conduct a security check and provide a preliminary assessment of SIV eligibility for each SIV Applicant before arrival in the State of Qatar.

3. The hosting of SIV Applicants in the State of Qatar shall be temporary. Not later than September 1, 2022, all such relocated individuals should reside in the United States of America

or in such other place outside of the State of Qatar, as the United States shall arrange.

4. Upon arrival, SIV Applicants shall be treated by the immigration officials in the State of Qatar as temporary residents until no later than September 1, 2022.

5. The Parties intend to develop procedures for ensuring that SIV Applicants receive appropriate health screenings and to address other public health concerns, including COVID-19. The Parties intend for quarantine measures for SIV Applicants to be conducted according to the current COVID-19 guidelines in the State of Qatar. The Parties intend for medical professionals to offer COVID-19 vaccines approved by the State of Qatar for vaccinating upon arrival any SIV Applicants who have not been vaccinated before their arrival.

6. The Parties intend to coordinate regarding measures to ensure the maintenance of good order at Camp As Sayliyah and/or Al Udeid Air Base where SIV Applicants are housed, which may include joint static security positions and/or conducting joint community patrols. The State of Qatar retains authority to exercise any necessary law enforcement functions.

* * * *

On November 13, 2021, the governments of the United States and Qatar issued a joint statement, published as a State Department media note at https://www.state.gov/joint-statement-on-the-u-s-qatar-strategic-dialogue/, regarding the strategic dialogue held by Secretary Blinken with Deputy Prime Minister and Minister of Foreign Affairs Sheik Mohammed bin Abdulrahman Al Thani on November 12, 2021. The dialogue addressed a wide range of topics, including the relocation transit agreement, excerpted *supra*. The joint statement includes the following:

> Secretary of State Antony J. Blinken and Deputy Prime Minister and Minister of Foreign Affairs Sheikh Mohammed bin Abdulrahman Al Thani led the fourth U.S.-Qatar Strategic Dialogue on November 12, 2021 in Washington, DC. A testament to our strong partnership, this year's dialogue addressed regional and global issues, and advanced bilateral cooperation in the areas of health, humanitarian assistance, international development, labor and human rights, security cooperation, climate change, trade and investment, culture, and education. The United States and Qatar signed … an Arrangement on the Protection of U.S. Interests in Afghanistan and an MOU on Cooperation to Host Individuals at Risk Due to the Situation in Afghanistan.
>
> …
>
> Underscoring deep cooperation on regional issues, U.S. and Qatari officials discussed challenges in Afghanistan and the extraordinary teamwork between the two countries on the relocation to the United States, through Qatar, of more than 60,000 U.S. citizens, Lawful Permanent Residents, Special Immigrant Visa holders and at-risk Afghans. …

Secretary Blinken and Minister Al Thani also delivered remarks at their meeting on November 12 at a signing ceremony for the relocation transit agreement and the instrument expressing Qatar's intent to serve as the United States' protecting power in Afghanistan ("protecting power arrangement" or "PPA"). The November 12 remarks are

available at https://www.state.gov/secretary-antony-j-blinken-and-qatari-deputy-prime-minister-and-minister-of-foreign-affairs-mohammed-bin-abdulrahman-al-thani-at-a-signing-ceremony-and-joint-press-availability-for-the-u-s-qatar-str/.

B. CHILDREN

1. Adoption

a. Annual Reports

As discussed in *Digest 2020* at 95-96, the Intercountry Adoption Information Act of 2019 ("IAIA"), Pub. L. 116-184, 134 Stat. 897, which directs the Department to include additional information in its intercountry adoptions annual report to Congress, was signed into law on October 30, 2020. The IAIA requires the Department to identify countries with laws that "prevented or prohibited" adoptions to the United States and identify the Department's actions that would have similarly "prevented, prohibited, or halted any adoptions." The first annual report submitted pursuant to the IAIA was released in July 2021. The Fiscal Year 2020 Annual Report, as well as past annual reports, can be found at https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/AnnualReports.html. As in the past, the report includes several tables showing numbers of intercountry adoptions by country during fiscal year 2020, average times to complete adoptions, and median fees charged by adoption service providers.

As required by new reporting requirements, the FY 2020 report references the Department's FY 2020 decision not to process intercountry adoptions from the Republic of Congo and the report lists Russia, Kenya, the Democratic Republic of the Congo, and Ethiopia as countries with a significant law or regulation that prevented or prohibited adoptions involving immigration to the United States. Also in accordance with the IAIA, the Department addresses in the FY 2020 report the impact of the accrediting entity's fees on U.S. families seeking to adopt through intercountry adoption.

b. Litigation: National Council for Adoption v. Blinken

On July 9, 2021, the U.S. Court of Appeals for the D.C. Circuit found the Department violated the Administrative Procedure Act ("APA") in issuing guidance that an adoption service provider may not refer a child who has not yet been determined eligible for adoption to prospective parents; nor refer an eligible child to prospective parents who have not yet been found suitable to adopt ("soft referral guidance"). *National Council for Adoption v. Blinken*, 4 F.4th 106 (D.C. Cir. 2021). The appellate court found that the soft referral guidance was a legislative rule, not an interpretive rule, and therefore should have gone through notice and comment rulemaking under the APA. Excerpts follow from the court's opinion.

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* * * *

On the merits, the Council argues the Guidance is a "legislative rule." State argues that the Guidance is an "interpretive rule." The distinction matters because, under the Administrative Procedure Act, legislative rules require notice and comment, but interpretive rules do not. 5 U.S.C. § 553(b)(3)(A); *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 406 (D.C. Cir. 2020).

"A legislative rule is one that has legal effect or, alternatively, one that an agency promulgates with the intent to exercise its delegated legislative power by speaking with the force of law." *Natural Resources Defense Council v. Wheeler*, 955 F.3d 68, 83 (D.C. Cir. 2020) (cleaned up).

In contrast, an interpretive rule "derives a proposition from an existing document, such as a statute, regulation, or judicial decision, whose meaning compels or logically justifies the proposition." *Id*. (cleaned up). "The critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortgage Bankers Association*, 575 U.S. 92, 97, 135 S.Ct. 1199, 191 L.Ed.2d 186 (2015) (cleaned up). In that sense, an interpretive rule explains "pre-existing legal obligations or rights" rather than "creating legal effects." *Natural Resources Defense Council*, 955 F.3d at 83.

Under this framework, the Guidance is a legislative rule.

By expressly prohibiting certain types of soft referrals, State intended to "speak[ ] with the force of law." *Id*. State does not seriously deny that violating the Guidance exposes adoption agencies to enforcement actions. The Guidance may cost agencies that practice the prohibited types of soft referrals their accreditation. See 22 C.F.R. § 96.27(a) (requiring for accreditation that agencies demonstrate "substantial compliance with" certain specified standards); *id*. § 96.75 (requiring that the entity responsible for accrediting agencies "take adverse action" against agencies not so in compliance); id. § 96.35(a) (establishing as one such standard that agencies ensure "that intercountry adoptions take place in the best interests of children"); see also 82 Fed. Reg. 40,614, 40,615 (Aug. 25, 2017) (memorandum of agreement that the accrediting entity "will operate under policy direction from [State]").

State says those obligations are nothing new. By its account, the Guidance merely clarified the types of soft referrals State already prohibited. We disagree. State had never before announced a categorical prohibition on the two types of soft referrals the Guidance prohibits. In fact, it's doubtful State had ever even published rules mentioning "soft referrals," much less categorically prohibiting any. That's why, when the Guidance appeared on State's website, some adoption agencies didn't know what a "soft referral" was. …

In the parts of the Guidance relevant here, State never said it was clarifying or interpreting specific provisions of a treaty, statute, or regulation that "compel[led] or logically justifie[d]" a prohibition on soft referrals. *Natural Resources Defense Council*, 955 F.3d at 83 (cleaned up). That further illustrates the Guidance's novelty.

Now, on appeal, State specifically points us to "the best interests of children" standard from 22 C.F.R. § 96.35(a), (a)(1) ("[e]nsuring that intercountry adoptions take place in the best interests of children," which is "in accordance with the Convention's principles"). But, even assuming the types of prohibited soft referrals are inconsistent with the best interests of the child in most cases, the Council and amici describe circumstances that show a categorical prohibition is far from "compel[led] or logically justifie[d]" by the best-interests-of-the-child standard.

Natural Resources Defense Council, 955 F.3d at 83 (cleaned up). For example, is the Guidance's rule always in the best interests of a child whose biological relatives have almost completed a home study?

The notice-and-comment process makes an agency consider those types of concerns. After that process, State might be able to promulgate a rule — like the Guidance — that applies to each internationally adopted child in a manner that accords with the Administrative Procedure Act. But State cannot pretend that the Guidance merely "explain[s] something" that a context-specific, totality of the circumstances standard "already required." *Mendoza*, 754 F.3d at 1021.

Finally, State says the Guidance is implied by the regulatory context for international adoptions. See, e.g., 42 U.S.C. § 14923; 22 C.F.R. Part 96. But the only parts of that context on which State relies are the requirements that a child be determined eligible for adoption and a home study be completed before an adoption is finalized. Soft referrals are consistent with those requirements. Nothing about the home study statute or regulations, for instance, necessitates home studies before soft referrals. They don't even mention soft referrals. They just require home studies before a child is placed in the home. State's argument ultimately hinges on the best-interests-of-the-child standard, which again does not compel or logically justify the Guidance.

To sum up, the Guidance is a legislative rule because it makes new law by banning two types of soft referrals. It therefore required notice and comment.

We reverse the judgment of the district court and remand for the court to enter an order vacating the Guidance and for other action consistent with this opinion.

* * * *

c. Hague Adoption Convention Accessions

On September 1, 2021, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167. ("Convention") entered into force for Niger. See September 1, 2021 State Department Advisory and Notice, available at https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/Adoptions-from-Niger.html. The Department of State determined it will not be able to process intercountry adoptions from Niger initiated on or after September 1, 2021 because Niger does not yet have implementing legislation giving authority to the designated Central Authority to carry out its responsibilities under the Convention.

2. Abduction

a. Annual Reports

As described in *Digest 2014* at 71, the Sean and David Goldman 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. 22 U.S.C. § 9101, et seq.; see also 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. The April 2021 Annual Report on International Child Abduction is available at https://travel.state.gov/content/dam/NEWIPCAAssets/2021%20ICAPRA%20Annual%20Reportrd.pdf. The 2021 report cites eleven countries for a pattern of noncompliance: Argentina, Brazil, Costa Rica, Ecuador, Egypt, India, Jordan, Peru, Romania, Trinidad and Tobago, and the United Arab Emirates.

b. Hague Abduction Convention Partners

On September 1, 2021, the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, entered into force between the United States and Seychelles. See September 1, 2021 State Department media note, available at https://www.state.gov/united-states-and-seychelles-become-partners-under-the-hague-abduction-convention/. Seychelles became the 81st partner of the United States under the Convention.

c. Hague Abduction Convention Case: **Golan v. Saada**

On October 27, 2021, the United States submitted its amicus brief in the U.S. Supreme Court in *Golan v. Saada*, No. 20-1034, a Hague Abduction Convention case brought by a father after his four-year-old child was taken by his mother from Italy to the United States without his father's consent. Under the Convention, a child must be returned to his/her country of habitual residence unless an exception to return applies, such as a grave risk of exposure to physical or psychological harm upon return. At issue is whether, if it is proven that there is a grave risk that a child will be exposed to harm upon return as defined by Article 13(b) of the Convention, a court is required to consider ameliorative measures before exercising its discretion to grant or deny return under the Convention. The U.S. amicus brief, excerpted below, conveys the government's views that the petition should be granted and that courts should take a flexible, discretionary approach in considering ameliorative measures.[*]

* * * *

[*] Editor's note: The Supreme Court issued its decision June 15, 2022. 596 U. S. ____ (2022)

I. THE COURT OF APPEALS ERRED IN HOLDING THAT COURTS ARE REQUIRED TO CONSIDER A FULL RANGE OF AMELIORATIVE MEASURES AFTER FINDING THAT RETURN POSES A GRAVE RISK OF HARM

A. The Text Of Neither The Convention Nor ICARA Mandates Consideration Of Ameliorative Measures

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). Article 13(b) of the Convention provides that "the requested State is not bound to order the return of the child" if the relevant party "establishes that * * * [t]here is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Convention art. 13(b). The Convention does not specifically mention consideration of ameliorative measures if the court finds that return poses a grave risk to the child. Rather, Article 13(b)—by providing that "the requested State is not bound" to order return—affords the court discretion to deny the return upon such a finding of grave risk. Convention art. 13.

The text of the Convention does, however, provide some guidance regarding the Article 13 inquiry, explaining that "[i]n considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." Convention art. 13. Notably, that provision does not specify that courts must take possible ameliorative measures into account. Thus, while courts are obliged to consider information such as "home studies and other social background reports" if the relevant authorities choose to provide them, 51 Fed. Reg. at 10,513, in order to facilitate "a balanced record upon which to determine whether the child is to be returned," *id.* at 10,510, nothing in the Convention suggests that courts invariably must "'develop a thorough record' on potential ameliorative measures" and take into account "'the [full] range of [such] remedies,'" as the Second Circuit has held. Pet. App. 35a-36a (quoting *Blondin* v. *Dubois*, 189 F.3d 240, 249 (2d Cir. 1999)) (first brackets in original).

To be sure, a court has discretion under Article 13(b) to order return of a child despite a grave-risk finding. In deciding whether to do so, the court may take into account existing or potential ameliorative measures that might reduce the grave risk of harm. But there is no requirement that a court do so in every instance, much less explore the full range of possible measures. "[T]he Convention does not pursue" its goal of deterring international child abduction through its return remedy "at any cost," and the Second Circuit's contrary rule effectively "rewrite[s] the treaty" as if it did. *Lozano* v. *Alvarez*, 572 U.S. 1, 16-17 (2014); see also *Monasky* v. *Taglieri*, 140 S. Ct. 719, 728 (2020) (rejecting atextual imposition of "categorical requirements for establishing a child's habitual residence").

2. Nor do the statutory provisions Congress enacted to implement the Convention mandate consideration of ameliorative measures in deciding whether to return a child following a finding of grave risk under Article 13(b). Consistent with the Convention, ICARA outlines the procedures by which a petitioner can seek the return of a child and a respondent can oppose that request. See 22 U.S.C. 9003. A petitioner seeking return must prove by a preponderance of the evidence that the child was wrongfully removed or retained within the meaning of the Convention. 22 U.S.C. 9003(e)(1)(A). A respondent may raise one of the Convention's specified exceptions in an attempt to prevent the return, and the respondent must prove the "grave risk" exception to return by clear and convincing evidence. 22 U.S.C. 9003(e)(2)(A). The Act does not mention any requirement to inquire into or evaluate ameliorative measures or otherwise channel

courts' discretion to deny or grant return after finding that the respondent has established a grave risk under Article 13(b).

B. A Discretionary Approach To Ameliorative Measures Accords With The Longstanding View Of The State Department, Which Finds Support In International Understandings Of The Convention

1. Recognizing courts' discretion regarding ameliorative measures is also consistent with the State Department's interpretation of the Convention. See, *e.g.*, *Abbott*, 560 U.S. at 15 (Executive Branch's interpretation of the Convention is entitled to "great weight") (citation omitted). The Department has long held the view that consideration of protective measures can sometimes be appropriate under the Convention, but it has never treated that as a requirement under Article 13(b) across the board.

The State Department's authoritative legal analysis of the Convention issued soon after its adoption contemplates that denial of a return under Article 13(b) may be proper even absent consideration of possible ameliorative measures. See 51 Fed. Reg. at 10,510. The State Department explained that "a court in its discretion need not order a child returned" where the requisite grave risk exists or return would "otherwise place the child in an intolerable situation." *Ibid.* "An example of an 'intolerable situation,' " the Department observed, "is one in which a custodial parent sexually abuses the child." *Ibid.* "If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition." *Ibid.* The Department's analysis makes no mention of a requirement to develop or consider possible ameliorative measures under such circumstances.

The State Department's view on protective measures under the Convention is also set out in a 1995 letter to an official of the United Kingdom. App., *infra*, 1a-20a (Let- ter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Dep't of State, to Michael Nicholls, Lord Chancellor's Dep't, Child Abduction Unit, United Kingdom (Aug. 10, 1995)). The letter explained that, "[w]hile undertakings are not necessary to operation of the Convention, there are good arguments that their use can be consistent with the Convention." *Id.* at 2a. In particular, undertakings can "facilitate Article 12's objective of ensuring the return of abducted children 'forthwith.' " *Ibid.* The letter also emphasized, however, that "undertakings should be limited in scope and further the Convention's goal of ensuring the prompt return of the child to the jurisdiction of habitual residence," and that "[u]ndertakings that do more than this would appear questionable under the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance." *Id.* at 2a (noting that Articles 16 and 19 of the Convention contemplate that "substantive issues relating to custody" are to be resolved in the courts of the child's habitual residence).

In particular, the Brown Letter criticized undertakings entered by a British court that "went well beyond what was necessary to ensure the prompt return of the child" by directing that "the left-behind father would provide the mother and their three children a motor vehicle," school expenses, weekly maintenance payments of $200, and medical and dental insurance. App., *infra*, 3a-4a. The State Department elaborated that those undertakings were, in its judgment, "too broad," failing to give "appropriate respect" to the Convention's premise that return proceedings should "not attempt to address the underlying [custody] dispute." *Id.* at 4a, 6a. "If the requested state court is presented with unequivocal evidence that return would cause the child a 'grave risk' of physical or psychological harm, * * * then it would seem less appropriate for the court to enter extensive undertakings than to deny the return request." *Id.* at 16a.

Similarly, in a 2006 newsletter for judges published by the Hague Permanent Bureau, a State Department official opined that while consideration of ameliorative measures is "not necessary to the proper operation of the Convention," the State Department supported the "limited use" of undertakings, but only where narrowly tailored to support the prompt return of an abducted child. Kathleen Ruckman, *Undertakings As Convention Practice: The United States Perspective*, The Judges' Newsletter (Hague Conf. On Private Int'l Law, London, England) Vol. XI, at 46 (2006), https://assets.hcch.net/docs/b3f445a5-81a8-4ee8-bc42-720c6f31d031.pdf. The article indicated that courts had a choice whether to consider ordering undertakings, and cautioned against using such discretion to undermine the basic precepts of the Convention. See *ibid.*

2. The Hague Conference on Private International Law, *1980 Child Abduction Convention: Guide to Good Practice Part VI Article 13(1)(b)* (2020) (*Guide*), https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf, which was developed to "promote, at the global level, the proper and consistent application of the grave risk exception," also contemplates the exercise of discretion. *Guide* ¶ 3. It states that "[t]he examination of the grave risk exception should then also include, *if considered necessary and appropriate*, consideration of the availability of adequate and effective measures of protection in the State of habitual residence." *Id.* ¶ 36 (emphasis added).

Many contracting states that mandate consideration of ameliorative measures root that obligation outside the Convention. European Union member states (other than Denmark) follow Brussels IIa, a regulation that limits their discretion to refuse to return a child to another member state in light of an Article 13(b) defense where "adequate arrangements have been made to secure the protection of the child after his or her return." Council Regulation 2201/2003, art. 11(4), 2003 O.J. (L 338) 6 (EU). That regulation—which operates only between member states subject to separate instruments affecting the enforceability of any ameliorative measures under consideration—does not suggest that the Convention itself supports a requirement that courts take ameliorative measures into account under Article 13(b).

3 The *Guide* includes evaluation of ameliorative measures as a necessary step in its section describing the grave-risk exception "in practice." *Guide* ¶¶ 41, 61. Paragraph 36 of the *Guide*, however, makes clear that the Convention permits such consideration as courts may deem "necessary and appropriate." *Guide* ¶ 36.

C. A Flexible Ameliorative-Measure Approach Best Serves The Convention's Purposes

By requiring courts to consider a broad range of possible ameliorative measures, and even to develop them, the Second Circuit stated that it sought to "honor[] the important treaty commitment to allow custodial determinations to be made—if at all possible—by the court of the child's home country." *Blondin*, 189 F.3d at 248. But the Second Circuit's standard is based on an unduly restrictive understanding of the Convention's purposes and fails to respect the treaty's provisions barring custody determinations, directing expeditious adjudication of return petitions, and permitting denial of return under Article 13(b).

1. The Convention and ICARA expressly prohibit courts from resolving any underlying custody dispute in adjudicating a return petition; the remedy is limited to returning the child to the country of habitual residence. See Convention arts. 16, 19; 22 U.S.C. 9001(b)(4) (empowering courts "to determine only rights under the Convention and not the merits of any underlying child custody claims"). "It is the Convention's core premise that 'the interests of children . . . in matters relating to their custody' are best served when custody decisions are made

in the child's country of 'habitual residence.'" *Monasky*, 140 S. Ct. at 723 (quoting Convention Pmbl.).

Directing courts to consider or develop ameliorative measures in every grave-risk case could embroil U.S. courts in issues more properly left to other countries' custody proceedings. This case is illustrative. In order to enable B.A.S.'s safe return under the Second Circuit's standard, the district court on remand found it necessary to assess respondent's behavior as a spouse and parent, and to engage in an "extensive examination" of a "'full range'" of ameliorative options deemed adequately "'enforceable * * * or supported by other sufficient guarantees of performance.'" Pet. App. 12a- 14a (citations omitted). That course led to the issuance of a "comprehensive order" from an Italian court not just encompassing a protective order pending a custodial determination, but also "directing Italian social services to oversee [respondent's] parenting classes and behavioral and psychoeducational therapy," based on the district court's concern about his "lack of insight into his behavior and its effect on B.A.S." *Id.* at 17a, 20a. The district also ordered respondent to provide petitioner with "[a] payment of $150,000.00" to ensure petitioner's "financial independence from the [respondent] and his family" for an entire year. *Id.* at 22a-23a.

The order of the Italian court supported the district court's determination that there were adequate protections to permit the child to return. But to the extent Second Circuit precedent *required* the district court to take extensive steps to prompt the issuance of an order containing such detailed provisions, that mandate is hard to square with the principle "that the Hague proceeding should * * * not attempt to address the underlying [custody] dispute." App., *infra*, 4a. Thus, while in some cases, imposition of protective measures limited in time and scope are appropriate—and while consideration of protective measures a court in the country of habitual residence has already imposed is ordinarily appropriate—the Convention's prompt-return goal does not justify transforming Article 13(b) into a back-door route for adjudicating custody issues. Rather, where return presents a grave risk of harm to the child, it is "less appropriate for the court to enter extensive undertakings" that mimic a custody order of its own "than to deny the return request" in accordance with Article 13(b)'s express exception. *Id.* at 16a.

2. Requiring consideration of a range of ameliorative measures after every grave-risk finding is also at odds with the Convention's emphasis on prompt adjudication of return petitions, regardless of the ultimate decision reached. "To avoid delaying the custody proceeding" by adjudicating the Convention's merely " 'provisional' remedy that fixes the forum," "the Convention instructs contracting states to 'use the most expeditious procedures available.' " *Monasky*, 140 S. Ct. at 723-724 (citations omitted); see *id.* at 724 (pointing to Article 11's provision permitting inquiry into "delay[]" after six weeks as indicating a "normal time for return-order decisions"). Article 11, moreover, expressly requires contracting states to "act expeditiously in proceedings for the return of children." Convention art. 11. The Convention takes care to simplify its proceedings to support that mandate. For example, Article 30 makes documents submitted "in accordance with the terms of th[e] Convention * * * admissible in the courts" of contracting states, thereby avoiding potentially lengthy authentication processes. *Id.* art. 30; see *id.* art. 22 (precluding a security or bond requirement); *id.* art. 23 (limiting formality requirements).

That emphasis on expedition reflects the recognition that a decision regarding a petition for return should be made quickly, whether that decision orders return or not. See *Chafin* v. *Chafin*, 568 U.S. 165, 179 (2013) (noting that "courts can and should take steps to decide

these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation"). If, however, courts are invariably required to consider a range of ameliorative measures—particularly based on a "thorough record" they are required to "develop," including by making "any appropriate or necessary inquiries of the government" of the country of habitual residence, *Blondin*, 189 F.3d at 249—then Article 13(b) cases would routinely take many months, if not more, to resolve.

Again, this case provides a useful example. After the Second Circuit found the initial protective measures inadequate, the district court spent over nine months conducting the type of inquiry the Second Circuit directed, "communicat[ing] with Italian authorities" and undertaking an "extensive examination," including "multiple conferences and * * * status reports and briefs on the status of the case in Italy." Pet. App. 4a, 12a. This case demonstrates how mandatory requirements like the Second Circuit's, with extensive oversight of foreign proceedings, can lead to additional—perhaps substantial—delay, in significant tension with the Convention's focus on expedition.

3. In contrast with the Second Circuit's mandatory regime, a more flexible, discretionary approach to ameliorative measures permits courts to consider each case in light not only of the Convention's general policy to return a child, but also of its prohibition on custody determinations by courts considering return petitions, its emphasis on prompt resolution of return petitions, and its solicitude for the child's welfare. Cf. *Lozano*, 572 U.S. at 23 (Alito, J., concurring) (explaining that case-specific "[e]quitable discretion" is "a far better tool" "to address the dangers of concealment" of a child than an across-the-board equitable-tolling requirement). Courts' discretion in balancing those potentially competing aspects of the Convention should be substantial, leaving them free to take into account such factors as the nature of the grave risk, whether protective measures are already in place in the country of habitual residence, and whether there are or promptly could be proceedings in that country in which a court would be able to expeditiously issue protective measures. In general, however, ameliorative measures ordered by a U.S. court are most appropriate where they are limited in time and scope to ensure prompt return of the child. Cf. App., *infra*, 3a-4a (noting with disapproval undertakings going "well beyond what was necessary to ensure the prompt return of the child," addressing motor vehicles, school expenses, insurance, and weekly maintenance payments).

II. THE SCOPE OF JUDICIAL DISCRETION UNDER ARTICLE 13(b) IS AN IMPORTANT ISSUE DIVIDING THE CIRCUITS THAT WARRANTS THIS COURT'S REVIEW

This case merits this Court's review. The Second Circuit's creation of a categorical and atextual requirement that courts consider and even craft ameliorative measures under Article 13(b) could impact the United States' performance of its obligations under the Convention, prompting intrusions into the arena of custody arrangements and hindering courts' ability to expeditiously resolve return petitions. Congress has made clear that "the United States should set a strong example for other Convention countries in the * * * prompt resolution of cases involving children abducted abroad and brought to the United States." Sean and David Goldman International Child Abduction Prevention and Return Act of 2014, Pub. L. No. 113-150, § 2(b), 128 Stat. 1809 (expressing the sense of Congress). This Court should grant certiorari to provide guidance to the lower courts that will enable them to exercise their discretion appropriately and promptly in resolving Convention cases.

Moreover, the courts of appeals are in conflict regarding the appropriate role of ameliorative measures after a grave-risk finding. Like the Second Circuit, the Third and Ninth Circuits require courts to consider potential ameliorative measures before making a decision whether to deny return under Article 13(b). See *In re Adan*, 437 F.3d 381, 395 (3d Cir. 2006); *Gaudin* v. *Remis*, 415 F.3d 1028, 1035 (9th Cir. 2005). In contrast, the First, Eighth, and Eleventh Circuits have concluded that district courts may deny return under Article 13(b) even without examining whether they can craft sufficiently protective measures. See *Danaipour* v. *McLarey*, 386 F.3d 289, 303 (1st Cir. 2004) (rejecting argument that "a district court cannot properly find that an Article 13(b) exception exists unless it examines the remedies available in the country of habitual residence"); *Acosta* v. *Acosta*, 725 F.3d 868, 877 (8th Cir. 2013) (concluding that "[o]nce a district court concludes that returning a child to his or her country of habitual residence would expose the child to a grave risk of harm, it has the discretion to refuse to do so," and placing burden on petitioning parent to "proffer[]" any undertaking); *Baran* v. *Beaty*, 526 F.3d 1340, 1346-1352 (11th Cir. 2008) (explaining that "[a]lthough a court is not barred from considering evidence that a home country can protect an at-risk child, neither the Convention nor ICARA require it to do so," and concluding that the district court properly denied the petitioning parent's "request to propose undertakings at a future evidentiary hearing"); see also *Simcox* v. *Simcox*, 511 F.3d 594, 608 (6th Cir. 2007) (reasoning that "[o]nce the district court determines that the grave risk threshold is met," it is "vested by the Convention with the *discretion* to refuse to order return," emphasizing that courts' use of such discretion to "craft appropriate undertakings" is "intensely fact-bound"); *Van De Sande* v. *Van De Sande*, 431 F.3d 567, 571-572 (7th Cir. 2005) (citing *Danaipour* for the proposition that it may be less appropriate to order extensive undertakings than to deny return).

That disagreement among domestic courts results in inconsistent application of the Convention within the United States, permitting abducting parents to forum shop among U.S. courts to obtain the most favorable rule. Here, for instance, had petitioner brought B.A.S. to Florida or Massachusetts instead of New York, a district court could have opted to deny return without considering potential ameliorative measures after a grave-risk finding. The opportunity for such inconsistencies to manifest is substantial, given that the United States is among the contracting states that receive the highest yearly number of return applications. See Hague Conf. on Private Int'l Law, *A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part I* 6 (2018), https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf.

Finally, this case presents an appropriate vehicle to review this issue. Respondent's suggestion (Br. in Opp. 14) that this Court's resolution of the question presented could "have no impact on this case" is misplaced. The United States takes no view on whether any particular ameliorative measure imposed by the district court would be an abuse of discretion. But to the extent the full slate of conditions on return was effectively imposed by the district court—and when that slate is viewed in its totality and in light of the delay in securing those conditions—it exceeded what would ordinarily be appropriate under the Convention. The district court's approach nevertheless reflected the Second Circuit's erroneous legal standard. See Pet. App. 14a (noting obligation under Second Circuit precedent to consider full range of ameliorative measures after finding grave risk of harm to B.A.S.); see pp. 6-7, *supra* (discussing "extensive" inquiry undertaken and "comprehensive" measures developed). While the time spent crafting that return order cannot now be recovered, and the comprehensive order issued by the district court has been found adequate, the courts below nonetheless should have an opportunity to

consider the appropriate disposition of this case absent the Second Circuit's erroneous rule. On remand, those courts could decide in the first instance whether to deny return in light of the grave risk of harm to B.A.S., or to order return.

* * * *

Cross References

Afghan Special Immigrant Visa program, **Ch.1.B.5.e**
Afghanistan refugee program, **Ch. 1.C.5**
UN 3C general statement on consular notification, **Ch.6.A.4.a**
HRC on Afghanistan, **Ch. 6.A.6.b**
Joint statement on the situation of women and girls in Afghanistan, **Ch.6.B.2.c**
Children, **Chapter 6.C**
Suspending operations at Embassy Kabul, **Ch. 9.A.8**
Enhanced consular immunities, **Chapter 10.C.1**
Request for import restrictions on cultural property of Afghanistan, **Ch. 14.A.7**
Afghanistan, **Ch. 17.B.1**
Afghanistan, **Ch. 18.A.2**

CHAPTER 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

On January 7, 2021, the U.S. Court of Appeals for the First Circuit issued its decision affirming habeas relief for Cristian Aguasvivas, whom the Dominican Republic had requested for extradition. *Aguasvivas v. Pompeo*, 984 F.3d. 1047. The court disagreed with the district court's holding relating to the Convention Against Torture ("CAT") but affirmed based on the insufficiency of the documents submitted in support of extradition. Excerpts follow from the majority opinion of the court of appeals. See *Digest 2019* at 56-57 for discussion of the U.S. brief on appeal, arguing for reversal of the district court.

* * * *

The Dominican Republic requests Cristian Starling Aguasvivas for extradition. After a federal magistrate judge certified Aguasvivas as eligible for extradition, Aguasvivas filed a habeas corpus petition in the District of Rhode Island arguing, among other things, that the Dominican Republic had failed to provide the required documentation in its extradition request, and that his extradition would violate the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, T.I.A.S. No. 94-1120.1 ("CAT"), given that the Board of Immigration Appeals ("BIA") had previously found that he was qualified for CAT relief. The district court agreed with Aguasvivas on both points, and the United States has now appealed.

For the reasons explained below, we disagree with the district court that the United States is bound by the BIA's prior determination awarding Aguasvivas CAT relief. We nevertheless affirm the grant of habeas relief because we agree that the United States has failed to file the necessary documents to support an extradition request.

I.

On December 6, 2013, Aguasvivas was with his brother, Francis ("Frank"), when three Dominican drug officers, including Lorenzo Ubri, handcuffed and attempted to arrest Aguasvivas. Shots were fired while the officers were attempting to put Aguasvivas into their car. According to the Dominican Republic as represented by the United States, "Frank distracted the agents by protesting, and Aguasvivas took advantage of this distraction to disarm Agent Ubri and

shoot him three times at close range, including two bullets to the chest area." Ubri died; the two other officers were shot but not killed.

In December 2013, a Dominican warrant issued for Aguasvivas's arrest. Eight months later, Aguasvivas fled to the United States. In immigration court, he sought asylum, withholding of removal, and CAT relief because of his fear of Dominican police. The immigration judge denied all relief, but in August 2016, the BIA reversed and granted withholding of removal under the CAT. The BIA found that it was "more likely than not that [Aguasvivas would] be tortured at the instigation of or with the consent or acquiescence of public official[s] in the Dominican Republic" if he returned.

Just over three years after the warrant issued, in February 2017, the Dominican Republic submitted an extradition request to the United States. Extradition is a "two-step procedure [that] divides responsibility ... between a judicial officer and the Secretary of State." *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir. 1997). The process is set out in the extradition statutes, 18 U.S.C. § 3181 *et seq.* First, upon a complaint from the Department of Justice in response to the foreign government's request, the magistrate judge issues a warrant for the arrest of the individual sought. *See id.* § 3184. The magistrate then conducts a hearing to consider whether the extradition request complies with the relevant treaty's documentation requirements, and whether "the evidence [is] sufficient to sustain the charge under the provisions of the proper treaty." *See id.* If those requirements are fulfilled, the magistrate certifies the extradition to the Secretary of State. *Id.* The Secretary then "determine[s] whether or not the [fugitive] should actually be extradited." *Kin-Hong*, 110 F.3d at 109 (citing 18 U.S.C. § 3186). "The Secretary has the authority to review the judicial officer's findings of fact and conclusions of law de novo, and to reverse the judicial officer's certification ... if [he] believes that it was made erroneously." *Id.* The Secretary can also "decline to surrender the relator on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations." *Id.* Finally, the Secretary may "attach conditions to the surrender of the relator" or "use diplomatic methods to obtain fair treatment for the relator" -- tools the judiciary does not have. *Id.* at 110.

Upon receipt and review of the request from the Dominican Republic to extradite Aguasvivas, the United States filed an extradition complaint in the District of Massachusetts. A U.S. warrant issued, and Aguasvivas was arrested in September 2017 in Lawrence, Massachusetts. Following a hearing, a magistrate judge in the District of Massachusetts certified Aguasvivas's extradition in December 2018. The magistrate judge found that the extradition request was supported by the documentation required by the Dominican Republic-United States Extradition Treaty ("Extradition Treaty"), Extradition Treaty, Dom. Rep.-U.S., Jan. 12, 2015, T.I.A.S. No. 16-1215, and that there was probable cause to certify Aguasvivas for the extraditable offenses of murder, possession of a firearm, and robbery.

Magistrates' certifications of extraditability are not appealable final orders under 28 U.S.C. § 1291. *In re Mackin*, 668 F.2d 122, 127–28 (2d Cir. 1981). Extraditees therefore sometimes seek habeas relief to challenge their detention pursuant to the certifications. …

With this appeal, the United States challenges both the ruling that the BIA's 2016 CAT determination precludes extradition and the ruling that the request of the Dominican Republic does not satisfy the documentary requirements for extradition. We address each challenge in turn.

II.

A.

We begin with the United States' challenge to the district court's ruling that the Convention Against Torture precludes Aguasvivas's extradition. At issue here, according to Aguasvivas, is the prospect that, if extradited to the Dominican Republic, he will be tortured. A claim of feared torture warrants attention in the extradition context because of the principle of non-refoulement in international law, reflected in Article 3 of the CAT, and enacted in the United States (as pertinent here) in the "FARR Act." *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-761, 2681-822; *Nasrallah v. Barr*, —— U.S. ——, 140 S. Ct. 1683, 1690, 207 L.Ed.2d 111 (2020) ("[The FARR Act] implements Article 3 of the international Convention Against Torture, known as CAT."). That Act states in part that "[i]t shall be 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." FARR Act § 2242(a). It then "delegates the responsibility for 'prescrib[ing] regulations to implement the obligations of the United States' under the CAT to 'heads of the appropriate agencies.'" *Saint Fort v. Ashcroft,* 329 F.3d 191, 196 (1st Cir. 2003) (quoting FARR Act § 2242(b)). As relevant to extradition, the Secretary of State, "[i]n order to implement" the United States' obligations under the CAT, "considers" whether an individual sought is "more likely than not" to be tortured before extraditing him. 22 C.F.R. § 95.2(b).

Aguasvivas, though, does not want to wait to see what the Secretary decides. Instead, he launched a preemptive strike, asking the district court to rule now that the threat of torture must prevent his extradition, and thus that there is no reason to detain him. And the district court agreed, reasoning that, because the BIA previously found that removal of Aguasvivas by immigration authorities was barred by the CAT, the Secretary is estopped from ruling otherwise. In challenging that ruling, the United States advances two arguments that command our attention. First, the United States contends that the district court exceeded its own statutory jurisdiction by inquiring into the subject of whether the CAT precluded Aguasvivas's extradition. In support of this argument, the United States relies on the so-called "rule of non-inquiry," *Kin-Hong*, 110 F.3d at 110; the Senate's declaration that Article 3 of the CAT is not self-executing, 136 Cong. Rec. 36198 (1990); the FARR Act § 2242(d); and the REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(B), 119 Stat. 231, 310 (codified at 8 U.S.C. § 1252(a)(4)). Second, the United States argues that, in any event, the CAT's application to this extradition request is not pre-ordained by the BIA ruling and is in fact an issue that is not yet ripe. Because we find the collateral estoppel issue ripe, and the argument against treating the BIA ruling as controlling to be plain and persuasive, we skip over the more difficult issues of whether we possess statutory jurisdiction. *Cowels v. FBI*, 936 F.3d 62, 67 (1st Cir. 2019) ("Where a question of statutory jurisdiction is complex, but the merits of the appeal are 'easily resolved against the party invoking [ ] jurisdiction,' we can assume jurisdiction for purposes of deciding the appeal." (quoting *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 916 F.3d 98, 114 n.13 (1st Cir. 2019))).

* * * *

2.

We thus move to the merits of Aguasvivas's collateral estoppel claim, which is that the Secretary is estopped from determining that Aguasvivas is not likely to face torture if he returns

to the Dominican Republic, because the immigration courts have already determined that he is likely to face torture. Even putting to one side the questions of whether and when one agency of the federal government may collaterally bind another arm of the government, collateral estoppel cannot apply here because the issues are not the same. *See NLRB v. Donna-Lee Sportswear Co., Inc.*, 836 F.2d 31, 34 (1st Cir. 1987) ("[T]he issue before the second forum must be the same as the one in the first forum ...."). The issue before the BIA was whether it was more likely than not that Aguasvivas would be tortured if he were removed by immigration authorities to the Dominican Republic in 2016. *See* 8 C.F.R. § 208.16(c)(3). The issue to be addressed by the Secretary would be whether Aguasvivas is more likely than not to be tortured if he is extradited by the Secretary in 2020. *See* 22 C.F.R. § 95.2(b). The relevant time frames at issue differ by several years. And the Secretary may also be able to use the normal tools of diplomacy to assure certain treatment for Aguasvivas upon surrender, as described above. *See Kin-Hong,* 110 F.3d at 110. So whether Aguasvivas would be tortured if extradited by the Secretary in 2020 is a materially different question from whether he would have been tortured had he been removed by immigration officials without any such assurances in 2016.

As one amicus brief has pointed out, in theory the Secretary could have sought the same diplomatic assurances from the Dominican Republic during the litigation of Aguasvivas's CAT claim in removal proceedings. *See* 8 C.F.R. § 1208.18(c) (setting forth a procedure for the Secretary of State to forward diplomatic assurances to the Attorney General to be relied upon in immigration proceedings). But we see no reason why the Secretary should be required to seek diplomatic assurances in removal proceedings or else forever hold his or her peace, especially given that removal proceedings might take place before the foreign government even requests extradition in the first place—as happened here. Presumably, even potentially effective assurances in place at the time of removal proceedings would have to be re-sought or updated if there were an extradition process years later. The availability of diplomatic assurances in the removal process thus does not convince us that the Secretary must be bound by the results of that process. As a result, we see no reason to bind the government preemptively by collateral estoppel in these extradition proceedings, and Aguasvivas's detention would be proper as a matter of extradition procedure—at least as to the CAT issue. *See* 18 U.S.C. § 3184 (requiring the extradition magistrate to "issue his warrant for the commitment of the person so charged to the proper jail" upon certifying extraditability).

B.

We turn now to Aguasvivas's claim that the documentary requirements of the Dominican Republic-United States Extradition Treaty have not been met, beginning with the question of whether we have habeas jurisdiction to review the magistrate's determination on the issue at all and then proceeding to the merits.

1.

In its briefs, the United States makes no claim that we lack jurisdiction to determine whether the documentary requirements of the treaty have been satisfied. Counsel for the United States explained that the United States has previously and unsuccessfully contested jurisdiction over this issue in other cases and has intentionally abandoned that argument in this case. …

Nor has the United States argued that this set of claims fails to allege an injury in fact. We agree that there is an "immedia[te] and real[ ]" controversy as to the probable cause and documentation issues that Aguasvivas raises, because he would not be subject to detention but for the magistrate judge's challenged certification that the documentation was proper and that probable cause existed. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127, 127 S.Ct. 764,

166 L.Ed.2d 604 (2007) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941)). And even though these issues could be mooted if the Secretary decides that Aguasvivas should not be extradited, that possibility of eventual relief does not change the fact that the Secretary seeks to have Aguasvivas detained now.

2.

So we turn to the merits of Aguasvivas's argument—accepted by the district court—that the request for extradition does not comply with the basic documentary requirements of the treaty. That determination turned on an interpretation of the Extradition Treaty's Article 7, titled "Extradition Procedures and Required Documents." Paragraph 2 of Article 7 requires, among other things, that "[a]ll extradition requests shall be supported by ... information describing the facts of the offense or offenses [and] the text of the law or laws describing the offense or offenses for which extradition is requested." Extradition Treaty art. 7, § 2. Paragraph 3 then specifies that "[i]n addition to the requirements in paragraph 2 ..., a request for extradition of a person who is sought for prosecution shall also be supported by:"

> (a) a copy of the warrant or order of arrest or detention issued by a judge or other competent authority;
> (b) a copy of the document setting forth the charges against the person sought; and
> (c) such information as would provide a reasonable basis to believe that the person sought committed the offense or offenses for which extradition is requested.

Extradition Treaty art. 7, § 3.

Aguasvivas contends that the request for his extradition failed to satisfy these documentary requirements for two reasons: (1) the warrant was not a warrant for his arrest or detention because it did not name him; and (2) the request did not include "the document setting forth the charges" against him. We address each argument in turn.

a.

The Dominican Republic submitted a translated copy of the warrant for the arrest of Aguasvivas. It reads in part:

> "[T]he judge ... can ordain the arrest of a person when ... his presence is necessary and there is evidence to reasonably maintain that he is the perpetrator or accomplice of an offense, that he can hide, leave or escape from the place[,]" and "when the person after being summoned to appear ... does not do that, and his presence is necessary during the investigation or knowledge of an infringement. ..."
>
> [This warrant o]rdains the arrest against CRISTIAN STARLING AGUASVIVAS aka MOMON and FRAN AGUASVIVAS aka EL COJO, according to the request filed by the licentiate FELIX SANCHEZ, Deputy Prosecutor of Judicial District of Peravia ....

(quoting Dom. Rep. Code Crim. P. arts. 224, 225).

Aguasvivas points out that the warrant botches his name -- entirely omitting his first name ("Cristian") and in its place using only a misspelling of his middle name ("Estarling" instead of "Starling")—though the version translated to English inexplicably gets it right (and the difference is not a simple matter of translation). But extradition law discourages reliance on mere technicalities to impede the joint efforts of the treaty parties to extradite. *See Fernandez*, 268 U.S. at 312, 45 S.Ct. 541 ("Form is not to be insisted upon beyond the requirements of safety and

justice."); *Bingham v. Bradley*, 241 U.S. 511, 517, 36 S.Ct. 634, 60 L.Ed. 1136 (1916) (disfavoring defenses "savor[ing] of technicality" in extradition proceedings). And there is no dispute—even by Aguasvivas—that he is the person described in the warrant, which is accompanied by an affidavit that also describes him and includes his picture.

The Supreme Court has previously found that an arrest warrant was invalid when it used an entirely incorrect first name ("James" versus "Vandy M."). *See West v. Cabell*, 153 U.S. 78, 85, 14 S.Ct. 752, 38 L.Ed. 643 (1894) ("[A] warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him."). Here, however, the reasonable inference from the warrant's misspelling is that the police thought Aguasvivas's middle name was his first name, and then spelled that name wrong. *See Gero v. Henault*, 740 F.2d 78, 83 (1st Cir. 1984) (upholding a warrant that listed the defendant's real name and alias, but in reverse order, noting that it was clear that the police knew that the defendant used both names). This is a far cry from an arrest warrant that mistakes the identity of the party sought. So although we view the mistranslation of the warrant as troubling, it was not error for the magistrate to rely on the warrant despite the misspelling of Aguasvivas's name in the original, Spanish version.

b.

The bigger problem arises from the omission in the extradition request of any indictment or the like. To be more precise, such a document was not simply omitted—it does not exist at all, as the parties agree that the Dominican prosecutor has yet to seek an indictment (called an "acusación" in the Dominican Republic). Nor does any party dispute that the criminal code of the Dominican Republic provides for the initiation of an extradition request when a person against whom an indictment has been presented is in a foreign country. *See* Dominican Code of Criminal Procedure ("DCCP") Art. 161. Aguasvivas argues that Dominican law actually requires that an indictment precede seeking extradition from any country, but that contention is disputed, and we defer to that extent to the Dominican government's construction of its own law as not requiring any step or document that the treaty does not require. *Cf. Grin v. Shine*, 187 U.S. 181, 190-91, 23 S.Ct. 98, 47 L.Ed. 130 (1902) (refusing to consider a challenge to the validity of a foreign arrest warrant). Similarly, while the Dominican prosecutor's affidavit accompanying the extradition request explains that a prosecutor in the Dominican Republic may in the course of an investigation obtain an arrest warrant before deciding whether or not to bring any charges, nothing in the affidavit states that a prosecutor cannot indict before executing an arrest warrant. The prosecutor's affidavit also suggests that charges may be lodged in the Dominican Republic by a criminal complaint made out by a victim. But the affidavit does not claim that any criminal complaint has yet been lodged against Aguasvivas.

For our purposes the salient point is that as best this record shows neither the United States nor the Dominican Republic disputes that Dominican law certainly allows for an indictment or a criminal complaint as a precursor to an extradition request. So here we have an application for extradition that includes no indictment or criminal complaint only because no complaint exists and apparently no indictment has even been sought. In short, this case concerns a request to extradite for arrest and questioning in anticipation of a possible, yet-to-be-determined prosecution.

This all brings us back to the text of the treaty. *See United States v. Alvarez-Machain*, 504 U.S. 655, 663, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992) ("In construing a treaty ... we first look to its terms to determine its meaning."); Restatement (Fourth) of Foreign Relations Law § 306 (Am. Law Inst. 2018) ("A treaty 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."). If the treaty's text is ambiguous and reasonably accommodates the United States' construction, we defer to that construction whether or not it is a construction we would adopt de novo. *See Kin-Hong*, 110 F.3d at 110 ("[E]xtradition treaties, unlike criminal statutes, are to be construed liberally in favor of enforcement ...."); *Factor v. Laubenhei*mer, 290 U.S. 276, 293–94, 54 S.Ct. 191, 78 L.Ed. 315 (1933) ("[I]f 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."). Conversely, if the textual meaning is plain and cannot reasonably bear the government's construction, then we must reject that construction. *Greci v. Birknes*, 527 F.2d 956, 960 (1st Cir. 1976) (declining to accept the State Department's interpretation where the language of the treaty to the contrary was "plain").

The United States' textual argument focuses on the phrase "the document setting forth the charges." Most persons familiar with criminal procedure would read that phrase as referring to either an indictment, a criminal complaint, or in some circumstances in this country, an information. In this case, the United States does not argue that the Dominican extradition request includes any one of these three types of documents. Rather, the United States argues that the warrant can do "double duty," serving as both the warrant and as "the document setting forth the charges." As to why we should regard the warrant as "the document setting forth the charges," the United States offers a single argument:

> The Dominican arrest warrant ... 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. It therefore qualifies as "the document setting forth the charges against the person sought."

We see six textual problems with this argument.

First, and most importantly, were the United States correct, then the entirety of paragraph 3(b) (requiring "the document setting forth the charges") would be entirely superfluous. In every case, the warrant would perform the government's version of double duty. The government, after all, makes no argument that Dominican or United States warrants of arrest or detention would ever fail to do what the United States says is necessary to do double duty as the document setting forth the charges. …

Our dissenting colleague posits that a warrant to search for and seize "a person to be arrested" under Federal Rule of Criminal Procedure 41(c)(4) need not contain such information, but points to no example of an arrest or detention pursuant to such a warrant (rather than a Rule 4 warrant). The United States itself makes no such argument (either in the district court or before us). And even were we to accept the possibility that a warrant silent as to the offense could authorize arrest or detention, the "missing" information required by the United States' "double duty" interpretation would always be supplied by the Paragraph 2 required information. So, whichever way you look at it, either the warrant by itself or certainly the warrant and the paragraph 2 information would in 100 percent of the cases supply everything that the United States claims is necessary, and thus do the requisite double duty, rendering Article 7.3(b) entirely superfluous.

Second, this is a treaty between two countries that both customarily employ warrants to arrest and separate documents to charge. When two experienced anglers refer to their "casts," we don't envision them making movies. Similarly, when these two countries refer in separately set-

off sub-paragraphs to the warrant and to "the document setting forth the charges," (emphasis added), we envision something more than a warrant procured by a prosecutor who has not yet decided to bring charges.

Third, a warrant, unlike an indictment, fails to indicate that the subject is wanted for prosecution. Under this treaty, the difference matters. Article 1 of the Extradition Treaty states that it is intended to provide for extradition of people "sought by the Requesting Party from the Requested Party *for prosecution*" (emphasis added). Article 7.3 itself describes the required documentation as support for "a request for extradition of a person who is sought for prosecution." This plain language expressly describing the role played by "the document setting forth the charges" reinforces the notion that Article 7 of the Treaty does not call for the extradition of a person wanted for questioning regarding a possible but not yet charged prosecution.

Fourth, we examine the text of this treaty against the backdrop of judicial interpretations of other treaties. Long before this treaty was concluded, two circuit courts had considered whether a treaty required presentation of an indictment or the like in support of an extradition request. *See Emami v. U.S. Dist. Ct.*, 834 F.2d 1444, 1448–49 (9th Cir. 1987); *In re Assarsson*, 635 F.2d 1237, 1240-43 (7th Cir. 1980). In rejecting the contention that the applicable treaty conditioned extradition on the filing of formal charges, each court pointed out that the treaty's list of required documents contained no reference to any formal document evidencing charges being brought. The lists included, instead, the warrant. *Emami*, 834 F.2d at 1448 n.3; *Assarsson*, 635 F.2d at 1243. The Seventh Circuit reasoned that, "[i]f the parties had wished to include the additional requirement that a formal document called a charge be produced, they could have so provided." *Assarsson*, 635 F.2d at 1243. We readily agree with the holdings and the rationale in both *Emami* and *Assarsson*. So we could rule for the government in this case were the language of this treaty materially similar to the language of those treaties.

The treaty in this case, though, adds to the list of required documents a requirement that was missing in those earlier treaties: "the document setting forth the charges." For that reason, our agreement with the holdings in *Emami* and *Assarsson* provides no succor for the United States in this case. Indeed, given that the State Department is presumably familiar with the various treaty forms that it has adopted and with circuit law construing those forms, the contrast between this treaty and the treaties in those cases strongly suggests that the addition of § 3(b) was intended to call for the production of more than just a warrant.

This reasoning moves even closer to home when we consider the fifth textual problem with the government's argument, this Treaty's departure from the language in the pre-existing, 1909 extradition treaty with the Dominican Republic. That treaty, like the treaties at issue in *Assarsson* and *Emami*, also had no requirement to include the document setting forth the charges. Extradition Convention art. XI, Dom. Rep.-U.S., June 19, 1909, 36 Stat. 2468 ("If, however, the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced ...."). When, subsequent to *Assarsson* and *Emami*, the Dominican Republic and the United States added to the list of required documents "the document setting forth the charges," a strong inference arose supporting the conclusion that this treaty requires more than an arrest warrant describing a suspected but yet-to-be charged crime.

Finally, this inference only grows stronger when we compare this treaty's supporting document requirements to those present in other recent treaties. After *Assarsson* and *Emami* and prior to this treaty's conclusion, the State Department demonstrated that it knew how to make the

production of a document other than an arrest warrant optional. The extradition treaty between the United States and Austria, for example, provides that "[a] request for extradition of a person who is sought for prosecution shall be supported by" "a copy of the warrant or order of arrest" and "a copy of the charging document, *if any."* Extradition Treaty, Austria-U.S. art. 10, § 3, Jan. 8, 1998, T.I.A.S. No. 12916 (emphasis added); *see also* Protocol Amending the Convention between the United States of America and Israel of December 10, 1962, Isr.-U.S., art. 6, July 6, 2005, T.I.A.S. No. 07-110 (amending Article X of the countries' extradition treaty to include the same language). This language plainly recognizes that there is a type of document in addition to the warrant that is known as a charging document. And that language also grants permission to proceed without that other document if it does not exist. The treaty before us preserves that recognition that there is some document that does more than a warrant does, but it eliminates the permission to proceed without such a document. This change would not have been made had the United States been willing to extradite to the Dominican Republic persons (including its citizens) based only on a warrant.

As best we can tell, no other United States extradition treaty uses the same relevant language as does the treaty with the Dominican Republic. The treaty that comes closest, the Chile-United States Extradition Treaty, preexisted this treaty and requires a warrant and "a document setting forth the charges." *See* Extradition Treaty, Chile-U.S., art. 8, § 3(b), June 5, 2013, T.I.A.S. No. 16-1214. The next-closest agreements are those with Belize, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Grenada, and Saint Lucia, all of which also preexist this treaty and none of which requires "the document setting forth the charges." *See* Extradition Treaty, Belize-U.S., art. 6, § 3(b), Mar. 30, 2000, T.I.A.S. No. 13,089; Extradition Treaty, St. Kitts & Nevis-U.S., art. 6, § 3(b), Sept. 18, 1996, T.I.A.S. No. 12,805; Extradition Treaty, St. Vincent-U.S., art. 6, § 3(b), Aug. 15, 1996, T.I.A.S. No. 99-908; Extradition Treaty, Gren.-U.S., art. 6, § 3(b), May 30, 1996, T.I.A.S. No. 99-914.1; Extradition Treaty, St. Lucia-U.S., art. 6, § 3(b), Apr. 18, 1996, T.I.A.S. No. 00-202. The parties cite no precedent concerning those treaties. Whether the United States' "double duty" theory would work with those treaties without rendering an entire paragraph superfluous, we need not decide. Rather, the arguably pertinent point is that in this treaty alone "a document setting forth the charges" is changed to "the document setting forth the charges."

* * * *

A final note on the charges: At oral argument, counsel for the United States acknowledged that because of the rule of specialty, any offense not listed in the document satisfying the requirement established in Article 7.3(b) cannot be certified for extradition. *See United States v. Tse*, 135 F.3d 200, 204 (1st Cir. 1998) ("The doctrine of specialty is grounded in international comity and generally requires that a requesting country not prosecute a defendant for offenses other than those for which extradition was granted."); *United States v. Saccoccia*, 58 F.3d 754, 766 (1st Cir. 1995) ("The principle of specialty ... generally requires that an extradited defendant be tried for the crimes on which extradition has been granted, and none other." (internal citations omitted)). Here, the arrest warrant does not list Article 379 of the Dominican Code, which criminalizes a form of robbery. Article 379 is included in the extradition request, however, and the magistrate certified it for extradition. Certification and Committal for Extradition at 3, *In re Extradition of Cristian Starling Aguasvivas*, No. 17-mj-04218 (D. Mass. Dec. 11, 2018), ECF No. 78. The government avers that the difference between the offense listed

in the extradition request and that listed in the arrest warrant (Article 309) amounts to no more than a typo, and the magistrate judge agreed. But Article 309 is an entirely distinct offense under the Dominican Code, so it is difficult to simply assume that its presence in the arrest warrant was a typo. As a result, even if we found the documentation sufficient to certify on the other charges, we would vacate the certification of Article 379 specifically.

* * * *

III.

For the foregoing reasons, the decision of the district court is *affirmed* as to the insufficiency of the documentation to support an extradition request under Article 7 of the treaty and *affirmed* as to the sufficiency of the probable cause determination, but *reversed* as to Aguasvivas's collateral estoppel claim. We *remand* for further proceedings consistent with this decision.

* * * *

B. INTERNATIONAL CRIMES

1. Terrorism

a. Global Counter-Terrorism Strategy

On June 30, 2021, Ambassador Patrick Kennedy, senior advisor for UN management and reform, delivered remarks and the U.S. explanation of position following the adoption of the UN Global Counter-Terrorism Strategy ("GCTS"), after its biennial review. Ambassador Kennedy's remarks are excerpted below and available at https://usun.usmission.gov/remarks-and-explanation-of-position-following-on-the-adoption-of-the-un-global-counter-terrorism-strategy/.

_____

* * * *

Thank you very much, Mr. President. Thank you for convening this General Assembly meeting on the biennial review of the United Nations Global Counter-Terrorism Strategy. We also thank Ambassadors Augustin Maraver of Spain and Mohammed Alhassan of Oman for co-facilitating this difficult but important negotiation process.

When the Strategy was adopted in 2006, the international community came together to coordinate a unified global framework to counter the evolving threat of terrorism. At the heart of our collective counterterrorism effort is the imperative to protect lives. Unfortunately, we have not always succeeded, and the resulting victims of terrorism are an eternal reminder of our collective responsibility to prevent acts of terrorism everywhere in the world, and to hold terrorists accountable. You must stand in solidarity with victims of terrorism and support the immediate, short-term, and long-term relief and rehabilitation of victims and their families.

That we have managed to adopt this Strategy by consensus, once again – despite the entrenched and divergent views of Member States – is a notable achievement. My intervention today serves as both our statement of debate and our explanation of position…

Although few of us would consider GCTS a perfect resolution, it does address many critical issues for which there is international consensus. For example, the United States welcomes the inclusion of language promoting national sentencing policies, practices, and guidelines for terrorism crimes that are proportionate and reflect the gravity of the offences, while respecting human rights and upholding international law. The United States also welcomes new language on terrorism and violent extremism based on racism, though we regret that we could not come to consensus on language that encompasses both race and ethnicity as potential motivating factors. The United States also welcomes references to the important topic of repatriation, but regrets that these references are not commensurate with the gravity of the issue, which as Under-Secretary-General Voronkov called, "one of the most pressing issues in the world today."

Foreign terrorist fighters in inadequate detention facilities and their associated family members living in overburdened camps in Syria and Iraq pose a serious security threat and a dire humanitarian crisis, raising human rights concerns. Unfortunately, many of the states that pushed for adding human rights language throughout the Strategy refuse to address the inhumane conditions of their own citizens languishing in Syria and Iraq. We believe that repatriation of all Member State citizens, rehabilitation, reintegration, and prosecution, as appropriate, of foreign terrorist fighters is the best way to prevent a resurgence of ISIS in Iraq and Syria and prevent the uncontrolled return of FTFs to countries of origin in the future. Similarly, the best way to support the short- and long-term relief and rehabilitation of associated family members – particularly the thousands of children who remain in displaced person camps like al-Hol – is to return them and reintegrate them into their local communities.

As the United States said in 2018, the Global Counter-Terrorism Strategy review resolution should guide global efforts to counter terrorism and prevent violent extremism, not be yet another vehicle to unjustly criticize Israel at the United Nations. The United States cannot accept the divisive reference to foreign occupation in preambular paragraph 43. It attempts to justify terrorist acts, which are categorically unacceptable under any circumstances, and to undermine a Member State's legitimate right to self-defense. Accordingly, the United States dissociates from consensus on preambular para. 43 of the resolution. All forms and manifestations of terrorism are criminal or unjustifiable.

The United States supports increasing humanitarian assistance and access for those in need consistent with both counterterrorism and humanitarian imperatives. We endorse the language in operative paragraph 60 – drawn from United Nations Security Council Resolution 2462, adopted in 2019 – which urges Member States, when designing and applying counterterrorism measures, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.

The United States rejects the efforts by some to read language included in paragraph 109 to mean that all Member States – including non-parties to the relevant armed conflict – have obligations under international humanitarian law any time it applies to ensure that counterterrorism legislation does not impede humanitarian aid, even if terrorists benefit from such aid. While we support the critical role humanitarian actors play, there is no obligation under international law that requires the completely unrestricted delivery of humanitarian or other

assistance to terrorist groups or individual terrorists at all times. We emphasize that paragraph 109 has no impact upon the binding obligation for Member States to criminalize the financing of terrorism and prohibit their nationals or those within their territories from providing funds or other economic resources directly or indirectly to terrorist organizations or individual terrorists for any purpose, even in the absence of a link to a specific terrorist act.

The United States also remains concerned about the references to the so-called "Principle to Extradite or Prosecute" in operative paragraphs 26 and 29 of the Strategy, which is a misstatement of international law. Extradition and prosecution are vital elements of law enforcement response to terrorism, but we remind the Assembly that the obligation to "extradite or prosecute" arises under specific multilateral treaties. It is incorrect to suggest that it exists as a freestanding principle of law that applies and has independent meaning outside the specific relevant provisions of those treaties.

In preambular paragraph 23, we note that the right to education is to be progressively realized, as with all economic, social, and cultural rights. In that same paragraph, we read "all feasible measures" to encompass existing obligations under international humanitarian law. This resolution does not expand on the obligations of parties to an armed conflict vis-a-vis schools. In operative paragraph 68, we read the term "nuclear, chemical and biological materials" to include only materials with the potential weapons of mass destruction applications and not – for instance – bona fide medical supplies.

We also reiterate that successful counterterrorism and prevention of violent extremism efforts must respect human rights, including freedom of expression, and the rule-of-law. As such, we read this resolution in light of our Constitution and international obligations.

One of the United Nations' founding purposes was the promise of collective measures to prevent and counter threats to international peace and security. For almost 20 years since the September 11 attacks, Member States and UN entities have fulfilled this purpose. The United Nations has created collective mechanisms to identify strategic counterterrorism priorities and strengthen the capacity of Member States to prevent and counter terrorism, while highlighting the value of whole-of-government and whole-of-society approaches, and the importance respecting human rights and the rule of law.

Over the next two years, the United States looks forward to building on this work, and to collaborating with UN and other multilateral organizations, Member States, and civil society to implement the GCTS in a balanced approach across all four of its pillars.

* * * *

In addition to Ambassador Kennedy's remarks, the United States submitted for the record an explanation of position on certain specific points in the 2021 GCTS. That further explanation of position is excerpted below and available at https://usun.usmission.gov/explanation-of-position-on-the-un-general-assembly-adoption-of-the-global-counter-terrorism-strategy/.

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* * * *

FOREIGN OCCUPATION

As the United States said in 2018, the Global Counter-Terrorism Strategy review resolution should guide global efforts to counter terrorism and prevent violent extremism, not be yet another vehicle to unjustly criticize Israel at the UN. The United States cannot accept the divisive reference to foreign occupation in preambular paragraph 43 of the resolution that serves to justify terrorist acts, which are categorically unacceptable under any circumstances, and undermine a Member State's legitimate right to self-defense. Accordingly, the United States dissociates from consensus on preambular paragraph 43 of the resolution. We must reject all terrorist acts. All forms and manifestations of terrorism are criminal or unjustifiable.

COMBATTING THE FINANCING OF TERRORISM (CFT)/INTERNATIONAL HUMANITARIAN LAW (IHL)

We continue to promote increasing humanitarian assistance and access for those in need consistent with both counterterrorism and humanitarian imperatives. We endorse the language in paragraph 60 – drawn from UN Security Council Resolution 2462, adopted in 2019 – which urges Member States, when designing and applying counterterrorism measures, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law. However, the United States rejects the efforts by some to read language included in paragraph 109 to mean that all Member States – including non-parties to the relevant armed conflict – have obligations under international humanitarian law (IHL) any time it applies to ensure that counterterrorism legislation does not impede humanitarian aid, even if terrorists benefit from such aid. Rather, we read paragraph 109 consistent with paragraph 60, which states that all measures undertaken by Member States to counter the financing of terrorism should comply with their obligations under international law, including when their obligations under IHL are applicable. While we support the critical role humanitarian actors play to alleviate the suffering of those who are displaced and otherwise victimized by terrorism, there is no obligation under international law that requires the completely unrestricted delivery of humanitarian or other assistance to terrorist groups or individual terrorists at all times. We emphasize that paragraph 109 has no impact upon the binding obligation for Member States to criminalize the financing of terrorism and prohibit their nationals or those within their territories from providing funds or other economic resources directly or indirectly to terrorist organizations or individual terrorists for any purpose, even without a link to a specific terrorist act, regardless of whether such support is meant to further the "terrorist," "humanitarian," or any other goals or activities of a terrorist or terrorist organization.

FINANCIAL ACTION TASK FORCE (FATF)

Additionally, the United States believes that the important work of the Financial Action Task Force, which sets global standards for preventing and combating money laundering, terrorist financing, and proliferation financing, as well as its recommendations, and guidance should be recognized in the Strategy review.

PRINCIPLE TO EXTRADITE OR PROSECUTE

The United States also remains deeply concerned about the references to a so-called "Principle to Extradite or Prosecute" in operative paragraphs 26 and 29 of the Strategy review, which is a misstatement of international law. While extradition and prosecution are vital elements of law enforcement response to terrorism, we remind the Assembly that the obligation to "extradite or prosecute" arises under specific multilateral treaties, including the international counterterrorism conventions. It is incorrect to suggest that it exists as a freestanding principle of

law that applies and has independent meaning outside the specific relevant provisions of those treaties. Attempting to advance incorrect and ambiguous legal propositions through this resolution harms the very legal cooperation it purports to advance.

RACIALLY OR ETHNICALLY MOTIVATED VIOLENT EXTREMISM (REMVE)

Though it is disappointing that we could not come to consensus on language that encompasses both race and ethnicity as motivating factors for violent extremism, we welcome new language on terrorism and violent extremism based on racism. In the Human Rights Council in February, Secretary-General Guterres noted that white supremacy movements, which are a subset of racially or ethnically motivated violent extremism, are becoming a transnational threat. He called for coordinated action from the international community to address this grave and growing danger. The international community has learned valuable lessons from countering Islamist terrorism, which can be applied to racially or ethnically motivated violent extremism. As a first step, our governments must share information. This will allow us to develop a comprehensive picture of the threat, so we can more effectively protect our citizens at home and overseas. Additionally, we must share that information as appropriate with the private sector and civil society. Both are key partners in our efforts to protect critical infrastructure and public places or soft targets from terrorist attacks.

OTHER PROBLEMATIC LANGUAGE

In preambular paragraph 23, as with all economic, social, and cultural rights, the right to education is to be progressively realized. In that same paragraph, we read "all feasible measures" to encompass existing obligations under IHL. This resolution does not expand on the obligations of parties to an armed conflict vis-a-vis schools. In operative paragraph 68, we read the term "nuclear, chemical and biological materials" to include only materials with potential weapons of mass destruction applications and not, for instance, bona fide medical supplies. With respect to operative paragraph 112, Member States cannot ensure that persons that allege violations of human rights or fundamental freedoms receive effective remedies; merely access to remedies. We also reiterate that successful counterterrorism and prevention of violent extremism efforts must respect human rights, including freedom of expression, and the rule-of-law. As such, we read this resolution in light of our Constitution and international obligations.

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b. Christchurch Call to Action to Eliminate Terrorist and Violent Extremist Content Online

On May 7, 2021, the United States announced its endorsement of the Christchurch Call to Action to Eliminate Terrorist and Violent Extremist Content Online. The State Department press statement announcing the endorsement is excerpted below and available at https://www.state.gov/united-states-joins-christchurch-call-to-action-to-eliminate-terrorist-and-violent-extremist-content-online/.

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The United States endorses the Christchurch Call to Action to Eliminate Terrorist and Violent Extremist Content Online, formally joining those working together under the rubric of the Call to

prevent terrorists and violent extremists from exploiting the Internet. The terrible terrorist attacks of March 15, 2019 against houses of worship in Christchurch, New Zealand, and the deplorable depiction in real time of those shootings graphically demonstrated the ability of terrorist and violent extremist online content to incite violence. For the United States, countering domestic violent extremism — including racially or ethnically motivated violent extremism — is a compelling priority. We are committed to working closely with international partners who share our values and norms to prevent and counter all forms of terrorism.

We applaud language in the Christchurch Call emphasizing the importance of respecting human rights and the rule of law, including the protection of freedom of expression. In participating in the Christchurch Call, the United States will not take steps that would violate the freedoms of speech and association protected by the First Amendment to the U.S. Constitution, nor violate people's reasonable expectations of privacy. We will continue to collaborate with other governments and online service providers on a voluntary basis to support their efforts to counter terrorist content on the Internet. The position of the United States remains unchanged and consistent with our long-standing ideals: We encourage technology companies to develop and enforce terms of service and community standards that forbid the use of their platforms for terrorist and violent extremist purposes. We continue to believe that promoting credible alternative narratives to expose false terrorist and violent extremist narratives is an important means of countering terrorist and violent extremist content online. Put simply, we remain of the view that the preferred way to defeat terrorist and violent extremist speech is more speech: to counter it with credible, alternative narratives that promote rather than restrict free expression.

To that end, we highlight the importance of ensuring that governments do not abuse the Call as justification for restrictions on internationally protected human rights, including the freedoms of individuals to seek, receive, and impart information through their media of choice. We note the importance of technology companies developing transparent criteria and robust safeguards to ensure the application of any terms of service is consistent with fundamental freedoms. The urgent need to counter the exploitation of the Internet by terrorists and violent extremists to promote violence should not overshadow the equally compelling need to promote human rights and fundamental freedoms, including freedom of expression, for people everywhere.

We welcome the important momentum that the Christchurch Call has generated and look forward to continuing our work with government, technology sector partners, civil society, and other stakeholders to prevent terrorists and violent extremists from exploiting the Internet while protecting its openness, interoperability, reliability, and security.

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c. United Nations

On October 6, 2021, Attorney Adviser Elizabeth Grosso delivered the U.S. statement at the 76th meeting of the General Assembly Sixth Committee on agenda item 111: measures to eliminate international terrorism. Her statement is excerpted below and available at https://usun.usmission.gov/statement-at-the-76th-general-assembly-sixth-committee-agenda-item-111-measures-to-eliminate-international-terrorism/.

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I would first like to take a moment to remember the heinous terrorist attacks of September 11th, 2001, now 20 years ago. The world remembers the nearly 3,000 lives taken so brutally, and honors the courage of those who put themselves in harm's way to save others, and the many who continue to suffer from injuries sustained that day.

One of the United Nations' founding purposes was the promise of collective measures to prevent and counter threats to international peace and security. Terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and any acts of terrorism are criminal and unjustifiable regardless of their motivations. The United Nations plays a critical role in strengthening the capacity of Member States to prevent and counter terrorism, while highlighting the value of whole-of-government and whole-of-society approaches, and the importance of respecting human rights and the rule of law. As we remember 9/11, the international community must come together and commit ourselves to meaningful action in the months and years to come.

Over the last twenty years, we have had significant success in diminishing terrorist threats, building effective partnerships to dismantle terrorist networks by targeting their financing and support systems, countering their propaganda, preventing their travel, as well as disrupting imminent attacks. But just last month, the loss of 13 Americans and almost 200 innocent Afghan civilians in the terrorist attack at the Kabul airport demonstrated that terrorism remains a serious concern. Al-Qa'ida and ISIS have metastasized through branches and affiliates in Africa and Asia. Violent white supremacists and other Racially or Ethnically Motivated Violent Extremists, or REMVE [pronounced rem-V] actors are exploiting the internet to spread their corrupt ideologies and to encourage attacks; and State Sponsors of Terrorism like Iran continue to pursue their interests through terrorist proxies and partners, including Hizballah.

The international community must recommit to multilateral efforts to combat terrorism and violent extremism. We must also remember that successful counterterrorism and prevention of violent extremism efforts respect human rights, including freedom of expression, and the rule-of-law. Indeed, efforts to counter terrorism are counterproductive when used as a pretext to stifle freedom of religion or belief and other human rights and fundamental freedoms. In this regard, we cannot avoid mentioning Xinjiang. The United States strongly objects to China's mass detention of Muslim Uyghurs and members of other minorities, repressive surveillance, and use of coercive population control like forced sterilization and abortion. These are not counterterrorism efforts. They are abuses.

Reflecting over the past year, there have been a number of achievements in the counterterrorism space, most notably the adoption of the General Assembly resolution that reviewed the Global Counterterrorism Strategy. When the Strategy was first adopted in 2006, the international community came together to coordinate a unified global framework to counter the evolving threat of terrorism. The four pillars of the GCTS – including addressing the conditions conducive to the spread of terrorism and upholding human rights and the rule of law – remain as relevant today as when the Strategy was adopted. The resolution adopted earlier this year provides Member States with useful guidance on these pillars; that we managed to adopt this Strategy by consensus, once again, is a notable achievement.

In particular, the United States welcomes new language in the resolution that recognizes the threat of terrorism and violent extremism based on racism. We believe that REMVE is one of the most pressing counterterrorism challenges facing the international community today, and we hope that further cooperation and conversation on how to address this scourge will be forthcoming.

On June 15, 2021, the United States released its first-ever National Strategy for Countering Domestic Terrorism, which reflects a culmination of the 100-day review of U.S. government efforts to respond to domestic violent extremism ordered by President Biden. With the threat of domestic terrorism brought into sharp relief by the January 6, 2021 attack on the U.S. Capitol, this strategy seeks to reflect upon the long history of domestic terrorist activity in the United States, and highlights that we must all be united in our efforts to prevent and counter the rising and changing threat posed by REMVE. Through multilateral efforts led by the United Nations, the Global Counterterrorism Forum, the Aqaba Process led by Jordan, and regional organizations such as the OSCE, we are also leveraging our respective tools and capabilities against REMVE challenges.

We also note that the United States has joined the Christchurch Call to Action, pledging with other member governments and technology partners to work together, while upholding the freedoms and protections of speech and association afforded by the U.S. Constitution, as well as reasonable expectations of privacy. Continuing to engage the technology sector to enhance information sharing and identify and counter often vague or coded language and symbols in terrorist and violent extremist propaganda and messaging is also vitally important.

As we reflect on other successes and advances during the past year, we emphasize the ongoing importance of countering the use of the internet for terrorist purposes, while respecting human rights such as freedom of expression. Technology itself is not the problem—terrorists and other bad actors who exploit the internet are the problem— and addressing this problem requires a comprehensive approach. We continue to strengthen and expand our voluntary collaboration and partnerships with private technology companies to counter terrorism online, including through improving information sharing and by companies' strengthening and enforcing their terms of service. Member States also should continue to seek to build long-term resilience to terrorist messages through partnerships with all stakeholders—particularly youth—to cultivate critical thinking skills and online public safety awareness through education. Positive narratives to counter terrorist propaganda are an important element of these efforts.

While the Global Counterterrorism Strategy review includes many critical elements, we are disappointed by several flaws in the resolution. For example, foreign terrorist fighters in inadequate detention facilities and their associated family members living in overburdened camps in Syria and Iraq pose a serious security threat and constitute a dire humanitarian crisis, raising human rights concerns. Unfortunately, many of the States that pushed for adding human rights language throughout the Strategy review refuse to address the inhumane conditions of their own citizens languishing in Syria and Iraq. Repatriation of Member State citizens, combined with rehabilitation, reintegration, and prosecution, as appropriate, of foreign terrorist fighters would prevent a resurgence of ISIS in Iraq and Syria and the uncontrolled return of FTFs to countries of origin in the future. Similarly, the best way to support the short- and long-term relief and rehabilitation of associated family members – particularly the thousands of children who remain in displaced person camps like al-Hol – is to repatriate them and reintegrate them into their local communities.

We urge all Member States to assist and sufficiently resource UN system actors and other relevant implementers in order to deliver needed technical assistance. The United States continues to contribute significant funding to the UN and other entities, for research, capacity-building assistance, and training. We have made substantial investments in the capabilities of our partners on the front lines. The United States has proven to be an indispensable counterterrorism partner, but we want partners to be self-sufficient in defending themselves against ISIS, al-Qa'ida, racially or ethnically motivated violent extremists, and any other terrorist threats they face.

Concerning a Comprehensive Convention on International Terrorism, we will listen carefully to delegates' statements. However, it is critical that the United Nations send united, unambiguous signals when it comes to terrorism, otherwise we risk some of the progress that we have made.

To close, the United States reiterates its firm condemnation of terrorism in all forms and manifestations. All acts of terrorism are criminal and unjustifiable, regardless of motivation. We look forward to continued cooperation and collaboration as we seek to address the complex and critical terrorism threats faced by the international community, and we call on Members States to demonstrate the unity shown following 9/11.

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On November 12, 2021, Nicholas Hill, deputy U.S. representative for ECOSOC, provided the U.S. explanation of position at the Third Committee's adoption of the terrorism and human rights resolution. The U.S. statement follows and is available at https://usun.usmission.gov/explanation-of-position-at-the-third-committee-adoption-of-the-terrorism-and-human-rights-resolution/.

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The United States thanks Mexico and Egypt for their continued efforts to address the critical issue of promoting and protecting human rights while countering terrorism in the UN system, and appreciates the update to this year's resolution with a newly-inserted paragraph.

The United States remains concerned, however, that the remainder of the resolution does not reflect important updates or member state agreed language from other UN bodies charged with these issues and risks becoming obsolete.

In particular, the United States disassociates from OP15. We fully support the role humanitarian actors operating in line with the humanitarian principles of neutrality, impartiality, and independence, including in alleviating the suffering of those who are displaced and otherwise victimized by terrorism. It is, at the same time, essential that terrorists are unable to use the guise of humanitarian to bolster their own operations. We submit that the language in OP15 is outdated in light of the binding obligation contained in UNSCR 2462 (2019) for Member States to ensure their laws establish criminal offenses that provide the ability to prosecute and penalize the willful financing of terrorist groups and individual terrorists for any purpose, even in the absence of connection with a terrorist act.

Additionally, OP15 is inconsistent with the binding obligation for Member States to prohibit their nationals or those within their territories from providing funds or other economic resources for the benefit of terrorist organizations or individual terrorists for any purpose, even in the absence of a link to a specific terrorist act, regardless of whether such support is meant to further the "terrorist," supposed "humanitarian," or any other goals or activities of a terrorist or terrorist organization.

Further, the United States dissociates from OP31 given it could hinder speech beyond the narrow exceptions to freedom of expression under the U.S. Constitution and Article 19 of the ICCPR. We remain committed to cooperating to counter violent extremist propaganda and incitement to violence on the Internet and social media, and believe the term "preventing" could be used to support excessive restrictions on speech, particularly online.

* * * *

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

On May 14, 2021, Secretary of State Blinken determined and certified 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." 86 Fed. Reg. 28,183 (May 25, 2021). The countries are: Iran, Democratic People's Republic of Korea, Syria, Venezuela, and Cuba.

e. Country Reports on Terrorism

On December 16, 2021, the State Department released its annual Country Reports on Terrorism, detailing key developments in 2020 in the global fight against ISIS, al-Qa'ida, Iran-supported terrorist groups, and other terrorist groups. See State Department media note, available at https://www.state.gov/on-the-release-of-the-2020-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 2020 calendar year and includes: 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 media note summarizes key points in the 2020 Report.

> Among the many accomplishments highlighted in the 2020 report are our efforts to expand the focus of the Global Coalition to Defeat ISIS to address new regions of concern, the first terrorist designation of a Racially or Ethnically Motivated Violent Extremist (REMVE) group, and the growing number of countries that have recognized the whole of Hizballah as a terrorist organization.

The 2020 Country Reports on Terrorism are available at https://www.state.gov/reports/country-reports-on-terrorism-2020/.

On December 16, 2021, Acting Coordinator for Counterterrorism John T. Godfrey provided a special briefing on the 2020 Country Reports on Terrorism. The transcript of the briefing is available at https://www.state.gov/acting-coordinator-for-counterterrorism-john-t-godfrey-on-the-2020-country-report-on-terrorism/ and excerpts follow.

* * * *

The Annex of Statistical Information accompanying the report … shows that both the number of terrorist attacks and the overall number of fatalities each increased by more than 10 percent in 2020 as compared to 2019.

The report highlights …some of the challenges we're facing. …

While ISIS's so-called physical caliphate … has crumbled, it remains a determined and dangerous enemy, and we're working to build on our gains by sustaining pressure on ISIS remnants in Iraq and Syria, and to deny its global network and branches the ability to effectively operate.

And a particular concern is ISIS's increased focus on branches and networks outside of Iraq and Syria. As an example of that, ISIS branches and networks outside Iraq and Syria caused more fatalities during 2020 than in any previous year. Deaths due to ISIS-affiliated attacks in West Africa alone almost doubled from around 2,700 in 2017 to nearly 5,000 in 2020.

Al-Qaida's affiliates also continue to exploit under-governed spaces, conflict zones, and security gaps in Africa and the Middle East. Al-Qaida further bolstered its presence abroad, particularly in the Middle East and Africa, where its affiliates AQAP in Yemen, al-Shabaab in the Horn of Africa, and Jama-at Nusrat al-Islam wal Muslim, or JNIM in the Sahel, remain among the most active and dangerous terrorist groups in the world. And of course, in January of 2020, at the beginning of the period encompassed by this CRT report, al-Shabaab attacked a security military base shared by U.S. and Kenyan military forces in Manda Bay, Kenya, killing one U.S. service member and two U.S. contractors, which was the most deadly terrorist attack against the U.S. military forces in Africa since 2017.

Iran also continued to support acts of terrorism in the region and further afield in 2020, supporting proxies and partner groups in Bahrain, Iraq, Lebanon, Syria, and Yemen, including Hizballah and Hamas. And senior al-Qaida leaders continued to reside in Iran.

The Racially or Ethnically Motivated Violent Extremism threat also continued to grow, including transnational links between REMVE actors around the world. The UN Security Council's Counterterrorism Committee noted a 320 percent increase in what it termed extreme right-wing terrorism globally in the five years prior to 2020.

In this dynamic threat landscape, the United States played a critical role in marshaling international efforts to counter global terrorism…

First, the State Department designated as Specially Designated Global Terrorists, or SDGTs, the Russian Imperial Movement and three of its leaders in April 2020, marking the first time that any counterterrorism sanctions authority has been used against a white REMVE group, white supremacist REMVE group.

The United States continued its leadership role within the Global Coalition to Defeat ISIS, including encouraging the expansion of the coalition's mission to address new regions of concern, particularly in Africa.

And in October, the United States – that's October of 2020 – the United States supported the United Kingdom in the transfer of Amon Kotey and El Shafee Elsheik, two of the four ISIS fighters known as "the Beatles," to the United States for prosecution.

We also continued high-level diplomatic engagements to counter Hizballah across Central America, South America, and Europe, resulting in nine countries in the Western Hemisphere and Europe taking significant steps in 2020 to designate, ban, or otherwise restrict Hizballah.

And the United States continued to play a major role in the repatriation, rehabilitation, reintegration, and prosecution of ISIS foreign terrorist fighters, or FTFs, and associated family members. And in that regards, we continued to lead by example, bringing back our own citizens and prosecuting them where appropriate. And just as a bellwether, as of December 2021, the United States has – had repatriated 30 U.S. citizens from Syria and Iraq – that's 13 adults and 17 children – and the Department of Justice had charged 10 of the adults with a variety of terrorism-related crimes.

And finally, in 2020, the United States led the UN Security Council's 1267 Sanctions Committee efforts to designate ISIS networks and branches in West Africa, the Greater Sahara, Libya, Yemen, and Indonesia, and the designations of Muhammad Sa'id Abdal-Rahman al-Mawla, the new ISIS leader, and Tehrik-e Taliban Pakistan leader Noor Wali Mehsud.

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f. U.S. Actions Against Terrorist Groups

(1) General

Designations of organizations as 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. A list of State Department-designated FTOs is available at https://www.state.gov/terrorist-designations-and-state-sponsors-of-terrorism/. See Chapter 16 for discussion of actions taken pursuant to Executive Order ("E.O.") 13224, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism," 66 Fed. Reg. 49,079 (Sept. 25, 2001) directed at specially designated global terrorists ("SDGTs").

(2) Foreign Terrorist Organizations

(i) New Designations

In 2021, the Secretary of State designated several additional organizations as FTOs.

On January 14, 2021, the State Department announced the designation of Harakat Sawa'd Misr ("HASM") as an FTO. See media note, available at https://2017-2021.state.gov/state-department-terrorist-designations-of-hasm-and-its-leaders-and-maintenance-of-pij-fto-designation/index.html. The media note mentions that HASM was previously designated pursuant to E.O. 13224 in January 2018 and includes the following additional background information:

> HASM is a terrorist group active in Egypt. Formed in 2015, the group claimed responsibility for the assassination of Egyptian National Security Agency officer Ibrahim Azzazy, as well as the attempted assassination of Egypt's former Grand Mufti Ali Gomaa. HASM also claimed responsibility for a September 30, 2017 attack on Myanmar's embassy in Cairo. In August 2019, HASM was responsible for a powerful car-bomb that exploded outside of a hospital in Cairo, killing at least 20 people and injuring dozens.

On January 12, 2021, Secretary Pompeo designated Ansarallah and its associated aliases as an FTO. 86 Fed. Reg. 5308 (Jan. 19, 2021). On February 12, 2021, the State Department announced that Secretary Blinken was revoking the designation of Ansarallah as an FTO, effective February 16, 2021. 86 Fed. Reg. 9568 (Feb. 16, 2021). The press statement, available at https://www.state.gov/revocation-of-the-terrorist-designations-of-ansarallah/, explains:

> This decision is a recognition of the dire humanitarian situation in Yemen. We have listened to warnings from the United Nations, humanitarian groups, and bipartisan members of Congress, among others, that the designations could have a devastating impact on Yemenis' access to basic commodities like food and fuel. The revocations are intended to ensure that relevant U.S. policies do not impede assistance to those already suffering what has been called the world's worst humanitarian crisis. By focusing on alleviating the humanitarian situation in Yemen, we hope the Yemeni parties can also focus on engaging in dialogue.
>
> Ansarallah leaders Abdul Malik al-Houthi, Abd al-Khaliq Badr al-Din al-Houthi, and Abdullah Yahya al-Hakim remain sanctioned under E.O. 13611 related to acts that threaten the peace, security, or stability of Yemen. We will continue to closely monitor the activities of Ansarallah and its leaders and are actively identifying additional targets for designation, especially those responsible for explosive boat attacks against commercial shipping in the Red Sea and UAV and missile attacks into Saudi Arabia. The United States will also continue to support the implementation of UN sanctions imposed on members of Ansarallah and will continue to call attention to the group's destabilizing activity and pressure the group to change its behavior.

On March 1, 2021, Secretary Blinken designated the Islamic State of Iraq and Syria-Democratic Republic of the Congo ("ISIS-DRC") as an FTO. 86 Fed. Reg. 13,959

(Mar. 11, 2021). Also designated on March 1, 2021 was the Islamic State of Iraq and Syria—Mozambique ("ISIS-Mozambique"). 86 Fed. Reg. 13,956 (Mar. 11, 2021).

On November 18, 2021, Secretary Blinken designated the Revolutionary Armed Forces of Colombia-People's Army ("FARC–EP") as an FTO. 86 Fed. Reg. 68,294 (Dec. 1, 2021). Segunda Marquetalia was also designated as an FTO. 86 Fed. Reg. 68,293 (Dec. 1, 2021). The State Department issued a press statement on November 30, 2021 regarding the designations of FARC-EP and Segunda Marquetalia, as well as the revocation of the designation of the FARC (discussed in section (ii) *infra*). The press statement is available at https://www.state.gov/revocation-of-the-terrorist-designations-of-the-revolutionary-armed-forces-of-colombia-farc-and-additional-terrorist-designations/ and states:

> Following a 2016 Peace Accord with the Colombian government, the FARC formally dissolved and disarmed. It no longer exists as a unified organization that engages in terrorism or terrorist activity or has the capability or intent to do so.
> …
>
> The designation of FARC-EP and Segunda Marquetalia is directed at those who refused to demobilize and those who are engaged in terrorist activity. In August 2019, former FARC commanders, including Luciano Marin Arango, alias Ivan Marquez, created Segunda Marquetalia after abandoning the 2016 Peace Accord. Since then, Segunda Marquetalia has engaged in terrorist activity and is responsible for the killings of former FARC members and community leaders. Segunda Marquetalia has also engaged in mass destruction, assassination, hostage-taking, including the kidnapping and holding for ransom of government employees. Segunda Marquetalia is also responsible for the attempted killings of political leaders.

(ii) Reviews of FTO Designations

During 2021, 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.

On January 14, 2021, the State Department published the determination, after review, that the designations as FTOs of the following entities should be maintained: Lashkar-e-Tayyiba; Jaysh Rijal al-Tariq al Naqshabandi; Jama'atu Ansarul Muslimina Fi Biladis-Sudan; Harakat ul-Mujahidin; al-Nusrah Front; Popular Front for the Liberation of Palestine; Continuity Irish Republican Army; and the National Liberation Army. 86 Fed. Reg. 3226 (Jan. 14, 2021). Also on January 14, 2021, separate notices of the maintenance of the designations of ISIL-Sinai Province and Palestinian Islamic Jihad appeared in the Federal Register (with amendment to the ISIL-SP designation to include additional aliases). 86 Fed. Reg. 3227 (Jan. 14, 2021). The designations of Harakat Sawa'd Misr and Lashkar i Jhangvi were also reviewed and maintained (with new aliases added for Lashkar i Jhangvi). 86 Fed. Reg. 3228 (Jan. 14, 2021). The State Department issued a media note on January 14, 2021 regarding the designation reviews and

amendments, which is available at https://2017-2021.state.gov/state-department-terrorist-designation-reviews-and-amendments/index.html.

Secretary Blinken maintained the designations of the following as FTOs upon review: Asbat al-Ansar; Harkat al-Mujahideen; The Popular Front for the Liberation of Palestine; The Popular Front for the Liberation of Palestine—General Command; Kata'ib Hizballah. 86 Fed. Reg. 68,295 (Dec. 1, 2021).

Secretary Blinken decided, after review of the designation of ISIL Khorasan as a Foreign Terrorist Organization, that the designation should be maintained and amended to include the following new aliases: The Islamic State of Iraq and ash-Sham— Khorasan Province, The Islamic State of Iraq and Syria—Khorasan, Islamic State of Iraq and Levant in Khorasan Province, Islamic State Khurasan, ISISK, ISIS–K, and IS-Khorasan. 86 Fed. Reg. 68,294 (Dec. 1, 2021).

On November 30, 2021, Secretary Blinken revoked the designation of the Revolutionary Armed Forces of Colombia ("FARC") (and other aliases) as an FTO, based on the conclusion that the circumstances that were the basis for the designation of the FARC have changed in such a manner as to warrant revocation of the designation. 86 Fed. Reg. 68,293 (Dec. 1, 2021). The press statement on this revocation as well as the designations of FARC-EP and others, cited *supra*, and available at https://www.state.gov/revocation-of-the-terrorist-designations-of-the-revolutionary-armed-forces-of-colombia-farc-and-additional-terrorist-designations/, includes the following explanation:

> The decision to revoke the designation does not change the posture with regards to any charges or potential charges in the United States against former leaders of the FARC, including for narcotrafficking, nor does it remove the stain of the decision by Colombia's Special Jurisdiction of Peace, which found their actions to be crimes against humanity. However, it will facilitate the ability of the United States to better support implementation of the 2016 accord, including by working with demobilized combatants.

(3) Rewards for Justice ("RFJ") Office

On January 12, 2021, the U.S. Department of State announced an RFJ reward offer of up to $7 million for information on Muhammad Abbatay, known as 'Abd al-Rahman al-Maghrebi. Al-Maghrebi is an Iran-based key leader of al-Qa'ida (AQ) and the longtime director of AQ's media arm, al-Sahab, and is the son-in-law and senior advisor to AQ leader Ayman al-Zawahiri. The Secretary of State's speech on Iran announcing the offer, available at https://2017-2021.state.gov/the-iran-al-qaida-axis/index.html, elaborates on the activities of al-Maghrebi:

> Documents recovered from the 2011 military operation against former al-Qa'ida leader Usama bin Ladin indicate al-Maghrebi has been rising through al-Qa'ida's ranks for years.

> Al-Maghrebi has served as al-Qa'ida's general manager in Afghanistan and Pakistan since 2012. Following years of international counterterrorism pressure, he relocated to Iran, where he has continued to oversee al-Qa'ida activities worldwide. As head of al-Qa'ida's External Communications Office, al-Maghrebi coordinates activities with al-Qa'ida affiliates, according to al-Qa'ida media statements.

On March 29, 2021, the U.S. Department of State announced an RFJ reward offer of up to $10 million for leading to the location or identification of Salim Jamil Ayyash, a senior operative in the assassination unit of the terrorist organization Lebanese Hizballah, or information leading to preventing him from engaging in an act of international terrorism against a U.S. person or U.S. property. The media note announcing the offer, available at https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-salim-jamil-ayyash/, elaborates on the activities of Ayyash:

> Ayyash is a senior operative in Hizballah's Unit 121, the group's assassinations squad which receives its orders directly from Hizballah leader Hasan Nasrallah. Ayyash is known to have been involved in efforts to harm U.S. military personnel.
>
> On December 11, 2020, an international tribunal sentenced Ayyash in absentia to five concurrent sentences of life imprisonment on terrorism-related charges pertaining to the February 2005 suicide truck bombing in Beirut that killed Lebanon's former Prime Minister Rafik Hariri. The attack also killed 21 others and wounded 226 persons.

On June 2, 2021, the State Department's RFJ office announced a reward offer of up to $7 million for information leading to the location or identification of Abu Ubaydah Yusuf al-Anabi, the leader of the terrorist organization al-Qa'ida in the Islamic Maghreb (AQIM). The media note announcing the offer, available at https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-abu-ubaydah-yusuf-al-anabi/, elaborates on the activities of al-Anabi:

> Al-Anabi has pledged allegiance to al-Qa'ida leader Ayman al-Zawahiri on AQIM's behalf and is expected to play a role in al-Qa'ida's global management. Al-Anabi was previously the leader of AQIM's Council of Notables and served on AQIM's Shura Council. Al-Anabi has also served as AQIM's Media Chief.
>
> On September 9, 2015, the U.S. Department of State designated al-Anabi as a Specially Designated Global Terrorist (SDGT) under Executive Order 13224. On February 29, 2016, he was placed on the United Nations (UNSCR 1267) sanctions list. AQIM is responsible for the abduction and killing of Americans. AQIM, formerly known as the Salafist Group for Preaching and Combat (GSPC), was declared a Specially Designated Global Terrorist on September 23, 2001. The U.S. Department of State designated the group as a Foreign Terrorist Organization on March 27, 2002. In September 2006, GSPC officially joined al-Qa'ida's terrorist network and re-branded itself as AQIM.

On November 1, 2021, the State Department's RFJ office announced a reward offer of up to $5 million for information leading to those responsible for the December 13, 2019 abduction of U.S. citizen Ihsan Ashour in Baghdad. The reward offer on RFJ's website, available at https://rewardsforjustice.net/rewards/kidnapping-of-ihsan-ashour/, includes the following:

> [Ashour] was abducted by approximately 10 armed men in masks and black clothing in al-Sha'ab District, near Sadr City, during the mass demonstration in the capital's Tahrir Square. His kidnappers choked, beat, and administered electrical shocks to his body before driving him across the border to Iran. Inside Iran, another group of captors interrogated Ashour about alleged espionage activities. After determining he was not a spy, his captors returned Ashour to Iraq, where he continued to be tortured and interrogated. He was released in May 2020, and he returned home to the United States.

On December 20, 2021, the State Department's RFJ office announced a reward of up to $5 million for information leading to the arrest or conviction in any country of anyone involved in the terrorist attack in Dhaka, Bangladesh that left U.S. citizen Avijit Roy dead and his wife, Rafida Bonya Ahmed, seriously injured. The press statement, available at https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-the-murder-of-avijit-roy-and-attack-on-rafida-bonya-ahmed/, includes the following:

> Two related groups have claimed responsibility. Ansarullah Bangla Team, an al-Qa'ida-inspired terrorist group based in Bangladesh, claimed responsibility for the attack. Shortly thereafter, Asim Umar, the now-deceased leader of al-Qa'ida in the Indian Subcontinent (AQIS), posted a widely circulated video claiming that AQIS followers were responsible for the attack on Roy and Ahmed.

More information about reward offers is available on the RFJ website at www.rewardsforjustice.net.

2. Narcotics

a. Majors List Process

(1) International Narcotics Control Strategy Report

On March 2, 2021, the Department of State submitted the 2021 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 2020. 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 2021 INCSR is available at https://www.state.gov/2021-international-narcotics-control-strategy-report/.

(2) Major Drug Transit or Illicit Drug Producing Countries

On September 15, 2021, the White House issued Presidential Determination No. 2021-13, "Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2022." 86 Fed. Reg. 52,819 (Sept. 22, 2021). In this year's determination, the President named the following 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, the 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 and the government of Bolivia are vital to the national interests of the United States, thus ensuring that such U.S. assistance would not be restricted during fiscal year 2021 by virtue of § 706(3)(A) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350.

b. Certifications related to narcotics trafficking

On February 19, 2021, the State Department determined and certified under section 490(b)(1)(A) of the Foreign Assistance Act of 1961, as amended, that the top five exporting and importing countries and economies of pseudoephedrine and ephedrine (the People's Republic of China, Denmark, France, Germany, India, Indonesia, Republic of Korea, Singapore, Switzerland, Turkey, and the United Kingdom) have cooperated fully with the United States, or have taken adequate steps on their own, to achieve full compliance with the goals and objectives established by the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. 86 Fed, Reg. 16,009 (Mar. 25, 2021).

On August 10, 2021, the President of the United States again certified, with respect to Colombia (Presidential Determination No. 2021-10, 86 Fed. Reg. 45,619 (Aug. 13, 2021)), 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 Biden made the 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. Narcotics Rewards Program

On April 14, 2021, the Department of State announced rewards under its Narcotics Rewards Program ("NRP") for information leading to the arrest and/or conviction of Audias Flores-Silva, a high-level member of the Cartel de Jalisco Nueva Generacion. See State Department press statement, available at https://www.state.gov/department-of-state-offers-reward-for-information-to-bring-mexican-drug-trafficking-cartel-member-to-justice/.

On August 19, 2021, the State Department announced a reward up to $5 million under the NRP for information leading to the arrest and/or conviction of Guinea-Bissau national Antonio Indjai. See press statement available at https://www.state.gov/department-of-state-offers-reward-for-information-to-bring-guinea-bissau-narcotics-trafficker-to-justice/. The press statement includes the following information about Indjai:

> Indjai is the former head of the Guinea-Bissau Armed Forces and has been the subject of a United Nations travel ban since May 2012, as a result of his participation in an April 2012 coup d'état in Guinea-Bissau. Indjai led a criminal organization which took an active part in drug trafficking in Guinea Bissau and the region for many years, even while serving as head of the Guinea Bissau Armed Forces. Indjai was seen as one of the most powerful destabilizing figures in Guinea-Bissau, operating freely throughout West Africa, using illegal proceeds to corrupt and destabilize other foreign governments and undermine the rule of law throughout the region.

On September 22, 2021, the State Department announced an increase from $5 million to up to $15 million of its NRP offer for information leading to the arrest and/or conviction of Sinaloa Cartel leader Ismael Zambada-Garcia, partner of convicted Sinaloa Cartel leader Joaquin Guzman-Loera, also known as, "El Chapo." See press statement, available at https://www.state.gov/department-of-state-offers-reward-for-information-to-bring-mexican-drug-trafficking-cartel-leader-to-justice/.

On December 1, 2021, the State Department announced an NRP reward of up to $5 million for information leading to the arrest and/or conviction of Juan Carlos Valencia Gonzalez, an alleged high-level member of the Cartel de Jalisco Nueva Generacion (CJNG – Jalisco New Generation Cartel). The press statement announcing the offer is available at https://www.state.gov/department-of-state-offers-reward-for-information-to-bring-mexican-drug-trafficking-cartel-member-to-justice-2/.

3. Trafficking in Persons

a. Trafficking in Persons Report

In July 2021, the Department of State released the 21st edition of the annual 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 2020 through March 2021 and evaluates the anti-trafficking efforts of countries around the world. Through the report, the Secretary determines the ranking of countries as Tier 1, Tier 2 or 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. Under the TVPA, the President decides whether to restrict certain types of foreign assistance for the governments of Tier 3 countries or to grant waivers for assistance that would promote the purposes of the TVPA or is otherwise in the U.S. national interest. The 2021 report lists 17 countries as Tier 3 countries. 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/2021-trafficking-in-persons-report/. Chapter 6 in this *Digest* discusses the determinations relating to child soldiers.

On July 1, 2021, a senior State Department official provided a briefing, previewing the release of the 2021 Trafficking in Persons Report. The remarks are excerpted below and available at https://www.state.gov/briefing-with-senior-state-department-official-on-the-release-of-the-2021-trafficking-in-persons-tip-report/

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[T]he Trafficking in Persons Report, also known as the TIP Report, is the U.S. Government's principal diplomatic and diagnostic tool to guide relations with foreign governments on human trafficking. It is also the world's most comprehensive resource on governmental anti-trafficking efforts, and it reflects the U.S. Government's commitment to global leadership on this key human rights, law enforcement, and national security issue.

This year's report, which is the 21st installment, includes narratives for 188 countries and territories, including the United States.

A country's tier ranking reflects the State Department's assessment of that government's efforts during the reporting period to meet the Trafficking Victim Protection Act minimum standards for the elimination of trafficking in persons. The department strives to make the report as accurate and objective as possible, documenting the successes and shortcomings of government anti-trafficking efforts, and it does not make assessments based on political considerations.

The TIP Report assesses a country's efforts against those TVPA minimum standards and against its own efforts during the previous reporting period; it does not compare countries. It also takes into account a country's resources and capacity when weighing factors.

And just to clarify, the reporting period is from April 1, 2020 through March 31st of 2021 for this year's report.

All governments should strive to continually improve their efforts across what are referred to as the 3Ps of the anti-trafficking framework – of prosecution, protection, and prevention. In fact, the TVPA requires governments to demonstrate continual progress, especially to retain rankings on Tier 1 or Tier 2.

Tier 2 Watch List rankings are time-limited by U.S. law, as governments can only retain this ranking for a maximum of three consecutive years; thus, here too ongoing efforts to improve are critical. For Tier 3 governments – those that are assessed as failing to make significant efforts to meet the minimum standards and do not, in fact, meet the minimum standards – also Tier 3 countries include countries whose governments have a policy or pattern of trafficking. For those countries on Tier 3, restrictions on assistance may apply.

The TIP Report introduction focuses on the impact of the COVID-19 pandemic on trafficking trends and anti-trafficking efforts around the world. It outlines how the COVID-19 pandemic exacerbated trafficking situations and significantly increased the number of people worldwide at risk to exploitation, as well as how traffickers adapted their methods to take advantage of these circumstances.

The introduction also illustrates the innovative ways that many have adapted their anti-trafficking efforts. It emphasizes lessons learned from practitioners, offers ways to rebuild strong anti-trafficking strategies, and focuses on ways governments can prevent the compounding effects of crises on trafficking victims and vulnerable individuals.

We saw, for example, that the governments of countries such as Paraguay identified significantly more trafficking victims through routine screening at pandemic quarantine facilities, or in Turkey, where the government trained shelter staff on pandemic mitigation efforts and provided COVID-19 tests and personal protective equipment to victims staying at those shelters. Mexico secured its first trafficking in persons conviction from a virtual court session in June 2020, just weeks after resuming legal proceedings following a two-month shutdown related to the pandemic. Lebanon and the Czech Republic extended the ability of migrants to stay in those countries for their safety related to the pandemic and also adjusted the limits of their respective visa regimes – all to help ensure the victims were protected during the pandemic. These are just a few of many examples that the report outlines.

The introduction to this year's report also seeks to elevate other important themes, such as the struggle to realize racial equity, the importance of survivor leadership, the harmful effects of conspiracy theories related to trafficking, and the reality of familial trafficking.

We also included a box in the introduction this year on state-sponsored trafficking in persons and, due to the scale of the problem, one specifically on forced labor in China's Xinjiang region and beyond.

I would also like to share some noteworthy results and tier movement within this year's report. Overall, there are approximately the same number of downgrades and upgrades as in prior years.

On a positive note, there were several upgrades due to tangible progress that governments made to combat trafficking around the world despite the pandemic. We saw progress even in countries where the trafficking challenges have been intractable over many years.

Several governments received upgrades to Tier 2 for increasing efforts to address trafficking, including Bosnia and Herzegovina, the Dominican Republic, Jordan, Nigeria, Saudi Arabia, Sudan, and Uzbekistan.

Not all countries made such progress. Six countries received downgrades from Tier 1 to Tier 2 as the department assessed that the governments of the Republic of Cyprus, Israel, New

Zealand, Norway, Portugal, and Switzerland did not meet all four of the minimum standards and were therefore not making "appreciable progress" compared to the previous year and no longer met the minimum standards to stay on Tier 1.

Twelve countries were also downgraded from Tier 2 to Tier 2 Watchlist. I won't list the full number, but I'll note a couple that may attract your attention include South Africa and Thailand.

There were also two countries that were downgraded this year from the Watch List to Tier 3. Those two countries are Guinea-Bissau and Malaysia.

There is also an important provision in the TVPA, the Trafficking Victim Protection Act, that requires the department to make a determination whether countries have a policy or pattern of the government engaged in trafficking.

This year, the department made that determination that 11 countries continued to have a government policy or pattern of trafficking and inadequate enforcement mechanisms; some government officials in these countries were themselves part of the problem, directly compelling citizens or foreign nationals into sex trafficking, forced labor, or use as child soldiers.

We found that officials used their power to exploit their citizens or foreign nationals ranging from forced labor in local or national public works projects, military operations, economically important sectors, or as part of government-funded projects or missions abroad, to sexual slavery on government compounds.

I'm happy to share the list of 11 countries, but in the interest of time I'll probably not read the full list now. But I will note a couple of particular interest. China remained on Tier 3 and is again noted for having a government policy of forced labor, particularly in Xinjiang detention in camps that is intended to erase ethnic and religious identities under the pretext of "vocational training," and forced labor is a central tactic used for this repression.

Also, the Cuban Government increased the number and size of overseas medical missions. Dozens of country reports include information regarding the program's lack of transparency, unaddressed labor violations, and forced labor.

Finally, just two more points I wanted to raise at the beginning.

This year, 15 countries are included on the 2021 Child Soldier Prevention Act List for having governmental armed groups or supporting nongovernmental armed groups that recruit or use children in armed conflict.

And finally, the department is recognizing eight TIP Report heroes who have devoted their lives to the fight against human trafficking.

The 2021 heroes come from Albania, the Central African Republic, Gabon, Japan, Kazakhstan, Mexico, Qatar, and Spain. These individuals inspire each of us to do more to advance the global fight against human trafficking and protect the victims and survivors of this crime. The ceremony today that Secretary Blinken will host will highlight and celebrate the accomplishments of these extraordinary individuals.

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b. National Action Plan

On December 3, 2021, the State Department announced the release of the Biden Administration's updated National Action Plan to Combat Human Trafficking. See press statement, available at https://www.state.gov/release-of-the-national-action-plan-to-combat-human-trafficking/. The full text of the National Action Plan to Combat Human

Trafficking can be found at https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/03/fact-sheet-the-national-action-plan-to-combat-human-trafficking-nap/#_blank. The State Department's press statement is excerpted below.

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The National Action Plan outlines a three-year comprehensive approach to combat human trafficking, including actions to strengthen prosecution of traffickers, enhance victim protections, and prevent the crime from occurring within our borders and abroad.

The updated National Action Plan integrates the Administration's core commitments to addressing the needs of underserved individuals, families, and communities – including by advancing racial and gender equity; furthering workers' rights; preventing forced labor in global supply chains; and ensuring safe, orderly, and humane migration. First launched in 2020, the National Action Plan's updates build on the foundational pillars of U.S. and global anti-trafficking efforts – prevention, protection, prosecution, and partnership.

Secretary Blinken chairs the President's Interagency Task Force to Monitor and Combat Trafficking in Persons (PITF), a cabinet-level entity created by statute in 2000 to coordinate U.S. government-wide efforts to combat trafficking in persons. The PITF, which consists of 20 federal agencies, serves as a forum for collaborating on implementation of the National Action Plan's priority actions. PITF agencies are already taking concrete steps to implement key aspects of the updated National Action Plan, including by forming two working groups — one to develop best practices in implementing screening forms and protocols and the second to analyze rights and protections granted to certain temporary visa holders.

The National Action Plan highlights several critical ways the Department of State combats human trafficking. It calls for collaboration between the Department's Diplomatic Security Service and other federal and local law enforcement agencies to continue building our collective capacity to pursue human trafficking cases and promptly connect victims to services. It also reinforces the urgency of the Department's ongoing work to engage governments, including across our own interagency, and with the private sector to prevent and address forced labor in global supply chains and public procurement. Most importantly, the National Action Plan underscores the need to further enhance our ability to ensure our anti-trafficking work is trauma- and survivor-informed, which the Department is committed to doing through its engagement with the U.S. Advisory Council on Human Trafficking and support of the Human Trafficking Expert Consultant Network.

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c. 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 December 21, 2021, the President issued a memorandum for the Secretary of State, "Presidential Determination With Respect to the Efforts of Foreign Governments Regarding Trafficking in Persons," available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/12/21/memorandum-on-the-presidential-determination-with-respect-to-the-efforts-of-foreign-governments-regarding-trafficking-in-persons/. The President's memorandum conveys determinations concerning the countries that the 2021 Trafficking in Persons Report lists as Tier 3 countries. See Chapter 3.B.3.a., *supra*, for discussion of the 2021 report.

4. Corruption

On June 2, 2021, the G7 ministers of Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States of America, and the High Representative of the European Union released a joint statement on the UN General Assembly special session against corruption. The G7 ministers' statement was released as a Department of State media note at https://www.state.gov/g7-ministers-statement-on-the-un-general-assembly-special-session-against-corruption/. Excerpts follow.

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We, the G7 Ministers, recognize that corruption is a pressing global challenge. As the UN Convention against Corruption notes, corruption threatens the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice, and jeopardizing sustainable development and the rule of law. Corruption presents serious threats for individuals and societies and often enables other forms of crime, including organized crime and economic crime, including money laundering. These threats have been heightened by COVID-19. As the world continues to recover, it is critical that we do not let corruption threaten our efforts to build back better and address global challenges especially the achievement of the 2030 Sustainable Development Goals.

We are looking forward to the G7 ministerial meeting in September this year, where there will be a discussion on our joint efforts to address corruption.

Corruption is a challenge faced by all countries. Its effects are felt at local, national, and global levels and it is our common and shared responsibility to take action. We as the G7 stand up for an open society, with a strong civil society and free media. We are convinced that these actors are crucial in preventing and combatting corruption. Thus, it is our goal to acknowledge the role of civil society and free media and to promote their freedom and protection in the UNGASS declaration. We recognise that progress will catalyse prosperity, security and development.

G7 Foreign Ministers committed to work collectively to strengthen the foundations of open societies and protect against threats, including corruption, and illicit finance, and the closure of civic space. In this regard, we reaffirm the fundamental role of the UN Convention

Against Corruption (UNCAC) and its supporting bodies play in the global fight against corruption. It is the only legally binding universal instrument on corruption, negotiated on the basis of consensus. The Convention is the cornerstone of our international anti-corruption framework. It forms an integral part of the international anti-corruption architecture which, when fully and effectively implemented, will robustly combat corruption.

We fully support the aims of this Special Session of the General Assembly against corruption to address challenges and measures to more effectively prevent, detect, prosecute, and punish corruption and strengthen international cooperation.

We welcome the adoption of the action-oriented political declaration and commit to achieving its aims. Given our international responsibilities, we as the G7 recognise the need to enhance our efforts to prevent and combat corruption by leading by example. We must continue to make real progress on this issue. We will ensure strong and effective implementation of UNGASS commitments. To this end, we commit to:

1. Prevention: As the G7, we will work to ensure there are strong measures in place to prevent corruption and other forms of illicit finance to protect our financial centres and deny safe haven to the proceeds of crime. We will support other countries' efforts to do the same, including anti-corruption safeguards and transparency mechanisms in the delivery of humanitarian aid to ensure that aid, required in times of natural disaster and other emergencies including the COVID-19 pandemic, reaches intended beneficiaries. We also reaffirm our commitment to putting in place measures that promote transparency in the beneficial ownership of legal entities. We further commit to promoting the effective implementation of the Financial Action Task Force (FATF) Standards, the global standard setter for combatting money laundering, terrorist financing and proliferation finance.
2. Transparency: Comprising many of the world's most open societies, we note that enhancing transparency benefits citizens and societies and is the foundation on which effective anti-corruption efforts are built. As such, we reaffirm our commitment to implementing measures that afford a high degree of transparency in governance, including measures to enhance transparency in public procurement, and supply chain transparency in the private sector. Consistent with our legal obligations, we will protect and promote access to information for all citizens, including civil society organisations, media and journalists.
3. Law Enforcement Cooperation/Criminalization:
4. Foreign bribery: As major centres of private enterprise, we commit to actively enforcing our domestic and foreign bribery laws and ensuring effective implementation of the OECD Anti-Bribery Convention and we urge all G20 countries to do the same. We recognize the positive impact that incentivizing robust private sector corporate compliance can have on the goal of effectively preventing corruption. We also recognise the corrosive effect of bribe solicitation and call for greater preventive action including awareness raising and training.
5. Denial of Safe Haven: As some of our financial centres and industries can attract corrupt actors and the proceeds of crime, we commit to strengthening international cooperation to deny safe haven to corrupt individuals and their ill-gotten gains, including through information sharing, and the appropriate use of sanctions and visa restrictions.
6. International Cooperation and Technical Assistance (TA): As many of the world's largest donors, we recognise the role of Official Development Assistance and commit to

using our programmes efficiently to build capacities and provide timely, sustainable, adequate and effective technical assistance that meet needs. We call on our partner countries to take a lead in the coordination of TA at country level, including by, publishing needs identified by the implementation review mechanism, involving all relevant stakeholders and, mainstreaming gender in analysis and the delivery of programmes.

7. Civil Society (including protection of journalists and role of the media): We commit to championing the role of civil society and media freedom as a vital part of upholding democracy and human rights around the world. We condemn all attacks on those who work to expose corruption, including journalists, civil society and individual whistle-blowers, and commit to support and protect those who report and stand up against corruption.
8. Asset Recovery: As home to many of the world's leading financial centres and as recipients of some of the largest volumes of mutual legal assistance requests in the world, we renew our commitment to counter money laundering linked to foreign corruption and to effectively recover proceeds of crime, particularly money laundering proceeds. We further underline the importance of ensuring confiscated stolen assets, when returned, are returned in a transparent and accountable manner, within the framework of the UNCAC, that ultimately benefits those harmed by corruption. We will promote and support international co-operation among relevant law enforcement agencies including in asset recovery.
9. Rule of Law and Fundamental Freedoms: We recognise that the fight against corruption must be based on respect for the rule of law, support for democratic governance, fundamental freedoms and human rights including due process rights of those accused of and sought for corruption. Rule of law is an essential component to achieve sustainability, to counter abuses of power and to foster an environment needed to effectively achieve the goals of the 2030 Agenda.
10. Implementation of anti-corruption conventions and other initiatives: As global leaders in the fight against corruption, we recognise the importance of international and regional conventions and other initiatives to fight corruption and emphasise our individual and collective responsibility to step up our efforts towards their effective implementation.
11. Commit to consulting civil society in our country reviews and promoting their inclusion as observers in subsidiary bodies of the UNCAC and Conference of States Parties.
12. Call all countries under review by UNCAC to publish their full UNCAC country reports and invite inputs from a wide range of stakeholders.
13. Support UNODC to prepare a comprehensive report on member state implementation of UNCAC, after completion of the current review phase, and report its findings to the COSP.
14. Support the effective implementation of existing regional anticorruption frameworks and the FATF standards, including their review mechanisms for compliance.
15. Urge those who have not ratified the UNCAC to join the 187 other state parties who have done so.

We firmly reiterate the importance of strong and unified leadership in addressing corruption. We look to forthcoming processes in relevant fora with close cooperation with other stakeholders such as, the US Summit for Democracy and the Open Government Partnership 10-year Anniversary Summit in South Korea and the UK presidency of the G7 to build on these

commitments. We commit to working within these forums, as well as through the G20 Anti-Corruption Working Group, to continue to drive progress on this important agenda.

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5. Organized Crime

On August 30, 2021, the State Department offered a reward under the Transnational Organized Crime Rewards Program ("TOCRP") of up to $5 million for information leading to the arrest and/or conviction of People's Republic of China national Zhang Jian, a key leader of the transnational criminal Zhang Drug Trafficking Organization. See press statement, available at https://www.state.gov/department-of-state-offers-reward-for-information-to-bring-chinese-fentanyl-trafficker-to-justice/. The press statement further explains:

> Between 2013 and 2016, with Zhang acting as principal leader and organizer, Zhang's criminal organization imported and distributed controlled substances and their analogues into the United States that led to the overdose deaths of four Americans in North Dakota, Oregon, North Carolina, and New Jersey and serious bodily injuries to five other Americans.

On October 14, 2021, the State Department announced two rewards under the TOCRP for information regarding Pakistani national and human smuggler Abid Ali Kahn: (1) a reward of up to $1 million for information leading to the arrest and/or conviction of Ali Khan; (2) up to $1 million for information leading to the financial disruption of Ali Khan's Pakistani-based human smuggling network. See press statement, available at https://www.state.gov/department-of-state-offers-reward-for-information-to-bring-pakistani-human-smuggler-to-justice/.

On October 22, 2021, the Department announced a TOCRP reward offer of up to $10 million for information leading to the arrest and/or conviction of Colombian national Alvaro Pulido Vargas, who was indicted for money laundering in connection with a foreign bribery scheme. The press statement announcing the reward, available at https://www.state.gov/department-of-state-offers-reward-for-information-to-bring-colombian-money-launderer-to-justice/, includes the following information about Pulido.

> Beginning in 2015, Pulido and others began working to obtain or retain contracts to provide food to the Venezuelan people. Pulido and his co-conspirators allegedly marked-up the cost of producing the boxes of food in order to make a personal profit from their production. From this cost mark-up, the conspirators were able to pay bribes and kickbacks to those Venezuelan government officials who assisted them in obtaining the contract to produce the boxes, and make millions of dollars in profit for themselves.

> According to the indictment against Pulido, as the Maduro regime's shortage of U.S. dollars limited their ability to pay foreign companies, including their ability to pay Pulido and others for the importation into and distribution of boxes of food in Venezuela, Pulido and a co-conspirator started a business to liquidate the country's gold. The money obtained through the gold liquidation was then used to pay foreign companies, including companies controlled by Pulido and a co-conspirator.

On November 4, 2021, the State Department announced a TOCRP offer of up to $10,000,000 for information leading to the identification or location of any individual(s) who hold(s) a key leadership position in the DarkSide ransomware variant transnational organized crime group. In addition, the Department also offered up to $5,000,000 for information leading to the arrest and/or conviction in any country of any individual conspiring to participate in or attempting to participate in a DarkSide variant ransomware incident. As explained in the press statement, available at https://www.state.gov/reward-offers-for-information-to-bring-darkside-ransomware-variant-co-conspirators-to-justice/:

> The DarkSide ransomware group was responsible for the Colonial Pipeline Company ransomware incident in May 2021, which led to the company's decision to proactively and temporarily shut down the 5,500-mile pipeline that carries 45 percent of the fuel used on the East Coast of the United States. In offering this reward, the United States demonstrates its commitment to protecting ransomware victims around the world from exploitation by cyber criminals. The United States looks to nations who harbor ransomware criminals that are willing to bring justice for those victim businesses and organizations affected by ransomware.

On November 8, 2021, the State Department announced a TOCRP offer of up to $10,000,000 for information leading to the identification or location of any individual holding a key leadership position in the Sodinokibi ransomware variant transnational organized crime group. In addition, the Department offered a reward of up to $5,000,000 for information leading to the arrest and/or conviction in any country of any individual conspiring to participate in or attempting to participate in a Sodinokibi variant ransomware incident. The press statement announcing the offers, available at https://www.state.gov/reward-offers-for-information-to-bring-sodinokibi-revil-ransomware-variant-co-conspirators-to-justice/, explains:

> The Sodinokibi ransomware group, also known as REvil, was responsible for the ransomware incident perpetrated against JBS Foods, a provider of agricultural products primarily to Australia and the United States, which caused a major disruption in food processing and delivery. Sodinokibi also compromised Kaseya, an IT management company that provides network, application, and infrastructure services to thousands of small businesses and managed service

providers. The incident not only impacted Kaseya's operations, but also those of its clients around the world. In offering this reward, the United States is demonstrating its commitment to protecting ransomware victims around the world from exploitation by cyber criminals, and to working with nations willing to bring those criminals to justice.

On December 15, 2021, the State Department announced rewards under the TOCRP and the NRP to complement other actions by the U.S. government in conjunction with two new Executive Orders relating to transnational organized crime (see Chapter 16 for discussion of E.O. 13959 and E.O. 13960). See State Department press statement from Secretary Blinken, available at https://www.state.gov/combating-transnational-crime-and-imposing-sanctions-on-persons-involved-in-the-global-illicit-drug-trade/. The press statement lists the December 15 reward offers:

> • The Department is offering rewards of up to $5 million each for information leading to the arrest and/or conviction of Mexican individuals Ovidio Guzmán López, Ivan Archivaldo Guzmán Salazar, Jesus Alfredo Guzmán Salazar, and Joaquín Guzmán López. All four are high-ranking members of the Sinaloa Cartel and are each subject to a federal indictment for their involvement in the illicit drug trade. Ovidio Guzmán Lopez, Ivan Archivaldo Guzmán Salazar, and Jesus Alfredo Guzmán Salazar were also designated today by Treasury under the new E.O. …
>
> • The Department is offering a reward of up to $5 million for information leading to the arrest and/or conviction of PRC national Chuen Fat Yip, charged in a five-count federal indictment for conspiracy to possess with intent to distribute a controlled substance, conspiracy to import a controlled substance, manufacturing and distributing a controlled substance knowing that the controlled substance will be unlawfully imported into the United States. This reward is also for information leading to the disruption of financial mechanisms of the Yuancheng Group, Yip's transnational organized crime group. Yip was designated today by Treasury under the new E.O. …
>
> • The Department is offering rewards of up to $5 million each for information leading to the arrest and/or conviction of PRC nationals Fujing Zheng and Guanghua Zheng. Both are subject to a federal indictment and charged with numerous counts of manufacturing and distributing acetyl fentanyl, U44700, Dibutylone, 4-CL-PVP, ABD-FUMINACA for the purpose of unlawful importation. …

6. International Crime Issues Relating to Cyberspace

a. CLOUD Act

See *Digest 2019* at 93-94 regarding the Clarifying Lawful Overseas Use of Data Act, Consolidated Appropriations Act, 2018, Div. V, Pub. L. 115-141, 132 Stat. 348 ("CLOUD

Act"). The United States and Australia signed a CLOUD Act agreement on December 15, 2021. The agreement and materials submitted to Congress in support of the agreement on December 22, 2021 are available at https://www.justice.gov/dag/cloudact.

b. Reward Offer

On July 15, 2021, the State Department's Office of Rewards for Justice announced a reward of up to $10 million for information leading to the identification or location of any person who, while acting at the direction or under the control of a foreign government, participates in certain malicious cyber activities against U.S. critical infrastructure in violation of the Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, 100 Stat. 1213, partly codified at 18 USCS § 1030 ("CFAA"). The press statement, available at https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-foreign-malicious-cyber-activity-against-u-s-critical-infrastructure/, includes the following:

> Certain malicious cyber operations targeting U.S. critical infrastructure may violate the CFAA. Violations of the statute may include transmitting extortion threats as part of ransomware attacks; intentional unauthorized access to a computer or exceeding authorized access and thereby obtaining information from any protected computer; and knowingly causing the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causing damage without authorization to a protected computer. Protected computers include not only U.S. government and financial institution computer systems, but also those used in or affecting interstate or foreign commerce or communication.
>
> Commensurate with the seriousness with which we view these cyber threats, the Rewards for Justice program has set up a Dark Web (Tor-based) tips-reporting channel to protect the safety and security of potential sources. The RFJ program also is working with interagency partners to enable the rapid processing of information as well as the possible relocation of and payment of rewards to sources. Reward payments may include payments in cryptocurrency.

c. UN Cybercrime Treaty

On October 11, 2021, U.S. Third Committee Advisor Stephanie Greene delivered a statement at an interactive dialogue with the UN Office on Drugs and Crime Division for Treaty Affairs Director Jean-Luc Lemahieu. The statement, expressing support for negotiation of a UN cybercrime treaty, is excerpted below and available at https://usun.usmission.gov/statement-at-a-third-committee-interactive-dialogue-with-un-office-on-drugs-and-crime-division-for-treaty-affairs-director-jean-luc-lemahieu/.

Negotiations on a UN cybercrime treaty begin in January 2022. It is vital that a UN instrument be tailored to meet the actual challenges we face from cybercrime, and the central priority of the United States remains that it protects human rights and fundamental freedoms, and preserves an open, interoperable, secure, and reliable internet.

The United States supports global action to combat cybercrime and is committed to a negotiating process that is transparent, focused, and open to experts, including those in civil society, industry, and other fields.

A good faith negotiation guided by well-informed, consensus-based, and practical solutions can achieve a meaningful UN instrument that will support international efforts to combat cybercrime. We look forward to the open and robust exchange of views to come.

C. INTERNATIONAL TRIBUNALS AND OTHER ACCOUNTABILITY MECHANISMS

1. General

Deputy Legal Adviser Julian Simcock delivered the U.S. statement at the 76th General Assembly Sixth Committee on agenda Item 83: crimes against humanity, on October 13, 2021. The U.S. statement is available at https://usun.usmission.gov/statement-at-the-76th-general-assembly-sixth-committee-agenda-item-83-crimes-against-humanity/, and excerpted below. Mr. Simcock delivered a similar statement on November 18, 2021, available at https://usun.usmission.gov/explanation-of-position-on-agenda-item-83-crimes-against-humanity/.

* * * *

The United States has a long and proud history of supporting justice for victims and accountability for those responsible for serious international crimes, including crimes against humanity. The United States was instrumental in the first prosecution of crimes against humanity at Nuremberg and has supported subsequent efforts to prosecute perpetrators of crimes against humanity in ad hoc international criminal tribunals, hybrid criminal tribunals, and the domestic courts of a number of countries.

Seventy five years after the Nuremberg trials, there is no dedicated multilateral treaty on the prevention and punishment of crimes against humanity. By contrast, the prevention and punishment of genocide and war crimes are the subjects of widely-ratified multilateral treaties, which have made a significant contribution to the development of international law. The absence of such a treaty addressing crimes against humanity has left a hole in the international legal framework – and it is one we strongly believe should be addressed.

The Commission's final draft articles on the prevention and punishment of crimes against humanity are an important step in this regard. We would like to thank the Special Rapporteur, Sean Murphy, for his prodigious efforts. He has brought tremendous value to this project, and we particularly appreciate his extensive consultations with Member States and his efforts to take into account their 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 recognize that States have a range of views on the final draft articles and the way forward. As reflected in the comments the United States submitted in 2019, we believe that, notwithstanding their many merits, the draft articles can and should be modified in certain, key respects. However, in our view, that would be best accomplished through further discussion of the draft articles by States in an ad hoc committee with an appropriately robust mandate that recognizes the importance of this project and the gravity of this subject. An ad hoc committee should consider modalities of work that would enable a substantive and thorough exchange of views by States and on the Commission's recommendation for the elaboration of a convention by the General Assembly or by a conference of States on the basis of the final draft articles.

We believe that this approach would have the greatest probability of ensuring that any future convention based on the draft articles would be effective in practice and widely ratified by States. Advancing discussion of this project towards the elaboration of a convention on the prevention and punishment of crimes against humanity should be our shared goal. Anything less would fall short of filling this critical gap in the international legal framework.

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2. International Criminal Court

a. General

On November 10, 2021, Ambassador Richard Mills, deputy U.S. representative to the UN, delivered remarks at the UN General Assembly annual debate on the International Criminal Court. His remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-the-un-general-assembly-annual-debate-on-the-international-criminal-court/.

* * * *

As noted in the Court's report on developments between August 2020 and August 2021, this has been a year of significant change and activity at the Court. The United States would like to commend the ICC for a number of achievements in some of the longest-running situations before the Court – situations involving national governments that invited the ICC to act because they were unable to do so. In March, the United States welcomed the verdict in the case against former Lord's Resistance Army Commander Dominic Ongwen for war crimes and crimes against humanity. This was a significant step in securing justice for atrocities committed by the LRA, and we hope that this verdict brought some measure of closure to the LRA's too many victims.

We also welcomed the Appeals Chamber's decision in March to confirm the conviction of Bosco Ntaganda, closing one chapter of the many years of atrocities against the population in the eastern Democratic Republic of Congo, including sexual slavery as a crime against humanity and a war crime, that had been committed by his forces. We are pleased to have assisted in facilitating the voluntary surrender of Ongwen and the transfer of Ntaganda to the ICC. The

United States remains committed to furthering justice for LRA atrocities, and we continue to offer monetary rewards for information leading to the arrest of LRA leader Joseph Kony.

Finally, the United States applauds the progress that has been made to advance accountability in the Central African Republic, including the commencement in February of the trial against Alfred Yekatom and Patrice-Edouard Ngaissona for atrocity crimes.

We are also pleased to note several positive developments beyond the ICC. These are developments in relation to broader efforts to seek justice for atrocity crimes in national, hybrid, and international courts. This includes the commencement of trials in the Kosovo Specialist Chambers, and the announcement of an atrocity crime indictment by the Special Criminal Court of the Central African Republic. Given the responsibilities that states have for protecting their own populations, and the limited capacity of any international court, the United States continues to robustly support countries in their own domestic efforts to ensure accountability.

Turning back to the ICC, we would also like to take note of the important effort underway relating to reform as the Court approaches its twentieth birthday. All organs of the Court and States Parties, working with other states, civil society, and victims, have engaged over the past year in consideration of a broad range of reforms, including those identified in the Independent Expert Review of the ICC.

Although, as this Assembly knows, the United States is not a State Party, we welcome these ongoing efforts to identify and implement reforms that will help the Court better achieve its core mission of serving as a court of last resort in punishing and deterring atrocity crimes. While we maintain our longstanding objection to the Court's efforts to assert jurisdiction over personnel of non-States Parties absent a Security Council referral or the consent of the state, we believe that our concerns are best addressed through engagement with all stakeholders. Where domestic systems are unable or unwilling to genuinely pursue the justice that victims deserve, and that societies require to sustain peace, international courts such as the ICC can have a meaningful role.

We are impressed that the ICC persevered during the COVID pandemic and has been able to remain continuously operational in its pursuit of justice. We extend our appreciation to all ICC staff for their dedication to accountability.

Mr. President, around the world, far too many victims of mass atrocities, both within and outside of the ICC's jurisdiction, have yet to find justice. We are reminded that much remains in our work together to prevent mass atrocities, and to ensure that the perpetrators and those responsible for genocide, crimes against humanity, and war crimes, are brought to justice.

The United States looks forward to continued discussions at the United Nations and to our upcoming participation as an observer at the meeting of the ICC's Assembly of States Parties in The Hague next month.

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On December 7, 2021, Under Secretary of State for Civilian Security, Democracy, and Human Rights Uzra Zeya delivered remarks to the (virtual) Assembly of States Parties to the Rome Statute. Under Secretary Zeya's remarks are excerpted below and available at https://www.state.gov/remarks-by-under-secretary-zeya-to-the-assembly-of-states-parties-to-the-rome-statute/.

* * * *

The ASP is an indispensable pillar of the International Criminal Court's architecture. You are essential to strengthening the Court and realizing the promise of justice.

The United States recognizes the significance of this moment for the ICC. Approaching 20 years since the Rome Statute entered into force, the Court has achieved meaningful advances in justice for victims of the worst crimes known to humanity – crimes against humanity, war crimes, and genocide.

The Court has established itself as an important part of the multilateral system in the fight against impunity. And, over the past year, States Parties, ICC officials, and civil society have made substantial progress on efforts to identify and implement reforms that will help the Court better achieve its core mandate, including those identified in the comprehensive Independent Expert Review report.

The United States is pleased to be at this meeting and stands ready to engage with all of you to continue to advance our shared objective of ensuring accountability for the most serious international crimes.

While we maintain our longstanding objection to the Court's efforts to assert jurisdiction over personnel of non-States Parties absent a Security Council referral or the consent of the State, we believe that our concerns are best addressed through engagement with all stakeholders.

We look forward to listening to all those here. From States Parties, whose active engagement is critical to the ICC's success; to victims and civil society, who prevail upon all States to find justice for atrocity crimes; and to the leadership and staff of the ICC, as they continue to work to strengthen the Court as an independent institution.

The United States' enduring commitment to justice and accountability for atrocity crimes is deeply embedded in our history, our values, and our policy. In remarking recently upon the importance of accountability, President Biden reflected on the historic Nuremberg Tribunal.

He said, and I quote: "The Tribunal was unlike anything that ever came before. It was not about vengeance. It was about accountability. For only acknowledging the truth can we prevent the repetition of atrocities — which are happening now in other parts of the world. It elevated our conception of the rule of law […] set a marker for the future of justice, [and] uplifted the importance of human rights in international affairs."

The ICC was intended to carry forth those principles. As a court of last resort, it is part of a global system of justice that the U.S. supports.

In the spirit of cooperation, the United States is exploring ways to assist the Court's prosecutions, and we are already taking action in several areas, such as:

- Using the State Department War Crimes Rewards Program to offer up to $5 million for information leading to the arrest of designated individuals subject to ICC warrants, including the leader of the Lord's Resistance Army, Joseph Kony—and I'm pleased to announce that we have just launched a new campaign about this reward;
- Exploring opportunities with national authorities and the ICC in locating and apprehending fugitives;
- Facilitating the travel of witnesses to The Hague to provide testimony to the Court; and
- Ongoing diplomatic engagement in support of the Court's work, including our recent statements at the UN General Assembly Annual Debate on the ICC and at the UN Security Council.

In addition, and in line with the principle of complementarity that underpins the Rome Statute, the United States continues to press forward on a broad range of efforts to support justice initiatives globally. These efforts include supporting – through funding, training, and information sharing – specialized national and regional courts, war crimes units, and international investigative mechanisms for atrocity crimes including, for example, in Kosovo, the Central African Republic, Ukraine, and Iraq.

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b. Termination of Sanctions

As discussed in *Digest 2020* at 143, President Trump issued E.O. 13928 of June 11, 2020, authorizing sanctions on ICC personnel, and sanctions were imposed on ICC Prosecutor Fatou Bensouda, and the ICC's Head of the Jurisdiction, Complementarity and Cooperation Division Phakiso Mochochoko. On April 2, 2021, Secretary of State Blinken announced that the sanctions and visa restrictions against ICC personnel were terminated by President Biden's revocation of E.O. 13928. See E.O. 14022 of April 1, 2021, "Termination of Emergency With Respect to the International Criminal Court." 86 Fed. Reg. 17,895 (Apr. 7, 2021). Notice of the removal of those designated from the Specially Designated Nationals and Blocked Persons ("SDN") list was published by the Treasury Department in the Federal Register on April 26, 2021. 86 Fed. Reg. 22,101 (Apr. 26, 2021). The April 2, 2021 press statement making the announcement is excerpted below and available at https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/.

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Today, President Biden revoked Executive Order 13928 on "Blocking Property of Certain Persons Associated with the International Criminal Court (ICC)," ending the threat and imposition of economic sanctions and visa restrictions in connection with the Court. As a result, the sanctions imposed by the previous administration against ICC Prosecutor Fatou Bensouda and Phakiso Mochochoko, the Head of the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor, have been lifted. The Department of State also terminated the separate 2019 policy on visa restrictions on certain ICC personnel. These decisions reflect our assessment that the measures adopted were inappropriate and ineffective.

We continue to disagree strongly with the ICC's actions relating to the Afghanistan and Palestinian situations. We maintain our longstanding objection to the Court's efforts to assert jurisdiction over personnel of non-States Parties such as the United States and Israel. We believe, however, that our concerns about these cases would be better addressed through engagement with all stakeholders in the ICC process rather than through the imposition of sanctions.

Our support for the rule of law, access to justice, and accountability for mass atrocities are important U.S. national security interests that are protected and advanced by engaging with the rest of the world to meet the challenges of today and tomorrow. Since the Nuremberg and Tokyo Tribunals after World War II, U.S. leadership meant that history permanently recorded fair judgments issued by international tribunals against justly convicted defendants from the

Balkans to Cambodia, to Rwanda and elsewhere. We have carried on that legacy by supporting a range of international, regional, and domestic tribunals, and international investigative mechanisms for Iraq, Syria, and Burma, to realize the promise of justice for victims of atrocities. We will continue to do so through cooperative relationships.

We are encouraged that States Parties to the Rome Statute are considering a broad range of reforms to help the Court prioritize its resources and to achieve its core mission of serving as a court of last resort in punishing and deterring atrocity crimes. We think this reform is a worthwhile effort.

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c. Verdict in the case against LRA Commander Dominic Ongwen

On February 4, 2021, the State Department issued a press statement welcoming the verdict in the case against Dominic Ongwen, former Lord's Resistance Army ("LRA") commander, for war crimes and crimes against humanity. The press statement is available at https://www.state.gov/welcoming-the-verdict-in-the-case-against-dominic-ongwen-for-war-crimes-and-crimes-against-humanity/ and further states:

> The United States helped facilitate the voluntary surrender and transfer of Ongwen to the ICC in 2015. While we continue to believe the ICC is in need of significant reform, we are pleased to see Ongwen brought to justice. There was extensive outreach to victims' groups in northern Uganda during Ongwen's trial, including broadcasting of the trial to affected communities.
>
> We hope Ongwen's conviction demonstrates to the people of Uganda that the perpetrators of the crimes committed against them will be held accountable, there will be justice, and the horrible legacy of the LRA's tactics to perpetuate and prolong violence and abuse will be addressed. The United States stands with all the victims of Ongwen and the LRA.
>
> The United States continues to offer a reward of up to $5 million for information that leads to the arrest, transfer, or conviction of Joseph Kony, leader of the Lord's Resistance Army. …

d. Palestinian Situation

On March 3, 2021, the State Department issued a press statement regarding its opposition to the ICC investigation into the Palestinian situation. The statement is excerpted below and available at https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/.

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Today, the Prosecutor of the International Criminal Court (ICC), whose term ends in June, confirmed the opening of an investigation into the Palestinian situation. The United States firmly

opposes and is deeply disappointed by this decision. The ICC has no jurisdiction over this matter. Israel is not a party to the ICC and has not consented to the Court's jurisdiction, and we have serious concerns about the ICC's attempts to exercise its jurisdiction over Israeli personnel. The Palestinians do not qualify as a sovereign state and therefore, are not qualified to obtain membership as a state in, participate as a state in, or delegate jurisdiction to the ICC.

The Prosecutor's statement acknowledges some of the many reasons why the ICC will first take its time to determine its priorities, given its limited resources and other challenges, and not proceed to conduct any investigative activity related to this situation. She has previously recognized that "it would be contrary to judicial economy to carry out an investigation in the judicially untested jurisdictional context of this situation only to find out subsequently that relevant legal bases were lacking." As she acknowledges, that very possibility remains as likely today as ever. The ICC Pre-Trial Chamber I's decision of February 5 did not resolve the serious legal questions arising from any exercise of territorial jurisdiction in this matter, suggesting potential temporal, territorial, and nationality gaps in the finding of jurisdiction in future cases, leaving it to the Prosecutor to navigate such complicated circumstances.

The United States remains deeply committed to ensuring justice and accountability for international atrocity crimes. We recognize the role that international tribunals such as the ICC can play—within their respective mandates—in the pursuit of those important objectives. The ICC was established by its States Parties as a Court of limited jurisdiction. Those limits on the Court's mandate are rooted in fundamental principles of international law and must be respected.

Moreover, the United States believes a peaceful, secure and more prosperous future for the people of the Middle East depends on building bridges and creating new avenues for dialogue and exchange, not unilateral judicial actions that exacerbate tensions and undercut efforts to advance a negotiated two-state solution.

We will continue to uphold our strong commitment to Israel and its security, including by opposing actions that seek to target Israel unfairly.

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e. Libya

On May 17, 2021, Ambassador Jeffrey DeLaurentis, acting alternate representative to the UN for special political affairs, delivered the U.S. statement at a UN Security Council briefing on Libya. His remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-libya-3/.

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Prosecutor Bensouda, as you prepare to end your term, the United States commends your efforts since the adoption of UN Security Council Resolution 1970 to investigate and prosecute those responsible for the heinous atrocities committed against the Libyan people. Let me start by noting the important and necessary step that President Biden took in lifting the sanctions previously imposed on you, Madam Prosecutor, and your colleague, Phakiso Mochochoko. These sanctions were inappropriate. As Secretary Blinken has said, U.S. concerns with the ICC "would be better addressed through engagement with all stakeholders in the ICC process." For

our part, we hope this can help us return to a time of cooperation between the United States and the ICC. After all, justice, accountability, and the rule of law are values we share, and we believe they're advanced by engaging with the rest of the world. Which brings me to today's topic: the ICC's investigation into the situation in Libya.

First, let's start with the investigations themselves. The U.S. government is deeply alarmed by the reports of continued atrocities and other human rights abuses in Libya – arbitrary killings; indiscriminate airstrikes; forced disappearances; torture, unlawful detention; sexual and gender-based violence. We need to document these abuses and do something about them. So, we strongly support the UN Human Rights Council's creation of an international fact-finding mission to do just that. This mission must be granted full access throughout Libya.

The discovery of mass graves in Tarhouna, reportedly containing the remains of more than 100 men, women, and children, horrified the world. We thank the ICC, the United Nations, and national authorities for cooperating in sending an investigative team to inspect and investigate these mass graves. We support continued efforts to investigate and exhume these mass graves, and to collect and preserve evidence for use in future prosecutions and other potential Council actions.

Now, let's talk about justice. Former senior officials of the Qadhafi regime – who are subject to arrest warrants by the ICC for charges of war crimes and crimes against humanity – must face justice. The perpetrators of serious human rights violations, war crimes, and crimes against humanity must not be allowed to continue to inflict misery, violence, and turmoil. So, any individual, group, or country providing protection and refuge to these individuals should and must immediately alert and otherwise facilitate their transfer to the appropriate authorities.

Furthermore, we urge this Council to take overdue action on designating malign actors. Libyan armed groups and security forces on all sides stand accused of perpetrating and enabling human rights abuses. And specifically, the United States has nominated Mohammed al-Kani and the Kaniyat militia to the 1970 Libya Sanctions Committee for gross human rights abuses including disappearances, torture, and killings. The horrific mass graves – the one I mentioned earlier – offer clear evidence of their crimes. These designations would send a strong message by the Security Council for Libyan authorities and the international community to act against human rights abusers, and to end the culture of impunity in Libya that has fueled the conflict.

Victims and survivors deserve justice. And accountability will deliver a powerful deterrent message to those who bear responsibility for atrocities and other human rights abuses, that such actions will not be tolerated.

Finally, let's discuss how we can promote peace and security in Libya. As the Libyans have made clear – and this Council has unanimously affirmed – external actors involved in this conflict – including foreign forces and mercenaries – must cease their military interventions and withdraw from Libya immediately. Further, all external military support inconsistent with the UN arms embargo must end. That includes the training and financing of mercenaries, proxy forces, and armed groups. The recent violent instability in Chad underscores the dangers foreign mercenaries pose – not just to Libya, but to the entire wider region.

The ICC's work in Libya is a critical element of our international commitment to accountability, peace, and security. To achieve these goals in Libya, the appropriate mechanisms – including international, hybrid, and domestic courts – need to deliver for victims of atrocities. We will continue to support the ICC's investigations and contributions, which we hope will help bring true justice to the people of Libya.

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On November 23, 2021, Ambassador DeLaurentis delivered remarks at another UN Security Council briefing by the ICC prosecutor on the situation in Libya. His remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-by-the-icc-prosecutor-on-the-situation-in-libya/.

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Thank you, Mr. President. And thank you, Prosecutor Khan, for your briefing. We congratulate you on your appointment as Chief Prosecutor of the International Criminal Court. We wish you success in your new role. The United States looks forward to working with your office and commends the efforts of the Court to investigate and prosecute those responsible for the atrocities committed against the Libyan people since the adoption of UN Security Council Resolution 1970 in 2011. 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. Justice, accountability, and the rule of law are values we share and continue to believe are best advanced together.

This brings me to today's topic: The Court's ongoing investigation into the situation in Libya.

The chronic insecurity we are witnessing in Libya today is best addressed through accountability – which starts with rigorous documentation and investigation. The precarious human rights situation makes such work all the more difficult. Numerous armed groups and forces have faced allegations of arbitrary killings, indiscriminate airstrikes, forced disappearances, torture, unlawful detention, and sexual and gender-based violence. Disturbing reports of violence committed in Libyan prisons, with detainees subject to torture and their families denied visitation rights, continue. The situation for internally displaced people as well as that of migrants, refugees, and asylum-seekers remains dire. Regrettably, Libya remains ill-equipped to accommodate such large population movements.

The unearthing of the mass graves in the town of Tarhouna remains at the forefront of our minds. The gravity of the allegations connected to these graves demands our ongoing attention and a concerted international response. We thank the Court, the United Nations, and national authorities for their ongoing investigative work, including efforts to exhume the mass graves, and to collect and preserve evidence for use in future prosecutions, truth-telling, and other transitional justice measures.

As another marker of the importance of documentation, we also welcome the report of the Independent Fact-Finding Mission on Libya, FFM, released on October 1. The Mission interviewed more than 150 individuals and reviewed hundreds of documents on violations and abuses in Tripoli, Ganfouda and Southern Libya. The establishment of the FFM by the Human Rights Council in June 2020, mandated to document alleged violations and abuses of international human rights law and international humanitarian law by all parties in Libya since the beginning of 2016, represented a positive step toward accountability. We welcome the recent resolution extending the Mission's mandate, but deeply regret that the extension was granted for

only nine – rather than the customary 12 months. The Mission must be afforded the time to conduct an exhaustive review of its current and future findings.

Now, on the question of justice. Former senior officials of the Qadhafi regime – such as Abdullah al-Senussi and Saif al-Islam Qadhafi, the latter of whom is subject to an arrest warrant by the ICC for charges of war crimes and crimes against humanity – must face justice. The perpetrators of serious human rights violations, war crimes, and crimes against humanity must not be allowed to continue to inflict violence and turmoil. We call upon the Government of National Unity to take all possible action to secure the arrest and surrender of those wanted by the ICC. Moreover, any individual, group, or country providing protection and refuge to these individuals should and must immediately alert and otherwise facilitate their transfer to the appropriate authorities.

We also continue to monitor the Libyan legal proceedings against al-Senussi. We support the ongoing efforts to build domestic capacity to punish perpetrators of human rights abuses and violations and encourage support for local capacity building and judicial reform in Libya. Guaranteeing due process rights, as well as protecting the rights and security of victims and witnesses is central to the success of any domestic prosecutions.

We would like to express our concern, as reported in the UN Security Council Final Report of the UN Panel of Experts on the Sudan, that Abdallah Banda, a prominent ex-JEM Darfuri commander subject to an arrest warrant by the International Criminal Court, launched his own rebel group and has received financing and military materials from the Libyan National Army in return for support.

This briefing is also an important reminder that the victims and survivors of human rights violations and abuses in Libya deserve justice. To achieve that end, such groups need the help and support of civil society advocates. The work of civil society, however, continues to be curtailed by the damaging effects of Decree 286 that regulates the activities of non-government organizations. We have credible reports that NGO's fear retaliation if they should meet with international organizations. The severe restrictions imposed by this decree impede domestic efforts to secure justice for victims and survivors. We strongly urge the Government of Libya to revoke this decree given its harmful effects on the rights and freedoms of its people.

Finally, I'd like to turn to how we can promote peace and security in Libya. The United States reaffirms our call for all actors in Libya to commit to ensuring that free and fair elections take place as scheduled. We welcome Libyan 5+5 Joint Military Commission's action plan for the withdrawal of all foreign forces, fighters, and mercenaries from Libya in line with UN Security Council resolution 2570 and the Libyan Ceasefire Agreement. Further, all external military support inconsistent with the UN arms embargo must end. That includes the training and financing of mercenaries, proxy forces, and armed groups. This violent instability remains a threat to the entire wider region.

The ICC's work in Libya is a critical element of our shared commitments to accountability, peace, and security. To achieve these goals in Libya, the appropriate mechanisms – including international, hybrid, and domestic courts – need to deliver for victims of atrocities. We will continue to support the Court's investigations and contributions, which we hope will help bring true justice to the people of Libya.

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f. Sudan

On June 9, 2021, Ambassador DeLaurentis delivered remarks at a UN Security Council briefing by the ICC prosecutor on Sudan. Ambassador DeLaurentis's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-by-the-icc-prosecutor-on-sudan/.

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Over 16 years ago, the Security Council referred the situation in Sudan to the International Criminal Court. Madam Prosecutor, as this briefing is your last before the Council, the United States would like to express our gratitude to you personally for your commitment to ensuring justice for the victims of atrocities in Darfur in the long fight against impunity. Through moments of despair and hopelessness that justice might not arrive for Sudan, your dedication and perseverance ensured that justice and accountability will now be part of Sudan's peaceful and democratic future. We hope that you take pride in that enduring legacy of your tenure as Prosecutor, and we wish you well in your future endeavors.

The hearing on the confirmation of charges against Ali Kushayb was a historic moment. The voices and experiences of victims of serious crimes, including victims of sexual violence, were a powerful testament to the necessity of justice and accountability for lasting peace and security.

The United States fully supports the ICC's investigations in Darfur. We call on the civilian-led transitional government to honor its obligations under the Juba Peace Agreement and UN Security Council Resolution 1593 to cooperate with the ICC. In that regard, the United States has taken – and will continue to take – active steps to encourage the civilian-led transitional government to immediately transfer Ahmed Harun to the Court.

Madam Prosecutor, your briefing today is timely. Just over one month ago, the Security Council met to discuss the latest developments in Sudan. During that meeting, we detailed our concerns about rising intercommunal violence in Darfur and underscored the need for Sudanese authorities, both at the national and local levels, to engage in earnest to address the underlying issues of housing, land, displacement, and property rights that spur so much of the violence.

We know full well the problems that have led to Sudan's decades of insecurity – including over 300,000 deaths in Darfur since 2003 alone. These include limited, or a complete lack of, access to justice in many parts of the country; gross violations of human rights; the lack of trust between local communities, and those responsible for governing in an accountable, transparent, and equitable manner under the law; and the indifference on the part of the former regime to Sudanese citizens who simply wanted to secure more prosperous futures for their children and families.

Our message today remains the same as it was during the Security Council's last meeting on Sudan: this body must continue to underscore the need to build lasting peace and security in the country, promote and protect human rights, and hold those responsible for insecurity to account. The civilian-led transitional government in Sudan has the responsibility to protect all people in Sudan and we should be ready to assist in its efforts to ensure civilian protection in Darfur.

The United States supports the ICC's efforts to shed light on the abuses and atrocities committed against countless Sudanese who deserve justice for these acts. Such accountability is a powerful deterrent against future abuses and makes clear to those who suffered that their pain will not be left unnoticed and unaddressed. Ending the culture of impunity is also an important step in the country's transitional justice process.

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

On June 8, 2021, the State Department issued a press statement, affirming the conviction of former Bosnian Serb commander Ratko Mladic for genocide, crimes against humanity, and war crimes. The press statement, available at https://www.state.gov/affirming-the-conviction-of-former-bosnian-serb-army-commander-ratko-mladic-for-genocide-crimes-against-humanity-and-war-crimes/, includes the following:

> As the former Commander of the Bosnian Serb Army, Mladic was a key figure in a campaign with the horrifying objective to permanently remove the Bosniak and Croat populations of Bosnia and Herzegovina from Serb-controlled territory. The crimes committed in Bosnia and Herzegovina mark one of the darkest chapters of history following the Second World War.
>
> Despite efforts of perpetrators to silence witnesses, keep evidence of their crimes buried, and evade warrants of arrest, justice has prevailed in this case. We commend the courage and resilience of survivors and their loved ones who have continued to fight for the official acknowledgment of these crimes. As we approach the 26th anniversary of the genocide at Srebrenica, we hope the verdict of the Appeals Chamber brings a measure of peace to the victims and their loved ones. We are grateful for the years of work by the International Residual Mechanism for Criminal Tribunals in carrying out justice in this case.

On June 8, 2021, Ambassador DeLaurentis delivered remarks at a UN Security Council Briefing on the International Residual Mechanism for Criminal Tribunals. His remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-international-residual-mechanism-for-criminal-tribunals-3/.

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Today, of course, is a historic day. Earlier this morning, the Appeals Chamber announced its decision on Ratko Mladic's appeal. Almost 30 years ago, Mladic and other perpetrators began a campaign to permanently remove Bosnian Muslims and Bosnian Croats from Serb-claimed

territory in Bosnia and Herzegovina through a campaign of genocide, extermination, murder, and other inhumane acts. We recall with particular horror the days in July 1995, when Mladic and his forces entered Srebrenica, forcing 25,000 women, children, and the elderly out on busses, and systematically murdered the Bosniak men and boys of the area.

We hope the decision brings a measure of peace to the victims and their families. We also acknowledge the courage of the hundreds of victims who came forward to testify and without whom justice would not have been served. The verdict today also represents the hard work of the judges, lawyers, and the entire staff of the Mechanism who have dedicated themselves to gathering, organizing, and presenting evidence, finding witnesses, and supporting victims. We also note the upcoming trial verdict in the Stanisic and Simatovic case, which we expect will shed light on their responsibility for crimes committed in Croatia and Bosnia and Herzegovina, as well as the work of the Mechanism to bring charges against Felicien Kabuga, arrested last year in France. We continue to support the Mechanism's efforts to bring the remaining Rwandan fugitives to justice, including through our offer of a reward of up to $5 million for information that leads to each fugitive's arrest. We urge all countries to cooperate with the Mechanism in these efforts. In addition to the Mechanism's work to finalize cases involving charges of genocide, war crimes, and crimes against humanity, we also note the importance of its work to ensure the administration of justice, including in the ongoing case against Anselm Nzabonimpa and other defendants.

Along these lines, we are deeply disappointed that Serbia has failed to comply with its obligations to arrest two individuals charged with contempt of court in relation to witness intimidation. Serbia, as a member of the United Nations and as a party to relevant international and regional commitments, including Serbia's EU accession commitments under Chapter 23 of the accession acquis, has an obligation to cooperate with the Mechanism in the above case. Failure to cooperate with the Mechanism undermines the operation of international law and the effectiveness of the Security Council. The United States calls on Serbia to execute the arrest warrants without further delay.

We underscore that contempt cases are a critical aspect of the Mechanism's work and play an important role in ensuring the rule of law. The assistance of Member States is no less important in these cases, as confidence that witnesses will testify truthfully without fear is essential for the just resolution of cases concerning the gravest crimes.

Finally, we commend the work of the Mechanism in supporting national jurisdictions in prosecutions and educational projects. As President Agius and Prosecutor Brammertz note in their report, there is still much work to do to encourage the acknowledgement of historical facts and further justice at the domestic level. Serbia's decision to grant citizenship to Mirko Vrucinic in June last year, while he faced war crimes charges in a court in Sarajevo, for example, effectively shields him from justice. The United States calls on all states in the Western Balkans to cooperate with the Mechanism and with one another to prevent impunity from taking hold in the region.

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On October 20, 2021, Sim Farar, U.S. representative to the 76th Session of the UN General Assembly, delivered remarks at a UN General Assembly debate and briefing on the International Residual Mechanism for Criminal Tribunals. His remarks are

available at https://usun.usmission.gov/remarks-at-un-general-assembly-debate-and-briefing-on-the-international-residual-mechanism-for-criminal-tribunals/, and excerpted below.

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The IRMCT's activities and accomplishments over the past year are truly commendable – and all in the face of significant COVID restrictions. With each fugitive apprehended, prosecution completed, and appeal upheld, this Mechanism is supporting the goals the Security Council set out at its establishment. We agree with the Security Council's vision of the IRMCT as a small, temporary, and efficient body whose functions diminish over time.

The United States fully supports the priorities of the Office of the Prosecutor continues to pursue, including the expeditious completion of trials and appeals, locating and arresting the remaining fugitives indicted by the International Criminal Tribunal for Rwanda, and assisting national jurisdictions prosecuting international crimes committed in the former Yugoslavia and Rwanda.

The IRMCT has taken significant action on cases that move us closer to these collective objectives. First, as President Biden stated, the decision affirming Ratko Mladic's conviction shows that those who commit horrific crimes will be held accountable, and it reinforces our shared resolve to prevent future atrocities from occurring anywhere in the world. We are grateful for the years of work by the International Residual Mechanism for Criminal Tribunals in carrying out justice in this case.

Second, we commend the thorough work of the court in Stanisic and Simatovic case. The first conviction of high-ranking officials from the 1990s wartime government in Serbia for crimes committed in a neighboring country is a notable accomplishment.

Third, the four convictions for witness interference in the Nzabonimpa et al. contempt case send an important signal to others who may be contemplating similar actions that much intimidation will not be tolerated.

We welcome the Mechanism's embrace of the recommendations from the 2020 OIOS progress and process regarding additional streamlining of resources and internal coordination. We continue to offer a reward of up to $5 million for information that leads to the arrest, transfer, or conviction of the remaining Rwandan fugitives.

Taken together, these judicial actions move us closer to securing justice for the victims of these horrific crimes, for their families and communities, and for their countries.

Additional steps can – and should – be taken today in the name of justice and prevention of future atrocities. This includes the swift apprehension of the remaining six Rwandan fugitives. We call on Member States who may be harboring them to cooperate with the investigation.

The United States also has serious concerns with Serbia's non-cooperation on the arrest warrants for Jojic and Radeta, who have been charged with witness interference. We reiterate that contempt cases are a critical aspect of the Mechanism's work and play an important role in ensuring the rule of law. Serbia has a legal obligation to cooperate with the Mechanism and shall we call on it to execute the arrest warrants without further delay.

As long as some continue to engage in the dangerous fiction of genocide denial, we risk recurrences of these horrific crimes. We must confront false narratives and uncover the truth,

however painful, about how the normalization of hatred and persecution of certain groups led to tragic consequences in Rwanda and the former Yugoslavia. We welcome the IRMCT's ongoing engagement with the affected countries and we encourage these national jurisdictions to vigorously pursue accountability for atrocity crimes.

We also thank the IRMCT for its significant work responding to national authorities' requests for assistance. In this way, the IRMCT has continued to play a critical role in facilitating the rule of law globally.

We thank the IRMCT, their judges and staff for their tireless engagement over the past year to ensure an efficient, thorough, and sound legal process in each of these cases. There is undoubtedly more work to be done, but each of these steps moves us closer to honoring the victims' memories and saying "Never Again." Thank you.

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On December 13, 2021, Ambassador Mills delivered remarks at a UN Security Council debate on the International Residual Mechanism for Criminal Tribunals. His remarks are available at https://usun.usmission.gov/remarks-at-a-un-security-council-debate-on-the-international-residual-mechanism-for-criminal-tribunals-2/, and excerpted below.

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Thank you, Mr. President. President Agius, Prosecutor Brammertz, thank you for your briefings on the International Residual Mechanism for Criminal Tribunals' ongoing work to bring perpetrators to justice for the atrocities committed in Rwanda and the former Yugoslavia.

The United States remains deeply grateful for the commitment and the hard work of the judges, the attorneys, the staff in Arusha and The Hague, as well as in field offices in Kigali and Sarajevo, despite numerous challenges over the past year. We commend your unwavering pursuit of justice for the victims in Rwanda and the former Yugoslavia.

We join others also in expressing the U.S.'s deep appreciation for the long and distinguished service of Judge Theodor Meron who has retired from the roster of Mechanism judges. Judge Meron's efforts to provide justice and accountability for victims for some of humanity's worst atrocities will always be remembered.

Mr. President, the Mechanism has continued to make important progress over the reporting period, despite the persistent impact of significant COVID restrictions. We commend its continued commitment to fulfill the goals the Security Council set out for the Mechanism at its establishment as a lean, temporary and efficient body. We appreciate the ongoing efforts to expeditiously complete remaining trials and appeals, to locate and arrest the remaining fugitives indicted by the ICT for Rwanda and assist national jurisdictions prosecuting international crimes committed in the former Yugoslavia and Rwanda.

The Mechanism has taken significant steps to realize these collective objectives over the past year, and we are grateful for the years of work by the Mechanism in carrying out justice. This work has clearly manifested itself through several achievements including the decision

affirming Ratko Mladic's conviction; the thorough work of the Mechanism in the Stanisic and Simatovic cases; and, the four convictions for witness interference in the Nzabonimpa et al. contempt case. Taken together, these judicial actions move us closer to securing justice for the victims of these horrific crimes, for their families and communities, and for their countries.

Still, we can and must do more to prevent future atrocities and realize the ideals of justice. This includes the swift apprehension of the remaining six Rwandan fugitives. We join others in calling on Member States who may be harboring them to cooperate with the investigation. The United States continues to offer a reward of up to $5 million dollars for information that leads to the arrest, transfer, or conviction of the remaining Rwandan fugitives.

In addition, the United States continues to have serious concerns with Serbia's non-cooperation on the arrest warrants for Jojic and Radeta, who have been charged with witness interference. Serbia has a legal obligation to cooperate with the Mechanism and we call on it to execute the arrest warrants without further delay. Contempt cases are a critical aspect of the Mechanism's work and are equally deserving of our attention in order to uphold the rule of law.

We also note that as long as some continue to engage in the dangerous fiction of genocide denial, to protect memorials that honor those responsible for genocide and other crimes, and to stoke ethnic division, we risk recurrences of these horrific crimes. A critical part of the efforts to ensure non-recurrence is the full recognition within domestic systems of international convictions.

We welcome the Mechanism's ongoing engagement with the affected countries and we encourage these national jurisdictions to vigorously pursue accountability for atrocity crimes in order to move beyond the dark and dangerous days of the past. We further encourage these national jurisdictions to explore opportunities for cooperation with one another to make justice a reality.

Mr. President let me conclude by welcoming the news of the announcement we heard today of the transfer agreement between the Republic of Niger and the UN. This is a significant, positive step that the U.S. welcomes and commends. I also want to take moment to commend the work of the Mechanism Registrar for his commitment and dedication to achieving this.

The tireless work of the Mechanism serves as an important reminder to us all that we must re-commit to protecting civilians during armed conflict and to holding those who commit atrocity crimes accountable. Each of these steps moves us closer to properly and fully honoring the victims' memories. Thank you, Mr. President.

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4. Other Accountability Proceedings and Mechanisms

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

On May 10, 2021, Ambassador Mills delivered remarks at a UN Security Council briefing on the UN Investigative Team for Accountability of Da'esh/ISIL. His 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/, and excerpts follow.

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Thank you, Mr. President. Let me start by thanking Ms. Murad for her compelling and powerful testimony, and for her insights into what steps need to be taken by this Council. Special Representative Khan, thank you for your extensive briefing on this difficult topic, as well. As the Special Representative takes on the position as the chief prosecutor at the ICC, I would like to commend him and his team for setting up UNITAD and doing so much excellent work since.

The "stocktaking section" of the Special Representative's report is both an impressive list of accomplishments and a clear set of signposts for our path forward. In particular, I'd like to especially applaud your efforts, Mr. Representative, toward returning the remains of 103 Yezidis recovered from nine mass grave sites in Kojo village. For their families, that return must have meant the world. Your work with the Yezidi community – including making sure that commemorations were dignified and accommodated Yezidi beliefs and practices – has helped these communities heal, and puts them closer to national reconciliation with other Iraqi communities. And your legacy will be UNITAD's continued efforts, as it works to accomplish these sensitive tasks.

That work must continue. And it must continue alongside investigative work to hold ISIS accountable for its brutality. Specifically, UNITAD must continue to investigate the horrors perpetrated against members of the Yezidi community in the Sinjar region, and the events of the June 2014 events at the Tikrit Air Academy, where unarmed cadets and military personnel were killed en masse. These investigations, as well as progress on similar cases involving other ethnic and religious communities in Iraq, will deliver justice to the Iraqi people. These investigations are critical for evidence-based trials. But we can never forget the human toll they take. Exhumations are a deeply painful process. So, we commend UNITAD and its partners for providing psychosocial support to staff, to survivors, and to family members.

Finally, UNITAD must especially make progress on the investigation into ISIS's alleged development and use of chemical and biological weapons. The international community cannot abide the use of chemical weapons – and those that use them cannot be allowed to do so with impunity.

With all of these investigative goals, success depends entirely on the partnership between UNITAD and Iraqi national entities. So, we support UNITAD's expanded cooperation with the Government of Iraq and the Kurdistan Regional Government, including Iraqi law enforcement and judicial entities, survivor groups, NGOs, and religious authorities. This increased cooperation will lead to more successful prosecutions of ISIS members in Iraq and abroad. And these partnerships will help ensure positive outcomes for the Iraqi people and the victims of these terrible crimes.

To push this effort to the next step, we urge Iraq to adopt legislation currently being considered by the Council of Representatives which would provide a basis for the Iraqi government to prosecute atrocity crimes, including those committed by ISIS. This law will be essential to finalizing an arrangement for UNITAD to share evidence with competent Iraqi authorities in accordance with the Terms of Reference. And it will be in line with the excellent law passed recently by the Iraqi government – the Female Yezidi Survivors Law – which recognizes the ISIS genocide against Yezidis and other Iraqi communities, and seeks to address the needs of the survivors of these unspeakable atrocities. We look forward to supporting the Iraqi government's implementation of this law.

Similarly, we also commend the Kurdistan Regional Government for announcing its intent to establish a special criminal court in Erbil for ISIS crimes. This announcement represents an important step in holding perpetrators of crimes against Yezidis accountable. We will monitor this court's implementation very closely.

Finally, on the difficult question of foreign terrorist fighters: we urge Member States to repatriate them, prosecute them as appropriate, and rehabilitate and reintegrate their associated family members. And we thank UNITAD for the valuable support it has provided to Member States – including the United States – to conduct such investigations and prosecutions.

Accountability is one of the most important pillars holding up our rules-based order. And so, we thank the Government of Iraq and UNITAD for their hard work and continued cooperation to hold ISIS accountable for its atrocities.

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Ambassador Mills delivered further remarks on UNITAD at a UN Security Council briefing on December 2, 2021. Those remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-un-investigative-team-for-accountability-of-daesh-isil-2/.

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Thank you, Mr. President. Mr. Special Advisor, welcome to the Security Council. We're glad to have you here today in your new role as Special Advisor and Head of UNITAD. Your previous experience in your home country prosecuting alleged members of ISIS for genocide committed against the Yazidi community in Iraq is a very meaningful asset in our shared pursuit of justice for the thousands of victims of ISIS's horrific campaign. Thank you for your briefing today.

The United States determined in 2016 that ISIS was responsible for genocide, crimes against humanity, and ethnic cleansing. The United States stands with victims in working to ensure that those responsible are held accountable. UNITAD is critical to that effort. We will continue to work with UNITAD to ensure the evidence of ISIS's atrocities is collected, processed, and shared in order to investigate and prosecute those who are responsible for these atrocities, including foreign terrorist fighters, by national courts.

To that end, we were encouraged to hear today from you, Mr. Advisor, of UNITAD's success in supporting Iraqi authorities to convert documentary evidence into searchable digital files. With over 2 million documents already digitized, UNITAD is providing essential services to the people of Iraq and the international community in the pursuit of justice. In addition, as we heard this morning, the investigation by UNITAD has produced evidence that on the morning of June 10, 2014, ISIS forces attacked the Badush Central Prison near Mosul, which housed approximately 3,000 prisoners, and executed several hundred predominantly Shia prisoners.

UNITAD's investigation into this heinous crime is a critical step in the pursuit of justice for the families of the victims. UNITAD, we believe, is most effective when it works in lockstep with the Government of Iraq and the Kurdistan Regional Government. We encourage UNITAD to continue coordinating closely with the new Iraqi government to build upon the good cooperation we saw in the past, as well to continue your engagement with Iraqi law enforcement

and judicial entities, as well as civil society, including survivor groups, NGOs, and religious authorities. The United States urges Iraq to adopt legislation that would provide a basis for the Iraqi government to prosecute atrocity crimes, including those committed by ISIS. Such authority is essential to finalizing an arrangement for UNITAD to share evidence with competent Iraqi authorities in accordance with its Terms of Reference.

The United States urges Member States – including Iraq – to repatriate and prosecute, as appropriate, their citizens who joined ISIS. Additionally, it is important all Member States rehabilitate and reintegrate, as appropriate, the associated family members of those who traveled to Iraq and Syria to join ISIS. As the Special Advisor can attest, UNITAD has provided valuable support to Member States, including the United States, to investigate and prosecute foreign terrorist fighters.

In conclusion, Mr. President, through our strategic dialogue with Iraq, the United States has confirmed its commitment to supporting Iraq's territorial integrity, stability, and prosperity. Holding ISIS accountable for its atrocities and promoting justice for ISIS's victims in Iraq is an important step in service of Iraq's national reconciliation.

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b. Syria

On April 21, 2021, Ambassador Linda Thomas-Greenfield delivered remarks at the UN General Assembly debate on the International, Impartial, and Independent Mechanism ("IIIM") for Syria. Ambassador Thomas-Greenfield's remarks are excerpted below and available at https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-the-un-general-assembly-debate-on-the-international-impartial-and-independent-mechanism-for-syria/.

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Ten years ago, the Assad regime met the peaceful demands of the Syrian people for dignity, respect, and fundamental freedoms with violence and repression. For over a decade now, the Syrian people have endured the unimaginable: from torture, to attacks on hospitals and healthcare, to cutting off humanitarian aid. That inability to even imagine what that must be like is exactly why we need the International, Impartial, and Independent Mechanism. Their work builds on the work of the United Nations' Commission of Inquiry on Syria in documenting the Assad regime's responsibility for mass atrocities. This way, we need not attempt to imagine – the evidence is there for everyone to see.

So, we're proud to support the IIIM's work and welcome their fourth report. And in particular, I would like to applaud Catherine Marchi-Uhel, the head of the Mechanism, on her significant efforts. Our commitment to accountability for perpetrators of atrocities in Syria, and justice for the victims, is unwavering. Without accountability, the Syrian people will never experience a stable, just, and enduring peace. So, the United States strongly supports funding for the IIIM from the UN Regular Budget through assessed contributions. And we urge all Member

States to continue to support this essential and appropriate arrangement so that the Mechanism's important work will be on firm financial footing.

The IIIM's structural investigations and case-building work provide the foundation for criminal accountability efforts that are necessary to combat impunity. We strongly support this information being made available to assist in new prosecutions, where jurisdictions exist. The recent conviction in Germany of the former Syrian regime official, Eyad al-Garib, for aiding and abetting crimes against humanity, demonstrates the valuable role independent documentation can play to facilitate justice processes outside of Syria.

We'd also like to applaud the IIIM's commitment to partnering with Syrian human rights groups – and including the perspectives of Syrian women and girls in its work. The IIIM's laudable efforts to build trusted relationships with civil society, and groups who represent victims, is a key component of its success. And in particular, I'd like to commend the work of the groups of survivors and family members in the "Truth and Justice Charter" in support of a future Syria with freedom, dignity, and security.

The United States will continue to support programs that provide legal and psychosocial services for Syrian survivors of torture, former political prisoners, as well as for their families. And we will support justice and accountability by adding survivor voices and perspectives to discussions on justice and the future of Syria.

Unfortunately, even in the face of all of the overwhelming evidence documented by IIIM, Russia continues to defend the Assad regime, spread disinformation, and attack the integrity of the Organization for the Prohibition of Chemical Weapons. The OPCW's most recent findings are clear: yet another chemical weapons attack is attributable to the Assad regime. We welcome today's decision by the OPCW Conference of States Parties to suspend Syria's rights and privileges under the Chemical Weapons Convention until it completes the steps set out in the OPCW's Executive Council decision of July 9, 2020. There must be consequences for the use of chemical weapons.

In the meantime, the work of the IIIM is essential to furthering justice and ensuring a sustainable political solution to the Syrian conflict, per the parameters outlined in UN Security Council Resolution 2254. And it remains deeply concerning that certain members of the Security Council have prevented the Council from acting to ensure accountability for the Syrian people.

Lastly, Mr. President, the Syrian people should be heard, and every individual Syrian should have the opportunity to seek justice. Without accountability, there will be no justice. And without justice, there will be no peace.

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On September 24, 2021, Ambassador Thomas-Greenfield delivered remarks at a virtual event co-sponsored by the United States on the margins of UN General Assembly 76th session on the Syria IIIM. Her remarks are available at https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-a-virtual-event-co-sponsored-by-the-united-states-on-the-margins-of-unga76-on-syria-iiim/, and excerpted below.

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Today we have heard from activists on the ground, colleagues from the UN, and governments who share our commitment to accountability in Syria. We can all agree on a simple fact: After more than a decade of conflict, the evidence of the Assad regime's innumerable atrocities – some of which rise to the level of war crimes and crimes against humanity – is overwhelming. The regime has committed systematic torture and sexual violence. It has detained people arbitrarily and used illegal chemical weapons to attack their own people. It has dropped barrel bombs to destroy food markets and hospitals. The nearly endless list of the regime's violations and abuses is damning.

As the Syrian economy crashes under Assad's reckless leadership and corruption, the regime continues to … purposefully obstruct the delivery of humanitarian assistance …

… Russia and Iran have continued to support and shield Assad from accountability. The UN, and all actors with influence, must continue to exert pressure. Specifically, we must help secure the release of arbitrarily detained Syrians. Reports indicate that more than 149,000 Syrians remain missing or in detention. We support the OHCHR's continued direct engagement with Syrian civil society groups, who courageously document abuses every day, including seeking to locate the missing and arbitrarily detained. Families should not have to live with the agony of uncertainty.

Make no mistake, the regime is responsible for the vast majority of abuses in Syria. That said, we strongly condemn the egregious abuses committed by other actors as well. Two and a half years after the territorial defeat of ISIS, the terrorist group continues to conduct attacks across the country, including killings, bombings, and kidnappings. Hayat Tahrir al-Sham reportedly has committed a wide range of abuses, including kidnappings and attacking women in the practice of their human rights. Other armed groups, including opposition groups such as Ahrar al-Sharqiya, reportedly are responsible for abductions, sexual and gender-based violence, and forced displacement.

We support accountability for all atrocities in Syria, regardless of the perpetrators or their allegiance. After all, accountability is the first step toward justice for victims and peace for Syria. And accountability is only meaningful if it applies to all. The Syrian people deserve that first step. So, we are encouraged by the progress on criminal accountability efforts targeting regime officials over the last year. In February, a German court sentenced a former member of the Assad regime's intelligence service to prison for aiding and abetting crimes against humanity. This was the first ruling regarding torture in Syrian detention facilities by a court outside of Syria. Hopefully more will come. Investigations and trials for other regime officials are underway.

This forward progress would not be possible without the Triple I-M and the courageous work of Syrian activists risking their lives for accountability. In April, the United States was proud to join other states in adopting a decision to suspend certain rights and privileges of Syria under the Chemical Weapons Convention. Most notably, Syria no longer has the right to vote at the OPCW. This small, but historic step further isolates the Assad regime and affirms the international community's opposition to the regime's use of chemical weapons.

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On November 29, 2021, Ambassador Thomas-Greenfield delivered remarks at a UN Security Council Arria-Formula meeting on accountability in the Syrian Arab Republic. Her remarks are excerpted below and available at

https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-a-un-security-council-arria-formula-meeting-on-accountability-in-the-syrian-arab-republic/.

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The United States holds deep admiration and gratitude for the Syrian civil society participants who bravely continue to document atrocities and demand justice for victims. Your work is not easy. I am personally inspired by your tireless efforts to bring attention to the prevailing impunity in Syria for past and continued international crimes, including war crimes and crimes against humanity. Your harrowing testimony should shock all members of this Council and other UN Member States to take action.

Just a few days ago, I walked through Zaatari Refugee Camp in Jordan and I met with Syrian refugees who are working to put the pieces of their lives back together after being devasted by the atrocities committed by the Assad regime. Hearing their hopes and dreams made me hopeful, but also sad. Hearing their fears reaffirmed for me that the situation in Syria is not safe for return at this moment. Hearing their and your stories has made me even more committed to ensuring that they and you receive justice.

In 2012, Hayan Mahmood had just graduated from medical school. He had great promise ahead of him, a life full of saving and preserving the lives of others. But after attending a street protest against the brutal Syrian regime, he was arrested and taken to the notorious Damascus detention center: Branch 251. Only 12 days later, his family was called to collect Hayan's body. He had died in custody. In less than two weeks, the lives of the Mahmood family had changed forever. Years later, his brother was called upon to testify in a courtroom in Germany against a regime official. But he and others were seriously, and rightfully, concerned about the safety of his family who remained inside Syria, as the regime sought to intimidate potential witnesses.

The search for accountability in Syria has been lengthy, it has been challenging, and fraught with risk for those speaking out. Those who have sought to share the stories of the Assad regime's crimes and human rights violations have faced retribution from the long arms of the regime's security apparatus.

In the end, after some of the family was able to safely exit, Hayan's siblings testified in a German court. But their story is a rare exception. While the Mahmood family finally received a measure of justice, accountability has proved far too elusive for most of the hundreds of thousands killed, the many wounded, and the millions who have been uprooted from their homes since the Syrian uprising. Families should not have to pay bribes to retrieve information about their loved ones. They should not have to wait for years to obtain the remains of their family members, or learn where they had been buried. They should not have to beg for death certificates.

We must support the ongoing efforts by national authorities to investigate and prosecute, within their jurisdiction, crimes committed in Syria. And while the road ahead remains long, we are encouraged by the progress made in this area, notably in Germany, where regime officials have been convicted for crimes against humanity. Accountability, justice, and respect for human rights are imperative for securing a stable, just, and enduring peace in Syria. The Assad regime's abuses – particularly its campaign of arbitrary detention and torture – affect every Syrian family.

The United States strongly supports the work of the Triple I-M, the Commission of Inquiry, and other organizations and UN mechanisms that work to collect, consolidate, preserve, and analyze evidence of the atrocities the Assad regime, ISIS, and others have perpetrated against the Syrian people. But the international community must do more than just listen to testimonies and read reports. We have an obligation to act. After all, not only is accountability essential to bringing long-overdue justice to the victims and their families, but it is also key to building confidence in the broader political process, as called for in Resolution 2254.

President Biden said in October that "the lesson at the heart of the Nuremberg Trials [was] finding truth, [and] documenting it so it could never be denied." We must do the same for the Syrian people. The Triple I-M and the COI, with the support of states and brave Syrian human rights defenders, have not only found and documented the awful truth of the Assad regime's atrocities, but they have also meaningfully helped ensure criminal justice systems could not deny this truth, through investigations, prosecutions, and convictions in independent national courts. We must maintain our unwavering commitment to them, and to justice for all of the Syrian regime's victims.

c. Ethiopia

See Chapters 6 and 17 for discussion of investigations into accountability for possible war crimes committed in the Tigray region of Ethiopia.

Cross References

Negotiation of a Cybercrime Treaty, **Ch.4.B.1**
HRC on accountability, **Ch. 6.A.5**
HRC on Ethiopia, **Ch. 6.A.6.a**
Children in Armed Conflict, **Ch. 6.C.1**
ICJ, **Ch.7.B**
ILC Draft Articles on Crimes Against Humanity, **Ch. 7.C.2**
Bosnia and Herzegovina, **Ch. 9.B.4**
Aybar-Ulloa *(case involving jurisdiction over drug trafficking on stateless vessels)*, **Ch. 12.A.5.a**
GCTF Good Practices for Interdicting Terrorist Travel, **Ch. 12.A.5.b**
Wildlife trafficking, **Ch. 13.C.4**
Cyber sanctions, **Ch. 16.A.3.d & A.10**
Cuba as State Sponsor of Terrorism, **Ch. 16.A.7.a**
Terrorism sanctions, **Ch. 16.A.9**
E.O. 14034, "Protecting Americans' Sensitive Data from Foreign Adversaries," **Ch. 16.A.10**
Sanctions related to transnational organized crime and global drug trade, **Ch. 16.A.12**
Applicability of international law to conflicts in cyberspace, **Ch. 18.A.5.d**

CHAPTER 4

Treaty Affairs

A. TREATY LAW IN GENERAL

1. U.S. Views on the Guidelines of the Inter-American Juridical Committee on Binding and Non-Binding Agreements

On November 22, 2021, the United States provided views on the "Guidelines of the Inter-American Judicial Committee on Binding and Non-Binding Agreements" ("the Guidelines"). The U.S. submission to the Organization of American States ("OAS") follows and is also available on the website of the OAS at https://www.oas.org/en/sla/iajc/docs/themes_recently_concluded_Binding_and_Non-Binding_Agreements_United_States.pdf.

* * * *

The United States welcomes this opportunity to provide views on the "Guidelines of the Inter-American Juridical Committee on Binding and Non-Binding Agreements" ("the Guidelines"). These views reflect general observations on the Guidelines and the Inter-American Juridical Committee's work on them. They are not intended to address all topics included in the Guidelines and their accompanying commentaries, or to imply agreement or disagreement with the Juridical Committee's treatment of matters not specifically addressed.

As an initial matter, the United States notes two considerations related to the character of the Guidelines and the process by which they were produced.

First, the Guidelines reflect the views of the Members of the Inter-American Juridical Committee, who serve on the Committee in their individual capacities. They have not been adopted by any Member State organs of the Organization of American States and should not be understood as having been endorsed by the OAS or by its Member States. Of particular note in this regard, the Juridical Committee adopted these Guidelines without providing any other OAS entity or Member States an adequate opportunity to review or comment on them. The Juridical Committee did circulate a near-final draft of the Guidelines to OAS Member States for their input in March, 2020, but provided a brief two-month timeframe for providing comments, which coincided with the early stages of the COVID-19 pandemic and did not provide states a meaningful opportunity to review and comment on the Guidelines and their extensive commentary.

These aspects of the process by which the Guidelines were adopted are unfortunate. The Guidelines address matters of great interest to OAS Member States and in which those states engage

in extensive practice. The Juridical Committee's failure to engage other OAS bodies and OAS Member States more meaningfully in review of the Guidelines deprived it of important perspective and insight on the matters addressed in the Guidelines. Similar projects conducted by the UN's International Law Commission are adopted only after extensive opportunity for comment and debate by UN Member States. The United States urges the Juridical Committee to revise its procedures to avoid similar shortcomings in its future work.

Second, and relatedly, the Guidelines reflect only suggestions by the Juridical Committee's members on the matters they address. As the Guidelines themselves note, they "in no way aspire to a legal status of their own. They are not intended to codify international law nor offer a path to its progressive development." To the extent that the Guidelines and their commentaries express views on legal issues, those views reflect only the views of the Committee's members and do not amount to authoritative statements regarding the content or meaning of domestic or international law. The OAS General Assembly did not endorse the Guidelines, but rather merely took note of them and requested the Department of International Law to compile views of Member States (such as these U.S. views) for dissemination with the Guidelines. OAS Member States are in no way bound to follow the Guidelines, nor should the Guidelines be assumed to reflect the actual practice of states with regard to the negotiation and conclusion of written instruments.

These process concerns aside, the United States shares the general view reflected in the Guidelines that clarity in written instruments entered into by states can help prevent misunderstandings regarding the meaning and effect of such instruments and can make such instruments more effective in helping states to advance shared objectives. The United States agrees, in particular, about the importance of states drafting written instruments in a manner that reflects as clearly as possible their intentions regarding the legal character and effect of the instrument. In this regard, the Guidelines' suggestions about drafting approaches that states may take to distinguish between those instruments intended to create legal rights and obligations, and those instruments that are not intended to have such effects, may be particularly useful. By contrast, the utility of the Guidelines' suggestion (in Guideline 3.2) that states should select a specific interpretive philosophy for determining an instrument's legal character is less clear. As the text of an instrument is the most reliable means to establish and identify its legal character, a focus on sound drafting approaches that reflect the parties' shared intentions has far more practical value than encouraging states to dwell on or debate more abstract theoretical concepts.

In other respects, the Guidelines risk creating confusion and undermining these objectives and make recommendations that go well beyond applicable legal requirements and regular state practice with respect to making both international agreements and non-binding instruments. Below are some illustrative examples in this regard.

The Guidelines use the phrase "non-binding agreements" to refer to instruments not intended to give rise to legal rights and obligations. At the same time, the Guidelines, appropriately, observe that the term "agreement" is generally reserved in international practice to refer to instruments that do give rise to legal rights and obligations. Thus, the incorporation of the word "agreement" into the term used to refer to instruments that do not have legal effect unnecessarily gives rise to potential confusion on this important point, thereby undermining a key objective of the Guidelines. It is not the practice of the United States to use the term "political agreement" to refer to instruments that do not give rise to legal rights or obligations, and the United States urges other states similarly to avoid its use.

Guideline 2.3 goes beyond applicable legal requirements and regular state practice in suggesting that states should affirmatively seek to confirm that another state's institution is sufficiently authorized by the state to conclude a treaty before entering into a treaty with that institution. In general, as reflected in Article 46 of the Vienna Convention on the Law of Treaties (VCLT), a State may not invoke the fact that its consent to be bound by a treaty has been expressed

in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. While states must conduct themselves in accordance with normal practice and good faith in such matters, international law does not create an affirmative requirement to confirm a state institution's competence to enter into an agreement in every case, and a state's failure to do so would not be presumed to invalidate the agreement. On a related point, we note the statement in the Commentary to Guideline 5.4 that "[a] number of Member States … believe that the failure to comport with domestic procedures may also preclude giving inter-institutional agreements international legal effects." In general and subject to the considerations noted above, the United States regards such views as legally incorrect. As noted above, except in extraordinary circumstances described in Article 46 of the VCLT, a state's failure to comport with its domestic procedures for concluding agreements does not affect the legal validity and effectiveness of the agreement. And the relevant legal framework in this regard is not different for inter-institutional agreements than for government-to-government agreements.

Similarly, there is no requirement in international law that states specify explicitly in the text of each instrument what its legal character is, as is proposed in Guideline 3.3. While such statements can be helpful on occasion, they will often be unnecessary as other elements of the instrument's drafting will be sufficient to reflect the states' intentions with regard to its legal character. The absence of such a specific statement does not give rise to any inference with regard to the legal character of the instrument, and the inclusion of such a statement is not a condition to the instrument having a particular legal character.

Finally, consistent with the commentary to Guideline 5.4.1, an inter-institutional treaty creates international legal obligations for the state as a whole unless otherwise agreed by the parties. Furthermore, the scope of responsibility for breaching a contract concluded between state institutions, including national ministries or sub-national territorial units, of two or more states, will generally be as specified in the contract or as otherwise provided in the law governing the contract. Nevertheless, we appreciate the sensible, practical advice provided in the Guidelines about ensuring that the views of the parties are aligned.

The United States urges OAS Member States and other readers of the Guidelines to bear these considerations in mind as they consider the views of the Members of the Inter-American Juridical Committee reflected in the Guidelines.

* * * *

2. Publication, Coordination, and Reporting of International Agreements

On April 27, 2021, the Department of State published a final rule regarding the publication, coordination, and reporting of international agreements. 86 Fed. Reg. 22,118 (Apr. 27, 2021). Excerpts follow from the Federal Register notice.

* * * *

The Treaties and Other International Acts Series (TIAS) is the official treaty series of the United States and serves as evidence of the treaties, and international agreements other than treaties, in all courts of law and equity of the United States, and in public offices of the federal government and of the states, without any need of further authentication. Certain international agreements may be exempted from publication in TIAS, if the Department of State (the Department)

provides notice in its regulations. This rule updates those regulations to clarify the scope of an existing exemption.

DATES: This rule is effective May 27, 2021.

* * * *

Background

Pursuant to 1 U.S.C. 112a, the Secretary of State is required to cause to be published annually a compilation of all treaties and international agreements to which the United States is a party that were signed, proclaimed, or "with reference to which any other final formality ha[d] been executed" during the calendar year. The Secretary of State, however, may determine that publication of particular categories of agreements is not required if certain criteria are met (See 1 U.S.C. 112a(b)).

As explained in the NPRM, the Department is amending 22 CFR 181.8(a)(9) to read "Agreements that have been given a national security classification pursuant to Executive Order No. 13526, its predecessors or successors, or are otherwise exempt from public disclosure pursuant to U.S. law."

The scope of this new exemption includes agreements that have not been given a national security classification pursuant to Executive Order No. 13526, its predecessors or successors, but nonetheless are exempt from public disclosure pursuant to U.S. law. The principal category of agreements for which this clarification is relevant are agreements that are exempt from public disclosure pursuant to 10 U.S.C. 130c, which authorizes specified national security officials to withhold from public disclosure otherwise required by law sensitive information of foreign governments and international organizations.

* * * *

3. The UN Treaty System

On October 15, 2021, Deputy Legal Adviser Julian Simcock of the U.S. Mission to the UN, addressed a meeting of the Sixth Committee on "Agenda Item 88: Strengthening the International Treaty Framework." Mr. Simcock's remarks are excerpted below and available at https://usun.usmission.gov/remarks-in-a-meeting-of-the-sixth-committee-on-agenda-item-88-strengthening-the-international-treaty-framework/.

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* * * *

We welcome the chance to continue the Committee's discussion of the international treaty framework. In connection with this topic, since 2018, the Committee has been reviewing the Secretariat's treaty registration and publication regulations. That year it adopted a consensus set of revisions to the regulations. During last year's session, the Committee gave additional consideration to a limited set of further proposals for revisions to the regulations, but deferred further consideration until this year's session.

In general, we think the UN's treaty registration and publication program should strive for transparency and accessibility of treaty information, and ease of use. We commend the Secretariat for the efforts it has made in pursuit of these goals.

In light of the substantial revisions made to the registration and publication regulations in 2018, we think the scope for any further changes to the regulations in the near term should be limited. In general, frequent changes to the regulations complicate the ability of states to use and rely on them.

We welcome the continuation of the Committee's discussion of possible limited additional changes to the regulations beyond those made in 2018. However, in the interests of stability and predictability in the registration and publication regime, we do not believe the Committee should take up revision of the regulations as a routine matter. Particularly in light of the substantial work the Committee has already done on this matter in recent years, including its discussions during last year's session, we would encourage the Committee to conclude its current consideration of further revisions to the regulations during this session.

* * * *

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

1. Negotiation of UN Cybercrime Treaty

As discussed in Chapter 3, the United States has expressed support for the negotiation of a treaty relating to cybercrime under the auspices of the United Nations. On November 12, 2021, the Department of State announced an initial public meeting on November 17, 2021 to prepare for the first session of the Open-Ended Ad Hoc Intergovernmental Committee of Experts ("AHC") to elaborate a comprehensive international convention on "countering the use of information and communications technologies for criminal purposes," in accordance with UN General Assembly Resolution 74/247, G.A. Res. 74/247 (Jan. 20, 2020), available at https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/Res/74/247&Lang=E. 86 Fed. Reg. 62,860 (Nov. 12, 2021). The first session of the AHC was scheduled for January 2022.[*]

2. Afghanistan

See Chapter 2 for discussion of agreements and arrangements entered into by the United States to facilitate relocation of individuals at risk as a result of the situation in Afghanistan and for discussion of the protecting power arrangement the United States reached with Qatar for Afghanistan.

[*] Editor's note: The General Assembly decided, in light of the impact of the coronavirus disease, to postpone the first session of the Ad Hoc Committee, scheduled to be held in New York from 17 to 28 January 2022.

3. World Health Organization

As discussed in *Digest 2020* at 163, the United States provided notice of its withdrawal from the World Health Organization. On January 20, 2021, the United States retracted its notice of withdrawal and stated that it "intends to remain a member of the World Health Organization." The depositary notification is available at https://treaties.un.org/doc/Publication/CN/2021/CN.11.2021-Eng.pdf.

Cross References

Baan Rao Thai Restaurant *(case asserting right to judicial review under treaty)*, **Ch. 1.B.1.b**
Termination of Asylum Cooperation Agreements, **Ch. 1.C.8**
Hague Adoption Convention entry into force for Niger, **Ch. 2.B.1.c**
Aguasvivas *case regarding documentary requirements under extradition treaty*, **Ch. 3.A**
UN Cybercrime Treaty, **Ch.3.B.6.c**
Relocation and evacuation arrangements regarding Afghanistan, **Ch. 2.A.2**
Protecting power arrangement regarding Afghanistan, **Ch. 2.A.2**
Negotiations relating to Compacts of Free Association, **Ch. 5.D**
UN 3C general statement on reservations to treaties, **Ch.6.A.4.a**
HRC on Afghanistan, **Ch. 6.A.6.b**
Negotiations for an Instrument on Business and Human Rights, **Ch. 6.H.2**
ILC work on provisional application of treaties, **Ch. 7.C.1**
Negotiations with Canada concerning the Transit Pipelines Treaty, **Ch. 8.C**
Suspending operations at Embassy Kabul, **Ch. 9.A.8**
Air Transport Agreements, **Ch. 11.A.1**
Suspension of the discretionary application of the U.S-Belarus ATA, **Ch. 11.A.2**
Maritime Law Enforcement Agreement with Seychelles, **Ch. 12.A.5.c**
Maritime law enforcement addendum for Venezuela, **Ch. 12.A.5.d**
Rejoining the Paris Agreement, **Ch. 13.A.1.a**
The International Solar Alliance, **Ch. 13.A.1.f(4)**
Transmittal to the Senate of the Kigali Amendment, **Ch. 13.A.1.3**
Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, **Ch. 13.B.2**
International instrument to combat ocean plastic pollution, **Ch. 13.B.7**
International instrument on pandemic prevention, preparedness, and response, **Ch. 13.C.1.a**
Colombia River Treaty negotiations, **Ch. 13.C.5**
Cultural property agreements, **Ch. 14.A**
Afghanistan, **Ch. 17.B.1**
Defense agreements and arrangements, **Ch. 18.A.4**
Nuclear arrangements and agreements, **Ch. 19.B.2**
Extension of New START, **Ch. 19.C.2**

CHAPTER 5

Foreign Relations

A. LITIGATION INVOLVING FOREIGN RELATIONS, NATIONAL SECURITY, AND FOREIGN POLICY ISSUES

1. *Crystallex v. Venezuela*

As discussed in *Digest 2020* at 165-70, the United States filed a statement of interest in *Crystallex Int'l Corp. v. Venezuela*, No. 17-mc-00151 (D. De.). Crystallex sought to enforce a judgment against Venezuela through the sale of assets of a state-owned entity (Petróleos de Venezuela, S.A., "PDVSA") that the court had determined to be an alter ego of Venezuela in 2018. The district court issued its opinion on January 14, 2021, which is excerpted below.

* * * *

5. Interests of the United States

In deciding to deny the Republic's motion, the Court has carefully considered the statement of interest and arguments made by the United States (as the Court has also done in connection with the sales procedures, as discussed below). The U.S. government, like Venezuela, takes the position that "fundamental premises underlying the alter ego ruling no longer hold," which the U.S. says could justify granting the Republic's motion, although it "express[es] no firm legal position on whether [the changed] circumstances require Rule 60(b) relief." (D.I. 212 at 8; *see also* D.I. 220 at 1) For the reasons already explained above, the Court has determined that the changed circumstances post-dating the August 2018 alter ego finding do not justify the relief sought by Venezuela.

Understandably, the government (like the parties) has devoted much attention to the sanctions regime, which is implemented by the United States Department of Treasury's Office of Foreign Assets Control ("OFAC"). In the Court's view, the 2019 changes to the OFAC sanctions do not amount to exceptional circumstances warranting Rule 60(b) relief. The sanctions are established by Executive Orders and through regulations imposing licensing requirements for certain transactions with the Republic. …The Court previously held that Executive Order 13,835, which governed the sanctions regime in August 2018, "does not pose a bar to granting relief." *Crystallex Writ Op.* at 421. Likewise now, the modified sanctions regime does not require a

retroactive change in the order granting the writ. While the current sanctions regime does appear to block issuance of new writs of attachment on Venezuelan assets in the United States without an OFAC license—as Crystallex and the Republic agree (*see*, *e.g.*, July Tr. at 41; D.I. 203 at 9) – neither the Executive Orders nor the regulations require invalidating preexisting judicial orders.
…

The OFAC licensing process is important for another reason: it provides a mechanism by which the interests the government has expressed to the Court can be taken into account by the Executive Branch itself. All involved in this litigation, including Crystallex, recognize that (under current law and policy) a specific license will be required from OFAC before a sale of PDVSA's shares of PDVH can close. The Court understands that the process by which OFAC reviews an application for such a license includes consideration of the foreign policy and national security interests the government has asked the Court to consider in this litigation. *See Crystallex App. Op.* at 151 ("[I]t is ... conceivable that short- or long-term U.S. foreign policy interests may be affected by attachment and execution of PDVSA's assets. The Treasury sanctions provide an explicit mechanism to account for these.").

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2. *In re Evison*

As discussed in *Digest 2020* at 170-73, the United States filed a statement of interest regarding U.S. foreign policy interests in *In re Evison*, No. 20-mc-00246, a case in federal district court in the Southern District of New York. On January 19, 2021, the court dismissed the case based on a stipulation of the parties.

3. *Fuld* and other cases under the Promoting Security and Justice for Victims of Terrorism Act

On July 23, 2021, the United States filed a brief in *Fuld v. Palestinian Liberation Organization ("PLO")*, No. 20-cv-03374, in federal district court in the Southern District of New York, defending the constitutionality of the jurisdictional provisions of the Antiterrorism Clarification Act, as amended in 2019 by the Promoting Security and Justice for Victims of Terrorism Act, Further Consolidated Appropriations Act, 2020, Division J, title IX, sec. 903, Pub. L. 116-94, 133 Stat. 2534 ("PSJVTA"), codified at 18 U.S.C. § 2334(e). These provisions deem consent to personal jurisdiction over the Palestinian Authority ("PA") and PLO, on the basis of certain activities. The *Fuld* case involves allegations that the PA and PLO are liable for the death of an American citizen in a 2018 stabbing attack in the West Bank.

Similar issues as to the applicability and constitutionality of the amended jurisdictional provisions are raised in the *Sokolow*, *Klieman*, and *Shatsky* cases involving U.S. victims of Palestinian terrorism during the Second Intifadah. The U.S. government has filed previously in the *Sokolow* and *Klieman* cases. See *Digest 2015* at 144-45 and *Digest 2018* at 139-43 (*Sokolow*); *Digest 2019* at 137-44 (*Klieman*). The Anti-Terrorism Clarification Act of 2018, Pub. L. 115-253, 132 Stat. 3183 ("ATCA") deems consent to personal jurisdiction in U.S. courts in terrorism cases if the PA/PLO either benefited from

a statutory waiver of certain restrictions on the PLO Office, or accepted certain foreign assistance from the United States. The PSJVTA removed the provision based on accepting U.S. foreign assistance, but added a new jurisdictional predicate that depends on PA prisoner payments and a new predicate based on PA/PLO activities in the United States. The constitutionality of these provisions regarding jurisdiction is at issue in *Fuld*. The U.S. brief in support of their constitutionality is excerpted below.[*] The United States filed substantively identical briefs defending the constitutionality of these jurisdictional provisions in *Sokolow v. PLO*, No.-cv-00397 (S.D.N.Y), on September 7, 2021, and *Shatsky v. PLO*, No. 18-cv-12355 (S.D.N.Y.), on October 25, 2021 (which are not excerpted herein).

* * * *

In the PSJVTA, Congress has specified activities that constitute deemed consent to personal jurisdiction in a civil action under the ATA. That is consistent with the constitutional requirements of due process under the Fifth Amendment.

A. The PSJVTA Establishes Personal Jurisdiction Based on Defendants' Knowing and Voluntary Consent

1. The PSJVTA Validly Provides for the PA and PLO to Consent to Jurisdiction

The Second Circuit has held that the PA and PLO, as non-sovereign entities, are entitled to due process rights, *Waldman*, 835 F.3d at 329, and the requirement that a court have personal jurisdiction over a defendant flows from those rights, *Bauxites*, 456 U.S. at 702–03. But "the requirement of personal jurisdiction . . . can . . . be waived." *Id.* at 703. More specifically, a defendant may consent to a court's exercise of personal jurisdiction through a "variety of legal arrangements." *Id.* at 703; *accord Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 625 (2d Cir. 2016) ("a party may simply consent to a court's exercise of personal jurisdiction . . . notwithstanding the remoteness from the state of its operations and organization"). As long as a defendant's consent is "knowing and voluntary," the court's exercise of jurisdiction is permissible and consistent with due process, *Wellness Int'l Network v. Sharif*, 135 S. Ct. 1932, 1948 (2015)—personal jurisdiction based on such consent "does not offend due process" as long as the consent was not "unreasonable and unjust," *Burger King*, 471 U.S. at 472 n.14 (quotation marks omitted); *accord Dorchester Financial Securities, Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 85 (2d Cir. 2013).

Consistent with those principles, the PSJVTA sets out a reasonable "legal arrangement[]" through which Congress specified a defendant consents to personal jurisdiction, *Bauxites*, 456 U.S. at 703, and gives potential defendants "fair warning that a particular activity may subject [them] to the jurisdiction" of U.S. courts, *Burger King*, 471 U.S. at 472 (quotation marks omitted). The statute expressly states what actions will cause a defendant to be "deemed to have consented" to personal jurisdiction in the courts of the United States, and it specifies that that

[*] Editor's note: On January 6, 2022, the court ruled in *Fuld* that the jurisdictional provisions of the ATCA, as amended in 2019 by the PSJVTA, are unconstitutional and therefore dismissed the case. Subsequently, the courts have ruled in both *Shatsky* (on March 18) and *Sokolow* (on March 10) that the provisions are unconstitutional. The United States has appealed in *Fuld* (on March 8) (as have the plaintiffs, on January 13) and *Shatsky* (on May 20, 2022), as well as *Sokolow* (on May 9, 2022).

consent is limited to civil ATA claims. 18 U.S.C. § 2334(e). The PSJVTA accordingly gives the defendants fair warning about what conduct will subject them to personal jurisdiction with respect to a particular class of claims, and a reasonable period to " 'structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' " *Daimler*, 571 U.S. at 139 (quoting *Burger King*, 471 U.S. at 472). The Act provides a 120-day implementation period before consent will be deemed by making payments to designees or family members of persons imprisoned for or killed while committing an act of terrorism that killed or injured a U.S. national, 18 U.S.C. § 2334(e)(1)(A), and a fifteen-day period before consent will be deemed from non-excepted activities on behalf of the PA or PLO while physically present in the United States, *id.* § 2334(e)(1)(B).

In short, since the PSJVTA's enactment, the PA and PLO have "know[n]" what activities will be deemed consent, and have had the opportunity to "voluntarily" choose whether or not to continue such activities and thereby consent to jurisdiction in the courts of the United States for ATA civil actions. *Wellness Int'l*, 135 S. Ct. at 1948. Asserting personal jurisdiction based on that knowing and voluntary consent is neither unreasonable nor unjust, and is consistent with due process.

2. The PSJVTA, as an Enactment in the Field of Foreign Affairs, Must Be Accorded Deference

Furthermore, the PSJVTA "warrants respectful review by courts" because it was enacted "on a matter of foreign policy." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 (2016). Specifically, Congress enacted, and the President signed into law, the PSJVTA to facilitate providing a meaningful response to international terrorism, and the political branches acted against an extensive backdrop of statutes concerning the PLO and PA.

The ATA's civil-liability provision 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 PA and PLO were not subject to general personal jurisdiction in the United States, the ATA's goals were not being realized. *See* H.R. Rep. No. 115-858, at 6. Congress thus determined that it was necessary to enact the ATCA so the ATA's civil-liability provision could function effectively to "halt, deter, and disrupt international terrorism." *Id.* at 7–8; *see also id.* at 2–3. In amending the ATCA's deemed-consent provisions through the PSJVTA, Congress acted with the same purpose. *See* 166 Cong. Rec. S627 (Jan. 28, 2020) (Sen. Leahy) ("Congress is committed to pursuing justice for American victims of terrorism while ensuring appropriate standards regarding the ability of foreign missions to conduct official business in the United States."); 165 Cong. Rec. S7182 (Dec. 19, 2019) (Sen. Lankford) (bill "strike[s] a balance between Congress's desire to provide a path forward for American victims of terror to have their day in court and the toleration by the Members of this body to allow the PA/PLO to conduct a very narrow scope of activities on U.S. soil"); *id.* (Sen. Grassley) ("these lawsuits disrupt and deter the financial support of terrorist organizations. By cutting terrorists' financial lifelines, the ATA is a key part of the U.S. arsenal in fighting terrorism and protecting American citizens.").

The actions Congress selected in the PSJVTA to "deem[ ]" consent to personal jurisdiction are consistent with this legislative purpose. The PA and PLO are *sui generis* foreign entities that exercise governmental power but have not been recognized as a sovereign government by the Executive Branch, and that have a unique relationship with the United States government premised on the entities' renunciation of terrorism and commitment to peace in the Middle East. Their ability to operate within the United States is dependent on the judgments of

the political branches, which have long imposed restrictions on these entities' U.S. operations based in part on the same concerns that motivated enactment of the ATCA and PSJVTA—namely, concerns about their historical support for acts of terrorism. *See* 22 U.S.C. § 5201 (enacted 1987; determining "that the PLO and its affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States"); *id.* § 5202 (prohibiting PLO from maintaining an office in the United States); Middle East Peace Facilitation Act of 1993, Pub. L. No. 103-125, §3(b)(2), (d)(2), 107 Stat. 1309, 1310 (authorizing temporary waiver of that prohibition if the President certifies that "it is in the national interest of the United States" and "the Palestine Liberation Organization continues to abide by" its Oslo Accords commitments); Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019, Pub. L. No. 116-6, div. F, § 7041(k)(2)(B)(i), 133 Stat. 14, 341 (authorizing temporary waiver of that prohibition if President determines the Palestinians have not obtained United Nations membership status as a state and have not "actively supported an [International Criminal Court] investigation against Israeli nationals for alleged crimes against Palestinians"); *see also* Palestinian Anti-Terrorism Act of 2006, Pub. L. No. 109-446, § 7, 22 U.S.C. § 2378b note (prohibiting the establishment or maintenance in the United States of any office of the PA during any period for which it is effectively controlled by or unduly influenced by Hamas, in the absence of a statutory waiver).

Similarly, in deeming payments to designees and family members of persons imprisoned for or killed while committing acts of terrorism killing or injuring U.S. nationals to constitute consent to personal jurisdiction, Congress furthered critical interests in national security and foreign affairs by acting to discourage support for violence harming U.S. nationals. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 8–10 (2010) (discussing national security interests in deterring support for terrorism); *Center for Constitutional Rights v. CIA*, 765 F.3d 161, 169 (2d Cir. 2014) ("incit[ing] violence against American interests at home and abroad [will cause] damage to the national security"); Taylor Force Act, Pub. L. No. 115-141, § 1002 (Findings), 132 Stat. 348, 1143 (22 U.S.C. § 2378c-1 note) (Mar. 23, 2018).

In this context, it was reasonable and consistent with the Fifth Amendment for Congress and the Executive Branch to determine that the PLO's or PA's voluntarily and knowingly engaging in specified activities in the United States, or making payments by reason of terrorist acts injuring or killing U.S. nationals, should be "deemed" consent to personal jurisdiction in ATA civil cases—the purpose of which is to deter terrorism. *See* H.R. Rep. No. 115-858, at 7 (2018) (committee report in support of ATCA) (explaining that "Congress has repeatedly tied [the PA's and PLO's] continued receipt of these privileges [including presence in the United States] 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. The PA and PLO Have Not Demonstrated Their Deemed Consent to Jurisdiction Is Unconstitutional

The PA/PLO's primary argument against the PSJVTA is that they must receive some benefit in return for their "deemed" consent to be constitutionally valid. (Defs.' Supp. Br. (ECF No. 42) 5–11). But as explained above, consent to personal jurisdiction need only be "knowing and voluntary." *Wellness Int'l*, 135 S. Ct. at 1948; *see Roell v. Withrow*, 538 U.S. 580, 590 (2003). Nothing in that phrase, or the case law concerning consent to jurisdiction, suggests a reciprocity requirement. To the contrary, as the Supreme Court has put it, "the key inquiry is whether 'the litigant or counsel was made aware of the need for consent and the right to refuse it,

and still voluntarily' " proceeded. *Wellness Int'l*, 135 S. Ct. at 1948 (quoting *Roell*, 538 U.S. at 590). Although the Court has not specifically addressed defendants' argument regarding the need for reciprocity in consent cases, it has upheld the assertion of personal jurisdiction based on a defendant's actions, in a situation in which the defendant receives nothing in return. In *Bauxites*, the Court held that under Federal Rule of Civil Procedure 37(b)(2)(A), a district court could deem personal jurisdiction to have been established as a sanction for the defendant's failure to comply with a discovery order directed at establishing jurisdictional facts. 456 U.S. at 703–06. The Court explained that such an action "amount[s] to a legal submission to the jurisdiction of the court, whether voluntary or not." *Id.* at 704–05. The Court likewise observed that a defendant's failure to timely object to personal jurisdiction would have the same effect of waiving the requirement, *id.*, even though the defendant would not receive anything in return.

And in other contexts the Supreme Court has held that a decision to waive a right is "knowing" if it was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it," and is "voluntary" if it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (waiver of *Miranda* rights); *accord United States v. Taylor*, 745 F.3d 15, 23 (2d Cir. 2014) (same); *United States v. Velez*, 354 F.3d 190, 196 (2d Cir.2004) (applying same definition to waiver of inadmissibility of statements made during plea discussions); *United States v. O'Brien*, 926 F.3d 57, 76 (2d Cir.2019) …Such a waiver can be effected even in the absence of "promises" made to obtain it, or any other consideration or exchange. *Oregon v. Elstad*, 470 U.S. 298,302(1985).

Thus, consent can be knowing and voluntary even where the person consenting receives no benefit in return. To be sure, the waiver of personal jurisdiction may be part of an exchange; such an exchange may occur when a state or the United States conditions a benefit or service on a person's agreement, express or implied, to consent to service or personal jurisdiction in a forum. *See Brown*, 814 F.3d at 632-33.[7] In addition, an exchange may be evidence that the person waiving a right did so voluntarily. But there is no requirement, in the Due Process Clause or elsewhere, of any such reciprocity before a person's waiver of personal jurisdiction can be considered knowing and voluntary.

The PA and PLO read too much into the Second Circuit's decisions in *Brown* and *Chen v. Dunkin' Brands, Inc.*, 954 F.3d 452 (2dCir. 2020), in support of their contention that consent requires more than a knowing and voluntary decision. Both cases concerned whether an out-of-state defendant had consented to general personal jurisdiction in the state by registering to do business in the state and, in accordance with the registration statute, appointing an in-state agent to accept service. *Brown*, 814 F.3d at 622; *Chen*, 954 F.3d at 496. In both cases, the court declined to opine on the due process limits of consent to personal jurisdiction achieved by satisfying statutory conditions—instead, influenced by the Supreme Court's narrowing of general jurisdiction in *Daimler*, it construed the state statutes as not "embodying actual

[7] In its brief in *Klieman*, the government described just such a condition: the Executive and Legislative Branches "historical practice" of "impos[ing] conditions" on the PA/PLO's right to operate in the United States and to receive foreign assistance. Br. for U.S. as Amicus Curiae, No. 15-7034 (D.C.Cir.), at 12–13. The PA/PLO misconstrues that description as endorsing the proposition that "'deemed' consent to jurisdiction cannot be squared with Due Process unless there is reciprocity." (Defs.'Supp. Br. 1, 10). But to say, as the government did in *Klieman*, that it is reasonable to deem an exchange of benefits for conditions as valid consent to personal jurisdiction is far different from saying that an exchange is necessary to consent.

consent...to the state's exercise of general jurisdiction." *Brown*, 814 F.3d at626, 636–37; *accord Chen*, 954 F.3d at 499. But the interpretation the Second Circuit rejected (one that it said would "rob" *Daimler* of meaning" by a back-door thief") was the "expansive" view that the court should "infer from an ambiguous statute" that registration and appointment of an agent alone constitute consent to general jurisdiction—that is,"the power to adjudicate any matter concerning any registered corporation, no matter where the matter arose and no matter how limited the state's interest in the dispute." *Brown*, 814 F.3d at 622, 640.

That is far afield from the PSJVTA, which expressly provides that certain actions will be deemed consent to jurisdiction in a limited class of cases. The Second Circuit recognized that "a carefully drawn ...statute that expressly required consent to general jurisdiction...might well be constitutional." *Brown*, 814 F.3d at 641.Rather than requiring courts to "infer" consent based on a "slender inference ...pulled from routine bureaucratic measures that were largely designed for another purpose entirely," *id* .at 639, the PSJVTA expressly states that a defendant is deemed to have consented to personal jurisdiction in U.S. courts if it engages in specifically enumerated activities in the United States or with a nexus to foreign policy interests.[11] The PSJVTA thus puts defendants on notice that their choice to continue those activities will be the "voluntary act" that manifests consent to jurisdiction, even if no quid pro quo is given. *Cf. Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93,95–96 (1917) (defendant's appointment of agent for service of process constitutionally subjected defendant to suit in state for cases growing out of defendant's activities because the governing statute" ha[d]been held to go to that length" and the execution of the document" was the defendant's voluntary act").

Moreover, in contrast to the general jurisdiction statutes at issue in *Brown* and *Chen*, the PSJVTA grants jurisdiction only over specified civil actions under a single federal statute: the ATA. Civil actions under the ATA have a nexus to concerns with combating terrorism, concerns that have also historically been the basis for statutory restrictions on PLO and PA activities in the United States. That nexus distinguishes the PSJVTA from defendants' hypothetical statute, under which "any activity anywhere in the world" would be deemed consent (Defs. Supp. Br.15 (emphasis omitted)): the activities specified in the PSJVTA are linked to the ATA claims the PSJVTA seeks to support, and to Congress's and the Executive Branch's foreign-affairs and national-security concerns that have long motivated statutory restrictions on the activities of the PA/PLO, warranting this Court's deference. *See Humanitarian Law Project*, 561 U.S. at 35–36 (discussing deference owed to political branches when "sensitive interests in national security and foreign affairs[are] at stake"). The PSJVTA is thus substantially narrower than state consent-by-registration statutes, and poses less risk of unfair surprise. *Brown* and *Chen* therefore do not support the PA and PLO's position that there must be more than "knowing and voluntary" consent in this context.

B. The PSJVTA Does Not Impose an Unconstitutional Condition

Although they do not squarely advance the argument in this case, the PA and PLO have previously argued that the PSJVTA's "deemed consent" provision imposes an unconstitutional condition. (Defs.'Supp. Br. 14 n.3).The unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up" by "deny[ing] a benefit to a person because he exercises a constitutional right." *Koontz*

[11] The express provisions of the PSJVTA also distinguish this case from *Waldman*, where the Second Circuit held that, prior to the ATCA or PSJVTA, consent to personal jurisdiction could not be inferred from the PA/PLO's appointment of an agent to accept process. 835 F.3d at 343.

v. St. Johns River Water Management Dist., 570 U.S. 595, 604 (2013) (quotation marks omitted); *see Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The PA and PLO have previously contended that they will be forced to give up due process rights unless they stop carrying out Palestinian laws regarding the payments at issue, or curtail their activities in the United States.

Neither the Supreme Court nor the Second Circuit 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. This Court should not be the first to do so, where defendants mention the unconstitutional conditions doctrine only in a footnote. Moreover, the doctrine only "prevents the Government from using conditions 'to produce a result which it could not command directly,' " *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1377 n.4 (2018) (quoting *Sindermann*, 408 U.S. at 597)—and as explained above, the PSJVTA is permissible on its own terms.

However, assuming that some form of unconstitutional conditions doctrine applies in this context, it is satisfied here. As explained above, consent to personal jurisdiction, even as a condition on some other benefit, "does not offend due process" unless it is "unreasonable and unjust." *Burger King*, 471 U.S. at 472 n.14 (quotation marks omitted). Defendants' suggestion that the government cannot condition any benefit on the surrender of objections to personal jurisdiction sweeps far too broadly and contradicts judicial decisions upholding such arrangements under certain circumstances. *E.g.*, *Bane v. Netlink, Inc.*, 925 F.2d 637, 641 (3d Cir. 1990) (upholding express statutory requirement of consent to general personal jurisdiction); *see also Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755, 770 n.1 (Fed. Cir. 2016) (O'Malley, J., concurring) ("the Supreme Court has upheld the validity of consent-by-registration statutes numerous times since the development of the unconstitutional conditions doctrine").

Burger King's reasonableness test for a statutory condition requiring that a person consent to personal jurisdiction appropriately balances the legitimate interests of the government against the due process rights of a defendant, and is consistent with the Supreme Court's application of the unconstitutional conditions doctrine in other contexts. In *Koontz v. St. Johns River Water Management District*, the Supreme Court recognized that a government may "offset" the "costs on the public" by conditioning a permit approval on an exaction of property without violating the Takings Clause. 570 U.S. at 605–06. To "accommodate" those types of regulations, the Court will uphold a condition "so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Id.*

The PSJVTA satisfies that test. The consent the PSJVTA requires is narrow—limited to *sui generis* foreign entities, applicable only to ATA claims, and in furtherance of U.S. foreign policy. That limited demand must be seen in light of the federal government's constitutional responsibilities for, and broad authority, over, international relations and the protection of U.S. nationals abroad—government interests reasonably linked to the deemed-consent provisions of the PSJVTA. Congress and the Executive Branch have each long placed limitations on the PLO's operations in the United States, taking into account concerns shared by both branches regarding the PLO's historical support for terrorism. *See, e.g.*, 22 U.S.C. §§ 5201(b), 5202 (reflecting Congress's determination prior to the Oslo Accords that the PLO is "a terrorist organization and a threat to the interests of the United States, its allies, and to international law"). To the extent the PLO is permitted to operate in the United States, it is reasonable and

proportional for the United States to condition the PLO's ability to do so on its consent to personal jurisdiction in civil actions under the ATA.

Similarly, the payments that are deemed consent under § 2334(e)(1)(A) bear a reasonable relationship to the waiver of personal jurisdiction. The payments at issue are those that occur after April 18, 2020, and are made to the designee (or family member) of a person who killed or injured a U.S. national, thus implicating the duty of the Executive and Legislative Branches to protect Americans abroad. *See Haig v. Agee*, 453 U.S. 280, 299 (1981); *United States v. Wong Kim Ark*, 169 U.S. 649, 692 (1898); *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (Nelson, Circuit Justice). And the nexus to opening the courts to vindicate the claims of terrorism victims is obvious and reasonable: Congress has found that such payments by the PA/PLO incentivize the very type of terrorism Congress sought to combat in creating a civil action under the ATA. *See* Taylor Force Act, Pub. L. No. 115-141, § 1002(1) (Findings) (22 U.S.C. § 2378c-1 note). Nothing about haling the PA and PLO into U.S. courts to answer civil suits for any alleged role they played in specific acts of terrorism is "unreasonable" or "unjust," and the PSJVTA therefore does not violate due process.

* * * *

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). *Sosa* established a two-step framework for determining whether to recognize a common-law cause of action under the ATS: (1) whether the alleged violation is of a specific, universal, and obligatory international law norm; and (2) whether the political branches should grant specific authority before imposing liability. 542 U.S. at 732-33. In *Kiobel* v. *Royal Dutch Petroleum Co*., 569 U.S. 108 (2013), the Supreme Court determined that the presumption against extraterritoriality applies to the ATS such that, "even where the claims touch and concern the territory of the United States, they must do so with sufficient force" to state a domestic claim. See *Digest 2013* at 111-17. In *Jesner v. Arab Bank*, 584 U.S. __, 138 S. Ct. 1386 (2018), the Supreme Court held that foreign corporations are not subject to ATS liability.

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. *Nestlé/Cargill*

As discussed in *Digest 2020* at 174-84, the 2020 U.S. brief in the consolidated cases of *Nestlé*, No. 19-416, and *Cargill*, No. 19-453, supported petitioners, Nestlé and Cargill. On June 17, 2021, the Supreme Court reversed and remanded for further proceedings, finding that generic allegations of corporate activity in the United States (such as corporate decisionmaking) are not sufficient to support domestic application of the ATS where nearly all conduct relevant to the claim occurred overseas. *Nestlé USA, Inc. v. Doe*, 593 U.S. ___, 141 S. Ct. 1931 (2021). A majority of the court joined in Parts I and II of the opinion, authored by Justice Thomas, and concurred with the judgment set forth therein. Separate opinions were written by Justices Gorsuch (concurring) and Justice Sotomayor (concurring in part, dissenting in part) joined by other justices, and by Justice Alito (dissenting). Excerpts follow from the majority opinion.

* * * *

According to the operative complaint, Ivory Coast—a West-African country also known as Côte d'Ivoire—is responsible for the majority of the global cocoa supply. Respondents are six individuals from Mali who allege that they were trafficked into Ivory Coast as child slaves to produce cocoa.

Petitioners Nestlé USA and Cargill are U. S.-based companies that purchase, process, and sell cocoa. They did not own or operate farms in Ivory Coast. But they did buy cocoa from farms located there. They also provided those farms with technical and financial resources—such as training, fertilizer, tools, and cash—in exchange for the exclusive right to purchase cocoa. Respondents allege that they were enslaved on some of those farms.

Respondents sued Nestlé, Cargill, and other entities, contending that this arrangement aided and abetted child slavery. Respondents argue that petitioners "knew or should have known" that the farms were exploiting enslaved children yet continued to provide those farms with resources. App. 319. They further contend that petitioners had economic leverage over the farms but failed to exercise it to eliminate child slavery. And although the resource distribution and respondents' injuries occurred outside the United States, respondents contend that they can sue in federal court because petitioners allegedly made all major operational decisions from within the United States.

The District Court dismissed this suit after we held that the ATS does not apply extraterritorially. *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108 (2013). It reasoned that respondents sought to apply the ATS extraterritorially because the only domestic conduct alleged was general corporate activity. While this suit was on appeal, we held that courts cannot create new causes of action against foreign corporations under the ATS. *Jesner* v. *Arab Bank, PLC*, 584 U. S. ___ (2018). The Ninth Circuit then reversed the District Court in part. Although the Ninth Circuit determined that *Jesner* compelled dismissal of all foreign corporate defendants, it concluded that the opinion did not foreclose judicial creation of causes of action against domestic

corporations. The Ninth Circuit also held that respondents had pleaded a domestic application of the ATS, as required by *Kiobel*, because the "financing decisions . . . originated" in the United States. *Doe* v. *Nestlé, S. A.*, 906 F. 3d 1120, 1124–1126 (2018); see also 929 F. 3d 623 (2019). We granted certiorari, 591 U. S. ___ (2020), and now reverse.

II

Petitioners and the United States argue that respondents improperly seek extraterritorial application of the ATS. We agree.

Our precedents "reflect a two-step framework for analyzing extraterritoriality issues." *RJR Nabisco, Inc.* v. *European Community*, 579 U. S. 325, 337 (2016). First, we presume that a statute applies only domestically, and we ask "whether the statute gives a clear, affirmative indication" that rebuts this presumption. *Ibid.* For the ATS, *Kiobel* answered that question in the negative. 569 U. S., at 124. Although we have interpreted its purely jurisdictional text to implicitly enable courts to create causes of action, the ATS does not expressly "regulate conduct" at all, much less "evince a 'clear indication of extraterritoriality.'" *Id.*, at 115–118. Courts thus cannot give "extraterritorial reach" to any cause of action judicially created under the ATS. *Id.*, at 117–118. Second, where the statute, as here, does not apply extraterritorially, plaintiffs must establish that "the conduct relevant to the statute's focus occurred in the United States." *RJR Nabisco*, 579 U. S., at 337. "[T]hen the case involves a permissible domestic application even if other conduct occurred abroad." *Ibid.*

The parties dispute what conduct is relevant to the "focus" of the ATS. Respondents seek a judicially created cause of action to sue petitioners for aiding and abetting forced labor overseas. Arguing that aiding and abetting is not even a tort, but merely secondary liability for a tort, petitioners and the United States contend that "the conduct relevant to the [ATS's] focus" is the conduct that directly caused the injury. See *id.*, at 346 (a plaintiff who "does not overcome the presumption against extraterritoriality . . . therefore must allege and prove a *domestic* injury"). All of *that* alleged conduct occurred overseas in this suit. The United States also argues that the "focus" inquiry is beside the point; courts should not create an aiding-and-abetting cause of action under the ATS at all. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 182–183 (1994) ("[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant . . . , there is no general presumption that the plaintiff may also sue aiders and abettors" because that would create a "vast expansion of federal law"). For their part, respondents argue that aiding and abetting is a freestanding tort and that courts may create a private right of action to enforce it under the ATS. They also contend that the "focus" of the ATS is conduct that violates international law, that aiding and abetting forced labor is a violation of international law, and that domestic conduct can aid and abet an injury that occurs overseas.

Even if we resolved all these disputes in respondents' favor, their complaint would impermissibly seek extraterritorial application of the ATS. Nearly all the conduct that they say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast. The Ninth Circuit nonetheless let this suit proceed because respondents pleaded as a general matter that "every major operational decision by both companies is made in or approved in the U. S." App. 314. But allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS.

As we made clear in *Kiobel*, a plaintiff does not plead facts sufficient to support domestic application of the ATS simply by alleging "mere corporate presence" of a defendant. 569 U.S., at 125. Pleading general corporate activity is no better. Because making "operational decisions" is

an activity common to most corporations, generic allegations of this sort do not draw a sufficient connection between the cause of action respondents seek—aiding and abetting forced labor overseas—and domestic conduct. "[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 266 (2010). To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity. The Ninth Circuit erred when it held otherwise.

* * * *

C. ACT OF STATE AND POLITICAL QUESTION DOCTRINES, COMITY, AND *FORUM NON CONVENIENS*

1. Taiwan: Political Question

On August 30, 2021, the United States filed its brief in support of summary affirmance of the district court's dismissal in *Tseng v. Biden*, No. 21-5163 (D.C. Cir.). Plaintiffs, like those in *Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009), which is discussed in *Digest 2009* at 300-03, are residents of Taiwan asserting they should be treated as U.S. nationals. The district court dismissed, holding that claims regarding sovereignty over Taiwan presented a nonjusticiable political question. Plaintiffs appealed. The U.S. brief in support of summary affirmance is excepted below. On November 10, 2021, the U.S. Court of Appeals for the D.C. Circuit granted the U.S. motion for summary affirmance in a brief order (without opinion), noting that the complaint presented non-justiciable political questions and referencing *Lin v. United States*.

_____

* * * *

I. The district court correctly dismissed because the amended complaint and other submissions from plaintiffs presented a nonjusticiable political question

Dismissal of Plaintiffs' claims without leave for further amendment was proper because the district court lacked subject matter jurisdiction. This Court has previously held that identifying Taiwan's sovereign is a non-justiciable political question. *See Lin v. United States*, 561 F.3d 502, 506 (D.C. Cir. 2009). Thus, any claim requiring the district court to decide that sovereignty issue lies outside of a federal court's jurisdiction. *See Lin*, 561 F.3d at 506 (declining to exercise jurisdiction over claims when "[i]dentifying Taiwan's sovereign is an antecedent question"); *see also Jones v. United States*, 137 U.S. 202, 212 (1890). *Lin* is dispositive here.

For a federal court to have subject matter jurisdiction, the action must present a case or controversy pursuant to Article III, § 2, of the United State Constitution and there must be a statutory basis for the jurisdiction. *See Ins. Corp. of Ireland, LTD. v. Compagnie des Bauxites de Guniee*, 456 US 694, 701–02 (1982) ("[f]ederal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in

Article III, § 2, cl. 1. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. Again, this reflects the constitutional source of federal juridical power: Apart from [the Supreme Court] that power only exists 'in such inferior Courts as the Congress may from time to time ordain and establish.' Art. III, § 1."). "The political question doctrine is one aspect of 'the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the 'case or controversy' requirement' of the Article III of the Constitution." *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006) (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 215(1974)). The doctrine is "primarily a function of the separation of powers." *Id*. (quoting *Baker v. Carr*, 369 U.S. 186, 210 (1962)) (quotation marks omitted). It "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." *Id*. (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)) (quotation marks omitted).

Appellants ground their claims in the assertion that they are nationals of the United States because the United States allegedly is or should be exercising sovereignty over Taiwan. *See* R.5 at 16 ("Plaintiffs or their parent were born in the Empire of Japan on Formosa or thereon and under superior command responsibility and thus control of the United States."), (alleging the head of the National Immigration Agency of the Ministry of the Interior, Taiwan exercises authority delegated by the United States). The sovereignty determination of a territory is non-justiciable. *See Jones*, 137 U.S. at 212 ("[w]ho is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.") (citing cases as far back as 1818) (emphasis in original).

The "judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory." *Baker*, 369 U.S. at 212. The political branches have made it clear that the United States does not exercise sovereignty over Taiwan and that Taiwan is not a territory subject to the jurisdiction of the United States. *See e.g.*, Exec. Order No. 13,014 (August 15, 1996), 61 Fed. Reg. 13,014 ("[This Order is to] facilitate the maintenance of commercial, cultural, and other relations between the people of the United States and the people on Taiwan without official representation or diplomatic relations"); Taiwan Relations Act of 1979, 22 U.S.C. § 3301(b)(3) (declaring that the policy of the United States is, inter alia, "to make clear that the United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means.").

This case falls squarely within the criteria that the Supreme Court and this Court have identified as presenting a non-justiciable political question, including as the doctrine applies specifically to Taiwan. *See Baker*, 369 U.S. at 217 (listing the criteria a court is to use for analyzing whether a cause of action presents a non-justiciable political question); *Lin*, 561 F.3d at 508. For this Court to issue a ruling in this case declaring the United States sovereign over Taiwan—contrary to the explicit position of the political branches that the United States exercises no sovereign authority over Taiwan—would have the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *See Baker*, 369 U.S. at 217. This Court would have to make an "initial policy determination of a kind clearly for

nonjudicial discretion" to go beyond the path chosen by the political branches of the government, which would show a "lack of the respect due coordinate branches of government." *See id*. Furthermore, due to the delicate relationship between and among the United States, the People's Republic of China, and Taiwan, and the need to preserve the stability and peace in the Taiwan Strait, there is "an unusual need for unquestioning adherence to a political decision already made." *See id*. In addition, it is unclear what "judicially discoverable and manageable standard" this Court would use in determining the status of a territory that was referenced by Douglas MacArthur's General Order dictating the terms of Japan's surrender at the end of World War II, and that has since been the subject of international dispute. *See supra*. These issues are directly related to the prominence of a "demonstrable constitutional commitment of [the determination of who is a sovereign of a territory] to a coordinate political department." *See Baker*, 369 U.S. at 217.

Summary affirmance is warranted because this case is controlled by *Lin v. United States*, 539 F. Supp. 2d 173 (D.D.C. 2008), *aff'd*, 561 F.3d 502 (D.C. Cir. 2009), in which Plaintiffs Roger C.S. Lin and a group of Taiwan residents sought a judicial declaration that they are nationals of the United States with all related rights and privileges, including the right to obtain U.S. passports. *Id.* at 176–77. The district court dismissed, concluding that the challenge involved "a quintessential political question" that required "trespass into the extremely delicate relationship between and among the United States, Taiwan[,] and China." *Id.* at 178. The district court sagely noted that the plaintiffs were asking it to "catapult over" a decision by the political branches to "obviously and intentionally *not* recognize[] any power as sovereign over Taiwan." *Id.* at 179 (emphasis in original). Given the "years and years of diplomatic negotiations and delicate agreements" between the United States and China, the Court concluded it "would be foolhardy for a judge to believe that she had the jurisdiction to make a policy choice on the sovereignty of Taiwan." *Id.* at 181.

This Court affirmed, holding that plaintiffs' request to be declared nationals of the United States was barred by the political question doctrine. *See Lin*, 561 F.3d at 508. The Court explained that addressing plaintiffs' attempt to be declared U.S. nationals "would require us to trespass into a controversial area of U.S. foreign policy in order to resolve a question the Executive Branch intentionally left unanswered for over sixty years: who exercises sovereignty over Taiwan. This we cannot do." *Id.* at 503–04.

As a result, any further amendment of the pleading clearly would have been futile and all other requests for relief lay outside the district court's jurisdiction. Once the district court correctly concluded that a political question was the core of this case, it had to dismiss without granting any relief whatsoever. Mem. Op. at 6; *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996); *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *Lovitky v. Trump*, 949 F.3d 753, 758–59 (D.C. Cir. 2020) (lack of mandamus jurisdiction where relief sought from the President).

* * * *

2. *Usoyan v. Republic of Turkey*

In this case, also discussed in Chapter 10, the U.S. Court of Appeals for the D.C. Circuit also considered the arguments regarding the political question doctrine and

international comity. The sections of the court's July 27, 2021 opinion on those issues are excerpted below. *Usoyan v. Turkey*, 6 F.4th 31 (D.C. Cir. 2021).

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* * * *

III. Political Question Doctrine

The political question 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.*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986). We have called it a "limited and narrow exception to federal court jurisdiction." *Starr Int'l Co. v. United States*, 910 F.3d 527, 533 (D.C. Cir. 2018). A lawsuit presents a non-justiciable political question if it involves one of the following:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Al-Tamimi v. Adelson, 916 F.3d 1, 5 (D.C. Cir. 2019) (alterations in original) (quoting *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

Relying primarily on the second factor, Turkey argues that the court lacks judicially discoverable and manageable standards necessary to resolve its immunity claim: "a court cannot decide ... whether Turkey used a 'degree and nature of force' that warrants immunity without first determining and then weighing the political justifications for, and reasonableness of, Turkey's security decisions concerning its head of state."

We disagree. As explained, the immunity inquiry turns not on whether Turkey's use of force was reasonable but whether it was the result of political, social or economic policy analysis. We can accept that Turkey has its own justification for responding vigorously to crowds that may endanger its President but nonetheless conclude that the specific attacks on the plaintiffs were "sufficiently separable from protected discretionary decisions." *Moore*, 65 F.3d at 197.

Notwithstanding Turkey's attempted resort to its own foreign relations and antiterrorism policies as a basis for us to find a non-justiciable political question, this case is not about Turkey's foreign relations. Instead, it is about its liability vel non for the actions of its own security officers. And that liability, if any, will not impinge on anything but Turkey's fisc.

IV. International Comity

International comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164, 16

S.Ct. 139, 40 L.Ed. 95 (1895). Comity can thus be described as a "golden rule among nations—that each must give the respect to the laws, policies and interests of others that it would have others give to its own in the same or similar circumstances." *United States v. One Gulfstream G-V Jet Aircraft*, 941 F. Supp. 2d 1, 8 (D.D.C. 2013) (quoting *Mich. Cmty. Servs., Inc. v. N.L.R.B.*, 309 F.3d 348, 356 (6th Cir. 2002)). According to Turkey, this doctrine prevents a federal court from "second-guessing the difficult decisions that U.S. inaction forced Turkey to make." The district court rejected Turkey's argument, a determination we review de novo, see *Simon v. Republic of Hungary*, 911 F.3d 1172, 1180 (D.C. Cir. 2018), vacated and remanded, —— U.S. ——, 141 S. Ct. 691, 208 L.Ed.2d 625 (2021) (mem.).

In evaluating Turkey's argument, the first task must be to pin down the precise form of the comity doctrine that Turkey purports to invoke. One international law scholar, surveying every Supreme Court case and numerous circuit court cases on international comity, identified three faces of the doctrine in U.S. law: deference to foreign lawmakers ("prescriptive comity"), deference to foreign tribunals ("adjudicative comity"), and deference to foreign litigants ("sovereign party comity"). See William S. Dodge, International Comity in American Law, 115 Colum. L. Rev. 2071, 2078 (2015). Turkey has not identified any foreign law or foreign judicial decision that pertains to this case. Its claim, then, can only be one of sovereign party comity.

Sovereign party comity acts as both a principle of recognition and a principle of restraint. See *id*. As a principle of recognition, it stands for the proposition that "sovereign states are allowed to sue in the courts of the United States." *Sabbatino*, 376 U.S. at 408–09, 84 S.Ct. 923; see also *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 318–19, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978); *The Sapphire*, 78 U.S. (11 Wall). 164, 167, 20 L.Ed. 127 (1870). As a principle of restraint, it shields foreign states from certain kinds of suits in federal or state court—foreign sovereign immunity, in other words. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983) (immunity is "a matter of grace and comity"); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972) (immunity "has its roots ... in the notion of comity between independent sovereigns"); Dodge, 115 Colum. L. Rev. at 2118. Turkey's competency as a party is not in doubt so its invocation of comity must be construed as an alternative argument for sovereign immunity.

We reach this conclusion not only through the process of exclusion but also by examining Turkey's requested relief. Turkey does not ask us to import a foreign rule of decision—which would invoke prescriptive comity. Nor does it ask us to give a foreign legal decision res judicata effect—which would invoke adjudicative comity. Rather, it asks us to "abstain from hearing" the suit altogether. Thus, although Turkey denominates its third argument as one of comity, it is in effect asserting an alternative basis for sovereign immunity.

In support of its argument, Turkey emphasizes the obvious challenges of protecting a head of state in a foreign country. The question before us, however, is not whether there are good policy reasons to grant latitude to foreign security services but whether those reasons require dismissal of a case of which the FSIA grants the district court jurisdiction.

In the FSIA, the Congress enacted a "comprehensive framework for resolving any claim of sovereign immunity." *Republic of Austria v. Altmann*, 541 U.S. 677, 699, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004). The purpose of the FSIA was "to free the Government from ... case-by-case diplomatic pressures." *Verlinden*, 461 U.S. at 488, 103 S.Ct. 1962. The statute effectuates this purpose by "set[ting] forth 'the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States.'" *MacArthur*, 809 F.2d at 919 (emphasis added) (quoting H.R. Rep. 94-1487, at 12.). We

thus have no authority to override the FSIA's express exception for tortious conduct based on the sort of "ambiguous and politically charged standards that the FSIA replaced." *Altmann*, 541 U.S. at 699, 124 S.Ct. 2240 (internal quotations omitted).

For the foregoing reasons, we conclude that the district court properly asserted jurisdiction of the plaintiffs' two lawsuits and affirm its denial of Turkey's motions to dismiss.

* * * *

3. Hungary v. Simon and *Germany v. Philipp*

See *Digest 2020* at 185-94 for discussion of the international comity arguments presented in *Hungary v. Simon*, 592 U.S. ___, 141 S. Ct. 691 (2021) and *Germany v. Philipp*, 592 U.S. ___, 141 S. Ct. 703 (2021). See Chapter 10 for discussion of the 2021 decision in these cases, which analyzes the expropriation exception under the Foreign Sovereign Immunity Act and does not reach the question of comity.

D. NEGOTIATIONS RELATING TO THE COMPACTS OF FREE ASSOCIATION

As discussed in *Digest 2019* at 155-56, the United States began negotiations relating to Compacts of Free Association, as amended, with the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. In 2021, the Department of State emphasized that "the Administration is prioritizing Compact negotiations with the Freely Associated States," and negotiations were ongoing. See October 20, 2021 press statement, available at https://www.state.gov/anniversary-of-the-compact-of-free-association-with-the-republic-of-the-marshall-islands/.

Cross References

Germany v. Philipp *and* Hungary v. Simon*,* **Ch. 10.A.3**
Usoyan v. Turkey, **Ch. 10.A.4**

CHAPTER 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On March 30, 2021, the Department of State released the 2020 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 contain legal definitions. The Country Reports are available at https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/. Acting Assistant Secretary Lisa Peterson, of the Bureau of Democracy, Human Rights, and Labor, delivered remarks on the release of the 2020 Country Reports, which are available at https://www.state.gov/acting-assistant-secretary-lisa-peterson-on-the-release-of-the-2020-country-reports-on-human-rights-practices/. Secretary of State Antony J. Blinken also spoke on the release of the reports. His statement is available at https://www.state.gov/secretary-antony-j-blinken-on-release-of-the-2020-country-reports-on-human-rights-practices/.

On November 4, 2021, Secretary Blinken announced the release of updated Country Reports with "information on a broad range of issues related to sexual and reproductive health and rights." See November 4, 2021 press statement, available at https://www.state.gov/2020-country-reports-on-human-rights-practices-addenda-on-reproductive-rights/. As explained in the press statement,

> an addendum now includes information on key issues such as maternal mortality, government policy adversely affecting access to contraception, access to skilled healthcare during pregnancy and childbirth, access to emergency healthcare, and discrimination against women in accessing sexual and reproductive health care, including for survivors of gender-based violence.
>
> … Reinstating the coverage of the above topics, which were previously included in the reports, is one way the United States is supporting the empowerment of women and girls and the advancement of gender equality, including promoting their sexual and reproductive health and rights. Moving

forward, the Department of State will continue to include coverage of these issues in the reports.

2. Universal Periodic Review

On March 17, 2021, Acting Assistant Secretary Peterson delivered the U.S. statement during the adoption of the Third Universal Periodic Report ("UPR") of the United States. The statement is excerpted below and available at https://geneva.usmission.gov/2021/03/17/us-upr-1/.

* * * *

INTRODUCTION

I am proud to represent the United States before the Human Rights Council and to reaffirm our commitment to promoting respect for the human rights of all people, everywhere.

* * * *

President Biden often speaks of the "power of our example." American leadership on human rights must begin at home, in the way we treat each other, our neighbors, and the most vulnerable among us. We're not perfect – far from it – but we are going to keep striving to live up to our highest ideals and principles. Among other challenges, we know it is long past time to confront deep racial inequities and the systemic racism that continue to plague our nation. We must, and we will, do more.

UPR PROCESS

I thank the President of this Council, the many states that participated constructively in the Working Group for our UPR, the Troika – the Bahamas, Germany, and Pakistan – the Secretariat staff, and, in particular, our own civil society for the many constructive recommendations and candid conversations we have had over the past year and more. You in civil society hold us in government accountable to our shared values by asking hard questions and making honest recommendations. In this respect you remind us that the most important line of accountability for human rights in America is to our own people. We welcome your participation in this process and thank you for your active engagement. In the coming weeks and months ahead, we look forward to working with you on the implementation of many of these recommendations. We hope other governments around the world also work closely with civil society organizations as they undertake their UPR reviews.

The U.S. government has carefully reviewed the 347 recommendations it received during this UPR review. We have accepted in whole or in part a total of 280 recommendations, or approximately 81%. We're very proud of this high number.

We have considered the substance of each recommendation. Our written submission responds to all recommendations and includes brief explanations for many of them.

Today I would like to summarize our approach in some key areas and address significant changes that have occurred since our presentation last November.

1. CIVIL RIGHTS/DISCRIMINATION

I would like to begin by addressing recommendations concerning civil rights and discrimination. No issue is more central to the goals and policies of this administration than addressing systemic racism – forthrightly, honestly, and powerfully – and the legacy of discrimination in our country.

We support almost all of the recommendations we received in the area of civil rights and discrimination, including those from Argentina, Cambodia, Canada, the Republic of Korea, Costa Rica, Ecuador, China, Iceland, Togo, and others which recommended that we examine and eliminate practices and policies that marginalize racial and ethnic minorities and address police violence against members of minority communities, including African Americans. We also support inputs from Norway, the United Kingdom of Great Britain and Northern Ireland, Indonesia, and others, which recommended we identify best practices for the use of force by police and for improving the enforcement of laws that prohibit racial profiling and excessive use of force in policing.

Last summer, as protesters marched to demand justice following the tragic death of George Floyd, we were reminded, once again, of how pervasive systemic racism is in the United States and the urgent need to address it. What many Americans did not see, or had simply refused to see, could not be ignored any longer. Floyd's death was a flashpoint within a longstanding national conversation around police brutality against African-Americans and persons of color that galvanized a global call to end the injustices of systemic racism across the globe. We saw this very Council take up this issue last summer during its Urgent Debate on Racism. And in that regard, we welcome the High Commissioner's statement that the implementation of HRC resolution 43/1, stemming from that debate, will reflect and amplify the voices of victims, as well as their families and communities in all countries.

The United States is dedicated to eliminating racial discrimination and the use of excessive force in policing. The Department of Justice has issued guidance stating unequivocally that racial profiling is wrong and has prohibited racial profiling in federal law enforcement practices. Many states have done the same. Our Department of Justice prosecutes individual officers who violate someone's civil rights and investigates police departments that might be engaging in a pattern or practice of conduct that deprives persons of their rights. We also seek to proactively prevent discrimination or the use of excessive force by participating in increased training of federal, state, and local law enforcement officers across the country.

And now, as seen in the horrific events at the U.S. Capitol on January 6, there is a growing threat of domestic violent extremism that we must confront and we will defeat. In responding to this threat, the new Administration will be guided by the evidence and the law and will be steadfast in maintaining the United States' commitment to civil liberties. We know this is not an issue for America alone as other countries also confront growing nationalist chauvinist movements. We must work together on this important effort.

The notion of equal opportunity is the bedrock of American democracy, but for too many this ideal has not translated to reality simply because of the color of their skin. Entrenched disparities in our laws and public policies, and in our public and private institutions, have often denied that equal opportunity to individuals and communities.

We are committed to addressing this and making it right. On his first day in office, President Biden issued an Executive Order directing that the "Federal Government … pursue a comprehensive approach to advancing equity for all, including African-Americans, Latinos, Asian-Americans and Pacific Islanders, Native Americans and other persons of color, persons

with disabilities, and LGBTQI+ communities and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."

The need is particularly urgent during the COVID-19 pandemic, which exacerbated existing inequities. We are taking affirmative steps to end unequal provisions in housing policy that disproportionately affect persons of color, and we are extending the nation-wide eviction moratorium during COVID-19. We are tackling hate crimes against Asian Americans and Pacific Islanders spurred by the pandemic. We are extending a pause on repaying student loans, the economic burden of which falls disproportionately on people of color.

Many of the steps we are taking are intended to reverse policies that have served to divide America. We are reauthorizing mandatory anti-bias training across the federal government system, and we are ensuring the inclusion of all people present in the United States in the 2020 census, irrespective of their immigration status. We are preserving the Deferred Action for Childhood Arrivals (DACA) program and ending discriminatory bans on entry to the United States. And we are taking steps to end the federal government's reliance on private prisons – the beginning of a plan to reform an incarceration system that disproportionately affects people of color.

Several states, including Belgium, France, and Malta, asked us to do more to address discrimination against LGBTQI+ individuals. Others, including India, Moldova and Montenegro, asked us to better address gender-based discrimination.

Despite the extraordinary progress we have made securing equal rights for LGBTQI+ individuals, discrimination is still rampant in many areas of our society. This Administration believes that every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love, and that all persons should receive equal treatment under the law, no matter their gender identity or sexual orientation. That is why, on his first full day in office, President Biden issued an executive order directing federal agencies to develop a plan to fully implement laws that prohibit discrimination on the basis of sex, sexual orientation, or gender identity. He followed up just a few days ago, on March 8, by establishing the White House Gender Policy Council, which will further advance gender equity and equality, including for those in marginalized and underserved communities. And on January 25, 2021, the President issued an executive order ensuring that transgender individuals who wish to serve in the United States military shall be able to do so openly and free from discrimination.

This Administration believes in the advancement of gender equality and women's and girl's empowerment, including promoting their sexual and reproductive health and rights, both in the United States and globally. We received and supported a number of recommendations from Norway, Canada, Austria, Mexico, and others related to sexual and reproductive health and rights.

On January 28, 2021, President Biden issued the Presidential Memorandum on Protecting Women's Health at Home and Abroad, which revoked the January 23, 2017 Presidential Memorandum on the "Mexico City Policy," and also directed the withdrawal of U.S. co-sponsorship and signature from the Geneva Consensus Declaration. These steps will help improve the lives of women and girls by increasing their access to critical health services.

2. MIGRATION/CHILD SEPARATION POLICY

I wish to turn now to our second broad focus. President Biden has stated that "immigration is an irrefutable source of our strength and is essential to who we are as a nation." For generations, immigrants have come to the United States with little more than the clothes on

their backs, hope in their hearts, and a desire to claim their own piece of the American Dream. These mothers, fathers, sons, and daughters have made our nation better and stronger.

We accepted numerous recommendations from Peru, Thailand, El Salvador, Slovenia, Zambia, Cuba, Fiji, Ghana, Nicaragua, and others related to enhancing efforts to protect the rights of migrants, and migrant children in particular.

On the very day he was inaugurated, President Biden took the first steps in a broad, whole of government effort to reform our immigration system, including sending to Congress legislation that creates a pathway to citizenship for nearly 11 million undocumented immigrants living in and contributing to our country. The President's strategy is centered on the basic premise that our country is safer, stronger, and more prosperous with a fair, safe, and orderly immigration system that welcomes immigrants, keeps families together, and allows everyone – both newly arrived immigrants and people who have lived here for generations – to fully contribute to our country.

President Biden has condemned the human tragedy of using U.S. immigration laws to intentionally separate children from their parents or legal guardians. The Biden Administration has rescinded the zero-tolerance policy and will protect family unity. On February 2, the President established an Interagency Task Force on the Reunification of Families that will bring families back together and provide them the relief, resources, and services they need to heal.

The United States is committed to safe, humane, and lawful immigration enforcement, including protecting family unity and strengthening the protection of human rights of non-citizens in immigration detention, as well as appropriate use of alternatives to detention. The United States will seek to ensure that children entering the United States are not separated from their families, except in the most extreme circumstances where a separation is clearly necessary for the safety and well-being of the child or is required by law. The United States provides care and placement in the least restrictive setting for unaccompanied children who enter the United States without a parent or legal guardian and works to expeditiously reunify them with parents or other loved ones in the United States.

It is also a priority of the Biden Administration to reinstate the safe and orderly reception and processing of arriving migrants and asylum seekers. Beginning on February 19, the Department of Homeland Security began the first phase in this effort by processing into the United States people who had been returned to Mexico under the Migrant Protection Protocols pending their removal hearings. This latest action is another step in our commitment to reform immigration policies that do not align with our nation's values.

3. CRIMINAL JUSTICE

A third major set of recommendations concerned criminal justice in our country. While our federal system consists of an array of different sub-national entities, each responding to the needs of and beholden to the people of different jurisdictions, all are subject to the U.S. Constitution and committed to the goal of administering justice equally and fairly.

We received recommendations from 33 countries concerning the administration of capital punishment at the State and Federal level.

While we respect those who make these recommendations, they reflect continuing differences of policy, not differences about what the United States' international human rights obligations require.

However, to those who desire as matter of policy to end capital punishment in the United States, I note that President Biden supports legislatively ending the death penalty at the federal level and incentivizing additional states to follow the federal government's example. Further, I

note that since the last U.S. UPR, five states have acted to abolish the death penalty, either through new legislation or judicial decision.

4. RIGHTS OF INDIGENOUS PEOPLES

In a fourth area, we received and support a number of recommendations urging us to continue promoting and protecting the rights of indigenous peoples and their members, including recommendations from Azerbaijan, Kenya, and Paraguay.

The United States recognizes past wrongs and is committed to working with tribal governments to address the many issues facing their communities. President Biden has issued a Memorandum that calls on federal agencies to develop detailed plans for implementing existing policies regarding consultation with tribes.

It is a priority of the Biden Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and meaningful consultation with Tribal Nations cornerstones of Federal policy.

5. NATIONAL SECURITY

In the area of national security, we supported recommendations from France and others regarding the Guantanamo Bay detention facility.

The United States intends to continue the work of the Obama Administration in finding a resolution to the issue of the Guantanamo Bay detention facility that comports with our values as a country. The Administration is now engaged in an interagency review to see how that goal can best be accomplished.

6. TREATIES/INTERNATIONAL MECHANISMS

The largest group of recommendations – the sixth category I will discuss here today – concern ratification of treaties and engagement with international mechanisms.

We support a number of recommendations asking us to consider ratifying additional human rights treaties, including the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities, the International Labor Organization's Convention #111, and the Convention on the Rights of the Child.

The fact that we have not ratified these treaties should not be seen as an indication that we do not support their goals. But, as many of you know, under our Constitution, treaty ratification requires approval not only by the Executive Branch, but also a two-thirds supermajority of our Senate. The Biden Administration will continue to review how we can approach ratification of these treaties.

We also received recommendations to rejoin the Human Rights Council from a number of states including Canada, Spain, Lithuania, Germany, and Jordan.

On February 8, Secretary of State Blinken announced that the United States would reengage immediately and robustly with the HRC, and we have been doing so ever since. The United States is also now running for election to the Human Rights Council for the 2022-2024 term. In seeking to rejoin the Council, we strive to work with the international community to meet our shared commitment to promoting respect for human rights. As I indicated at the outset, we recognize that any pledge to fight for human rights around the world must begin with a pledge to fight for human rights at home, so our approach is to hold ourselves accountable at the same time as we do so for others. We humbly ask for your support for our candidacy.

We also received recommendations from Fiji, Haiti, Bahamas, and Slovenia about strengthening cooperation with the international community on climate change.

This is a core priority of the United States, and we are committed to intensifying our efforts to address environmental challenges, including climate change. This is why, on his first

day in office, President Biden signed and the United States deposited with the UN, the instrument to rejoin the Paris Agreement on Climate Change and appointed former Secretary John Kerry as the nation's first presidential envoy for climate. As of February 19th, the U.S. is again a full member of the Paris Agreement and we are working hard to accelerate global efforts and commitments to tackle this critical issue.

6. RESPONSE TO COVID

Finally, let me address a few recommendations concerning access to health care and our response to the COVID-19 pandemic.

Shortly after taking office, President Biden launched an all-of-government effort to provide equitable emergency economic relief to working families, communities, and small businesses across the United States. As we continue to battle COVID-19, it is even more critical that Americans have meaningful access to quality, affordable health care. President Biden is taking action to strengthen Americans' access to make health insurance coverage more affordable for millions of Americans, meet the health care needs created by the pandemic, reduce health care costs, protect access to reproductive health care, and make our health care system easier to navigate and more equitable.

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On March 17, 2021, Secretary Blinken issued a statement on the final adoption of the third UPR of the United States. The statement follows and is available at https://geneva.usmission.gov/2021/03/17/secretary-of-state-blinken-final-adoption-of-the-u-s-universal-periodic-review/.

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Today, the UN Human Rights Council adopted the report of the third Universal Periodic Review (UPR) for the United States. All UN member states participate in the UPR process, which is designed to ensure that every nation is subject to scrutiny of its human rights record.

When President Biden made clear his intent to reengage with the world, he did so with confidence in our diplomatic capacity, the strength of our partnerships and alliances, and the power of our example. That example remains among our greatest strengths, and it is our charge to make it even stronger in the years ahead.

Last month, I spoke directly to the members of the Human Rights Council to announce the intent of the United States to return to that body and seek election to its membership. In those comments, I underscored our longstanding commitment to defending freedom, championing opportunity, upholding human rights, respecting the rule of law, and treating every person with dignity.

But leadership on human rights goes far beyond merely reminding other countries of their obligations and commitments, pointing out failures, and registering our displeasure. It involves leading by example, acknowledging our shortcomings, and striving to live up to our highest ideals and principles. In completing its Periodic Review, the United States demonstrates its commitment to openness, transparency, and self-reflection, and a return to leadership with confidence, respect, and humility.

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Also on March 17, 2021, Acting Assistant Secretary Peterson delivered concluding remarks at the adoption of the third UPR of the United States. The remarks follow and are available at https://geneva.usmission.gov/2021/03/17/us-upr-2/.

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We complete our third Universal Periodic Review proud of our heritage as a nation conceived in liberty, and firmly dedicated to the proposition that all persons are created equal.
As Secretary Blinken said before the Human Rights Council, the United States is placing democracy and human rights at the center of our foreign policy, because they are essential for peace, prosperity, and stability.
American leadership still matters. We will exercise that leadership with humility, knowing that we have a great deal of work to do at home to enhance our standing abroad, but also knowing that no single country acting alone, can fully and effectively address these problems.
The United Nations is uniquely poised to take on our shared global challenges. When – collectively – we are consistent and persistent in acting according to the values upon which it was founded, the United Nations can be an indispensable institution for advancing peace, security, and our collective well-being. When we falter in the defense of those values, others will come to fill the void, and the global community suffers, and so do American interests.

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3. ICCPR

On January 15, 2021 the U.S. filed its fifth periodic report with the Human Rights Committee on the measures the U.S. has adopted to give effect domestically to the rights contained in the International Covenant on Civil and Political Rights ("ICCPR"). This submission is the culmination of a lengthy and intensive inter-agency collaboration. The U.S. fifth periodic report is available at https://digitallibrary.un.org/record/3947286?ln=en.

Paragraphs 2 and 3 of the report, below, describe the process of compiling the report and its content:

> 2. This report was prepared by the United States Department of State (DOS), with assistance from the Department of Justice (DOJ), the Department of Defense (DoD), the Department of Homeland Security (DHS), the Department of Health and Human Services (HHS), the Department of Education (ED), the U.S. Agency for International Development (USAID) and other relevant components of the U.S. government. Representatives of U.S. government departments and agencies involved in implementation of the Convention also met with

representatives of non-government organizations as part of outreach efforts in connection with drafting the report. Except where otherwise noted, the report covers the time period from 2015 to 2020.

3. This report responds to the 29 questions in the List of Issues (LOI) of April 2, 2019, prepared by the Committee and transmitted to the United States pursuant to the reporting procedure. The information in our responses supplements information included in the U.S. Initial Report (CCPR/C/81/Add.4), the Second and Third Periodic Reports (CCPR/C/USA/3), and the Fourth Periodic Report (CCPR/C/USA/4), as well as other information provided by the United States in connection with Committee meetings and communications. It takes into account prior Concluding Observations of the Committee. Throughout the report, the United States has considered carefully the views expressed by the Committee in its written communications and in its public sessions with the United States. A list of acronyms used in the report, and the full name of each, is attached as Annex A.

4. UN Third Committee

a. General Statement

The 76th session of the UN Social, Humanitarian and Cultural Affairs Committee, or Third Committee, concluded on November 18, 2021. The United States submitted a long-form general statement to the UN Secretariat, which was posted to the website of the U.S. Mission to the UN at https://usun.usmission.gov/longform-general-statement-for-the-third-committee/.

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I would like to start by thanking the Third Committee Bureau and our colleagues for the spirit of cooperation. We take this opportunity to make brief but important points of clarification on some of our key priorities for the Third Committee. 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 Member States must join or implement obligations under international instruments to which they are not a party. Any reaffirmation of such Conventions or treaties, or obligations set forth therein, applies only to those States that are party to them.

We understand abbreviated references to certain human rights in these resolutions to be shorthand references for the more accurate and widely accepted terms used in the applicable treaties or the Universal Declaration of Human Rights, and we maintain our long-standing positions on those rights. We do not read references in resolutions to specific principles, such as proportionality, to imply that states have an obligation under international law to apply or act in accordance with those principles. We also reiterate our long-standing position that the

International Covenant on Civil and Political Rights (ICCPR) applies only to individuals who are both within the territory of a State Party and subject to its jurisdiction. The United States strongly condemns harassment, gender-based violence, and other acts that can amount to human rights violations or abuses, but believes it is important for resolutions to accurately characterize these terms, consistent with U.S. law and our international obligations. Moreover, U.S. co-sponsorship of, or our joining consensus on, resolutions does not imply endorsement of the views of special rapporteurs or other special procedures mandate-holders as to the contents or application of international law.

Specific Points of Clarification

Freedom of Expression and Freedom of Religion or Belief: The United States strongly supports the freedoms of expression and religion or belief. We oppose any attempts to unduly limit the exercise of these fundamental freedoms. We strongly believe that these fundamental freedoms are mutually reinforcing and that the protection of freedom of expression is critical to protecting freedom of religion or belief.

2030 Agenda for Sustainable Development (2030 Agenda): The United States supports the full implementation of the 2030 Agenda and the Sustainable Development Goals as a voluntary global framework for sustainable development that can help put the world on a more sustainable and resilient path and advance 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 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 institutions and processes, including negotiations and does not prejudge or serve as precedent for decisions and actions underway in other fora. For example, the 2030 Agenda does not represent a commitment to provide new market access for goods or services. The Agenda also does not interpret or alter any World Trade Organization (WTO) agreement or decision, including with respect to the Agreement on Trade-Related Aspects of Intellectual Property Rights. Further, citizen-responsive governance, including respect for human rights, sound economic policy and fiscal management, government transparency, and the rule of law, are essential to the implementation of the 2030 Agenda.

Trade: The United States supports strong and growing trade relationships around the globe. We welcome efforts to bolster those relationships, increase economic cooperation, and advance prosperity for all people, within the appropriate institutions.

It is our view that the UN must respect the independent mandates of other processes and institutions, including trade negotiations, and must not comment on decisions and actions in other fora, including at the WTO. While the UN and WTO share some common interests, they have different roles, rules, and memberships.

The UN is not the appropriate venue for these discussions, and the United States does not consider recommendations made by the General Assembly or the Economic and Social Council on these issues to be binding. This includes calls to adopt approaches that may undermine incentives for innovation, such as technology transfer that is not both voluntary and based on mutually agreed terms.

We underscore our position that trade language negotiated or adopted by the General Assembly or Economic and Social Council, or under their auspices, has no relevance to U.S. trade policy, for our trade obligations or commitments, or for the agenda at the WTO, including discussions or negotiations in that forum.

The "Right to Development": The "right to development" is not recognized in any of the core UN human rights conventions and, in any case, does not have an agreed international meaning.

Economic, Social, and Cultural Rights: As the International Covenant on Economic, Social, and Cultural Rights (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 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. Therefore, we believe that these resolutions should not try to define the content of those rights. The United States is not a party to the ICESCR and the rights contained therein are not justiciable as such in U.S. courts.

COVID-19-Related Measures: The ICCPR sets forth the conditions for permissible restrictions on certain human rights, including that any such restrictions must be in conformity with law and necessary in a democratic society for, inter alia, the protection of public health. The language in these resolutions in no way alters or adds to those provisions, nor does it inform the United States' understanding of its obligations under the ICCPR. We also note that language in certain resolutions this session appears to construe emergency measures as meaning restrictive measures. However, not all measures responsive to this health emergency restrict the enjoyment of human rights; for example, many States, including the United States, have implemented measures aimed at improving care and providing economic support.

COVID-19 Vaccine Access: We continue to promote global cooperation to end the pandemic. Recent examples include hosting the September 22 Global COVID-19 Summit at which the United States announced a commitment to supply an additional 500 million COVID-19 vaccine doses, boosting our global commitment to 1.1 billion doses. The United States wishes to clarify that we are engaged in facilitating access to safe, effective, and quality-assured COVID-19 vaccines, therapeutics, and diagnostics. Multilateral and regional efforts to improve global access should rely on products that have been listed for emergency use or prequalified by the World Health Organization (WHO), or that have been authorized by stringent regulatory authorities/WHO-Listed Authorities, such as the Food and Drug Administration or European Medicines Agency. Unsafe, ineffective, or substandard or falsified vaccine products could have adverse public health consequences and undermine confidence in the global response effort and in safe and effective COVID-19 tools.

Global Public Goods: The United States understands that references to immunization against COVID-19 as a global public good for health refer to the global public health benefit resulting from extensive immunization of the global population.

Right to Education: The United States strongly supports the realization of the right to education. As educational matters in the United States are primarily determined at the state and local levels, we understand that when resolutions attempt to define or prescribe various aspects of education, or call on States to strengthen or modify them, this is done in terms consistent with our respective federal, state, and local authorities. We likewise understand references to the "right to a quality education" to refer to the right to education as enshrined in core international human rights instruments. Moreover, the United States is firmly committed to

equal opportunity and equal access to education. Additionally, with respect to "special measures," including affirmative action, we understand these references consistent with our domestic laws in these areas.

International Humanitarian Law: The United States is deeply committed to promoting respect for international humanitarian law (IHL) and the protection of civilians in armed conflict. We note that IHL and international human rights law are in many respects complementary and mutually reinforcing. However, we understand that, with respect to references in these resolutions to both bodies of law in situations of armed conflict, such references refer to those bodies of law only to the extent that each is applicable. We do not necessarily understand references to conflict, IHL, or IHL terms of art in these resolutions to mean that, as a matter of law, an armed conflict exists in a particular country or to supplant States' existing obligations under IHL.

International Refugee Law: The United States strongly supports and advocates for the protection of refugees and other displaced persons around the world, and we urge all States to respect the principle of non-refoulement, while also supporting safe, dignified, and sustainable repatriation or return of migrants ineligible to remain. In underscoring our support for this principle, we wish to clarify that U.S. international obligations with respect to non-refoulement are the provisions contained in Article 33 of the 1951 Convention relating to the Status of Refugees (applicable to the United States by its incorporation in the 1967 Protocol relating to the Status of Refugees) and in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. We note that we understand references to international refugee law in certain resolutions to be referring to the obligations of States under the relevant treaties to which they are party.

Recognition of any Right relating to the Environment: The United States is committed to taking ambitious action to address environmental challenges, including continuing our work with international partners to share our experience with concrete domestic actions to protect the environment. We also recognize that climate change and environmental degradation impact the enjoyment of human rights and affirm that when taking action to address environmental challenges and climate change, States should respect their respective human rights obligations. Nevertheless, the United States has consistently reiterated that there are no universally recognized human rights specifically related to the environment and we do not believe there is a basis in international law to recognize "right to a clean, healthy, and sustainable environment," either as an independent right or a right derived from existing rights. We do not see any resolution introduced in this session as creating such a right, altering the content of international law, or establishing a precedent in other fora.

UN Declaration on the 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 the 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.

Sanctions: The United States does not accept that sanctions amount to violations of human rights. Among other legitimate purposes, sanctions can play an indispensable role in responding to human rights violations and abuses and threats to peace and security.

Consular Notification: The United States notes that individuals do not have a right to consular notification or access, rather, this right belongs to states.

Rights of the Child: The United States does not understand references to the rights of the child or principles derived from the Convention on the Rights of the Child, including the principle that the best interests of the child should be a primary consideration in all actions concerning children, as implying that the United States has obligations in that regard. We also understand references to recruitment or use of children as referring to the recruitment or use of children in violation of international law, including, where applicable, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

Legal Obligations of an Occupying Power: The law governing belligerent occupation, including as reflected in the 1949 Geneva Convention Relative to the Protection Civilians in Time of War, imposes obligations on Occupying Powers that must be met. While we strongly support the resolution on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and city of Sevastopol, Ukraine, the resolution urges certain actions by the Occupying Power in that territory that are not reflected in the law of belligerent occupation. For example, even though Occupying Powers have the duty under the law of belligerent occupation related to ensuring and maintaining public health and hygiene in the territory they occupy, an Occupying Power does not otherwise have the specific obligation to ensure the fair distribution of fresh- water resources, as stated in the resolution. Although the United States supports these calls as a policy matter, the United States does not understand the resolution as changing or reflecting the law of belligerent occupation.

Enjoyment of Human Rights: We note that the United States cannot "ensure" the enjoyment of human rights by individuals because non-state actors, or other factors beyond State control, can impact their enjoyment as well.

Reservations: Notwithstanding suggestions otherwise in certain resolutions, we note that reservations that are compatible with the object and purpose of a treaty are a regular and acceptable part of treaty practice under the Vienna Convention on the Law of Treaties.

References to Violence: The United States notes that certain resolutions inaccurately refer to a range of activities and concepts, including hate speech and racism, as "forms of violence." We reiterate our long-standing concern with equating speech and ideas with violence, noting that, however odious they may be, ideas and hateful speech that does not rise to the level of a true threat or incitement to imminent violence are protected under the right to freedom of opinion and expression. Likewise, harassment and bullying, while condemnable, do not necessarily constitute violence.

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. Thank you, Chairperson.

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b. Other thematic statements at the UN Third Committee

On November 9, 2021, Sofija Korac, advisor to the U.S. Mission to the UN for economic and social affairs, provided the explanation of vote at the Third Committee adoption of a resolution on human rights and unilateral coercive measures. The U.S. statement follows, and is available at https://usun.usmission.gov/third-committee-explanation-of-

vote-for-the-adoption-of-the-human-rights-and-unilateral-coercive-measures-resolution/.

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This resolution does not advance respect for and protection of human rights. Simply put, it is not sanctions that are undermining respect for human rights – that responsibility lies with those who commit human rights violations and abuses. Sanctions are an important and effective tool to respond to malign behavior, promote peace, and counter terrorism and the proliferation of weapons of mass destruction.

For instance, sanctions are designed to, among other things, promote accountability for human rights violations and abuses, corruption, or undermining democracy.

Those who point to sanctions as the problem advance a false narrative like the one in this resolution. The text of this resolution inappropriately challenges the ability of States to determine their economic relations and protect legitimate national interests, including taking actions in response to national security concerns. The resolution also attempts to undermine the international community's ability to respond to human rights violations and abuses. Economic sanctions are a legitimate way to achieve foreign policy, security, and other national and international objectives, and the United States is not alone in that view or in that practice.

We also often take extraordinary measures to minimize the potential humanitarian impact of our sanctions on vulnerable communities. Earlier this year, the United States took concrete action to minimize the impact of certain of our sanctions regimes on aid to stem the COVID-19 pandemic globally, including in Syria and Venezuela. We actively facilitate the provision of legitimate aid to the Syrian and Venezuelan people, even while Assad and Maduro actively work to restrict it. Indeed, we are the leading donor of humanitarian assistance to both countries, providing billions of dollars in aid on the basis of need. And just last month, our Treasury Department affirmed that the United States will continue to seek ways to tailor sanctions to mitigate unintended economic, humanitarian, and political impacts on non-targeted individuals abroad and support the flow of legitimate humanitarian goods and assistance.

Simply put, United States sanctions programs are designed, among other things, to prevent bad actors from taking advantage of the U.S. financial system with intent to threaten legitimate global markets or undermine respect for human rights.

For these reasons, we request a vote and we will vote against this resolution.

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5. Human Rights Council

a. General

On February 8, 2021, Secretary Blinken announced the U.S. decision to reengage with the UN Human Rights Council ("HRC"). The statement follows and is available at https://www.state.gov/u-s-decision-to-reengage-with-the-un-human-rights-council/.

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The Biden administration has recommitted the United States to a foreign policy centered on democracy, human rights, and equality. Effective use of multilateral tools is an important element of that vision, and in that regard the President has instructed the Department of State to reengage immediately and robustly with the UN Human Rights Council.

We recognize that the Human Rights Council is a flawed body, in need of reform to its agenda, membership, and focus, including its disproportionate focus on Israel. However, our withdrawal in June 2018 did nothing to encourage meaningful change, but instead created a vacuum of U.S. leadership, which countries with authoritarian agendas have used to their advantage.

When it works well, the Human Rights Council shines a spotlight on countries with the worst human rights records and can serve as an important forum for those fighting injustice and tyranny. The Council can help to promote fundamental freedoms around the globe, including freedoms of expression, association and assembly, and religion or belief as well as the fundamental rights of women, girls, LGBTQI+ persons, and other marginalized communities. To address the Council's deficiencies and ensure it lives up to its mandate, the United States must be at the table using the full weight of our diplomatic leadership.

In the immediate term, the United States will engage with the Council as an observer, and in that capacity will have the opportunity to speak in the Council, participate in negotiations, and partner with others to introduce resolutions. It is our view that the best way to improve the Council is to engage with it and its members in a principled fashion. We strongly believe that when the United States engages constructively with the Council, in concert with our allies and friends, positive change is within reach.

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Secretary Blinken issued a further press statement on U.S. reengagement on human rights and at the HRC on February 24, 2021. The February 24 statement is excerpted below and available at https://www.state.gov/putting-human-rights-at-the-center-of-u-s-foreign-policy/.

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The United States is committed to a world in which human rights are protected, their defenders are celebrated, and those who commit human rights abuses are held accountable. Promoting respect for human rights is not something we can do alone, but is best accomplished working with our allies and partners across the globe. President Biden is committed to a foreign policy that unites our democratic values with our diplomatic leadership, and one that is centered on the defense of democracy and the protection of human rights.

Today, the administration took an important step in that direction by announcing the U.S. intent to seek election to a seat on the UN Human Rights Council starting in January 2022. The

United States has long been a champion of human rights. If elected to the Human Rights Council, we will use the opportunity to be a leading voice within the Council for promoting respect for human rights.

The Human Rights Council is an important multilateral venue dedicated to furthering international human rights efforts and has played a critical role in promoting accountability for human rights violations and abuses. From investigations into abuses in Syria and North Korea to promoting the human rights for women and LGBTQI persons and other minorities, and combatting racism and religious persecution, the Human Rights Council must support those fighting against injustice and tyranny.

We acknowledge challenges at the Council as well, including unacceptable bias against Israel and membership rules that allow countries with atrocious human rights records to occupy seats they do not merit. However, improving the Council and advancing its critical work is best done with a seat at the table.

We seek to return to the Human Rights Council to stand shoulder-to-shoulder with our allies and partners to ensure that this important body lives up to its purpose. We do so with determination to listen, learn, and work toward a world in which human rights are universally respected.

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On October 14, 2021, the Department of State issued a press statement by Secretary Blinken on the election of the United States to the HRC. The statement follows and is available at https://www.state.gov/election-of-the-united-states-to-the-un-human-rights-council-hrc/.

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Since the earliest days of this Administration, President Biden has made clear that our foreign policy would be grounded in America's most cherished democratic values: defending freedom, championing opportunity, upholding human rights and fundamental freedoms, respecting the rule of law, and treating everyone with dignity. He also promised to restore American engagement internationally and renew our leadership to catalyze global action on shared challenges. We have taken up that charge to tirelessly pursue and promote those values – in our bilateral and multilateral relationships and at the United Nations.

Today, I can announce that the United States was elected to serve on the UN Human Rights Council for the next term, beginning in 2022.

We will work hard to ensure the Council upholds its highest aspirations and better supports those fighting against injustice and tyranny around the world. The path towards the protection of human rights and fundamental freedoms will be filled with challenges. The United States commits to continue this steadfast pursuit, at every opportunity, with any and all countries that will join us.

The Council plays a meaningful role in protecting human rights and fundamental freedoms by documenting atrocities in order to hold wrongdoers accountable. It focuses attention on emergencies and unfolding human rights crises, ensuring that those who are

voiceless have a place to be heard. The Council provides a forum where we can have open discussions about ways we and our partners can improve. At the same time, it also suffers from serious flaws, including disproportionate attention on Israel and the membership of several states with egregious human rights records. Together, we must push back against attempts to subvert the ideals upon which the Human Rights Council was founded, including that each person is endowed with human rights and that states are obliged to protect those rights.

I want to thank the UN Member States for affording the United States the opportunity to serve again on the Human Rights Council. We look forward to the work ahead with our international partners to protect, defend, and advance human rights and the work of the Council globally.

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On October 14, 2021, Ambassador Linda Thomas-Greenfield issued a statement on the election of the United States to the Human Rights Council. Her statement is available at https://usun.usmission.gov/statement-by-ambassador-linda-thomas-greenfield%E2%80%AFon-the-election-of-the-united-states-to-the-human-rights-council/.

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Today, the United States was elected to the United Nations Human Rights Council for the 2022-2024 term.

"All human beings," as the Universal Declaration of Human Rights recognizes, "are born free and equal in dignity and rights." This profound statement is not an opinion, it is a fact. Our human rights are inalienable, indivisible, interdependent, and interrelated. And they are universal.

Now, having fulfilled President Biden's campaign pledge to rejoin the Human Rights Council, we can work to ensure this body lives up to these principles.

Starting on January 1, 2022, in our new role as member, we can fully participate in the Council's work of protecting and promoting human rights. We will use every tool at our disposal, from introducing resolutions and amendments to wielding our vote when needed. Our goals are clear: stand with human rights defenders and speak out against violations and abuses of human rights.

Our initial efforts as full members in the Council will focus on what we can accomplish in situations of dire need, such as in Afghanistan, Burma, China, Ethiopia, Syria, and Yemen. More broadly, we will promote respect for fundamental freedoms and women's rights, and oppose religious intolerance, racial and ethnic injustices, and violence and discrimination against members of minority groups, including LGBTQI+ persons and persons with disabilities. And we will oppose the Council's disproportionate attention on Israel, which includes the Council's only standing agenda item targeting a single country.

Finally, we will press against the election of countries with egregious human rights records and encourage those committed to promoting and protecting human rights both in their own countries and abroad to seek membership. We hold others to our own standard: while we

may sometimes fall short of our own ideals, we must constantly strive to be as inclusive, rights respecting, and free as possible.

I am grateful to the UN Member States for their support today and for giving us this opportunity. We will take full advantage of our seat at the table. We look forward to getting to work.

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b. 46th Session

On March 24, 2021, the State Department issued a fact sheet on the key outcomes at the 46th session of the HRC. The fact sheet is reproduced below and available at https://www.state.gov/key-outcomes-at-the-46th-session-of-the-un-human-rights-council/.

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At the 46th Session of the UN Human Rights Council (HRC), February 22-March 23, the United States actively reengaged with the Council after a two-and-a-half-year absence and announced its candidacy for a member seat for the 2022-2024 term. With introspection about the United States' own human rights struggles, particularly in addressing systemic racism, we galvanized more than 155 members of the international community to join us in acknowledging the corrosive legacy of racism and racial discrimination and to proactively address this shameful legacy to make lasting progress. During HRC 46, the United States helped advance responses to dire human rights situations through resolutions, joint statements, and interventions including on: Belarus, Burma, Burundi, Egypt, Eritrea, Iran, Nicaragua, North Korea, Russia, Sri Lanka, Syria, Venezuela, South Sudan, and Yemen.

South Sudan: The United States rejoined the core group on South Sudan, also comprised of the United Kingdom, Norway, and Albania, to renew the mandate of the Commission on Human Rights in South Sudan for another year. The Commission is the only mechanism currently collecting and preserving evidence of violations of international humanitarian law and human rights abuses with a view to promoting accountability and addressing human rights and transitional justice issues in South Sudan from a holistic perspective. We stand ready, as ever, to work with the government of South Sudan and other regional partners to improve the lives of the South Sudanese people.

Burma: The United States co-sponsored a resolution led by the European Union that highlighted ongoing human rights concerns, including for Rohingya, and recalled developments since February 1. The United States, along with the core group, supported language that condemned the military's actions and expanded monitoring and reporting. The resolution also renewed the mandate of the Special Rapporteur and continued support for the Independent Investigative Mechanism for Myanmar. We continue to urge the military to restore the democratically elected government, release those unjustly detained, and refrain from violence against the people of Burma.

Sri Lanka: The United States co-sponsored a resolution led by the United Kingdom on "Promoting reconciliation, accountability, and human rights in Sri Lanka." The United States, in collaboration with the Sri Lanka Core Group and likeminded countries, worked to include a mandate for OHCHR to collect, analyze and preserve information and evidence and to develop possible strategies for future accountability processes for violations of human rights and international humanitarian law. We hope to continue working through UN mechanisms and partner countries to support this major step towards accountability.

Syria: The United States co-sponsored a resolution led by the United Kingdom, France, Germany, Italy, Jordan, Kuwait, Netherlands, Qatar, and Turkey that highlighted ongoing atrocities by the Assad regime in Syria and renewed the mandate of the Independent International Commission of Inquiry on Syria (COI). The United States successfully advocated to include a request for OHCHR to resume a civilian casualty count. Given that the 46th session of the HRC coincided with the 10th anniversary of the peaceful Syrian uprising, the United States reaffirmed the need for accountability, the release of those arbitrarily detained by the regime, and a political resolution to the conflict. The United States stands with Syrian survivors of the Assad regime's crimes and will continue to strongly support Syrian human rights defenders, the COI, the International Impartial Independent Mechanism for Syria, and other UN mechanisms and agencies as they document the regime's egregious abuses.

Belarus: The United States co-sponsored the EU resolution condemning the continuing human rights abuses in Belarus surrounding the fraudulent August 9, 2020 presidential election. The resolution calls for the immediate establishment of a strong OHCHR mandate, which would empower OHCHR to collect, preserve, and analyze evidence of human rights abuses surrounding the presidential election, identify those responsible for human rights violations, and provide recommendations on accountability and justice. This mandate enhances and complements the existing Special Rapporteur mandate.

Nicaragua: The United States cosponsored the resolution led by Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, Paraguay, and Peru on the promotion and protection of human rights in Nicaragua and collaborated with partners to reinforce the call for accountability for officials, security forces, and armed groups responsible for human rights abuses. We strongly supported the HRC's call for meaningful electoral reform in advance of November elections and respect for human rights and fundamental freedoms, including the unconditional release of all those arbitrarily or unlawfully detained.

The United States also cosponsored the **Iran** and **North Korea** resolutions which renewed the country-specific mandates for those Special Rapporteurs. In addition, the United States co-sponsored resolutions on technical assistance and capacity building in **Mali** and **Georgia**, which were run in cooperation with the countries involved and received widespread support.

The United States strongly opposed the "**Mutually Beneficial Cooperation in the Field of Human Rights**" resolution, led by China, which sought to promote an approach to human rights whereby States cooperate to advance the interests of governments over promoting and respecting the human rights and fundamental freedoms of individuals. Despite efforts by the United States and likeminded Member States to negotiate problematic language in Geneva, China did not respond constructively to our edits and the resolution passed by a vote (26 votes in favor, 15 votes against, 6 abstentions).

Thematic Issues: The United States co-sponsored resolutions on **Freedom of Religion or Belief; Albinism; Human Rights, Democracy, and the Rule of Law; Torture and Other**

Cruel, Inhuman or Degrading Treatment or Punishment; Economic, Social, and Cultural Rights; Privacy; and Least Developed Countries and Small Island Developing States Trust Fund decision.

Joint Statements: Overall, the United States led two joint statements and signed onto 12 thematic or country-specific joint statements. The United States led a Joint Statement on **Racism**, securing signatures from 156 countries, including all members of the Africa Group. The joint statement called on countries to take steps to address racism and racial discrimination, as well as examine and eliminate practices and policies that marginalize members of ethnic and racial minority groups. Fifty-three countries also co-sponsored a U.S.-led Joint Statement on **Human Rights Accountability**. This effort was prompted by a series of apparently coordinated statements by delegations insisting that states cannot interfere in the "domestic affairs" of others by criticizing their human rights records. The joint statement made clear that state sovereignty cannot be used as a shield to prevent scrutiny from the Council, and that states continue to have responsibility to protect human rights. We reinforced this sentiment by joining the statement of the Group of Friends for **Responsibility to Protect** for the first time in Geneva. We also joined statements on **Human Rights and COVID-19 Measures; Protection of Journalists; Ending Death Penalty as a Punishment for Blasphemy and Apostacy; and Human Rights of Migrants.**

For the first time since 2014, the United States also joined over 30 countries and cosponsored a Finland-led statement to express concern over the trajectory of human rights and fundamental freedoms, including freedom of expression, in **Egypt**. The United States also co-signed a Polish-led Joint Statement criticizing **Russia**'s ongoing attempts to silence its critics and attack independent media and civil society. In particular, the statement condemns Moscow's poisoning of prominent Kremlin critic Aleksey Navalny with the nerve agent Novichok and his and others' continuing unjust detention in Russia. The United States also signed onto country-specific joint statements on **Belarus, Venezuela, and Ethiopia.**

U.S. Universal Periodic Review (UPR): The HRC adopted the UPR outcome of the United States, the culmination of a multi-year process reviewing our domestic human rights record. The United States accepted in whole or in part 280 out of 347 recommendations it received from other UN Member States during the third cycle UPR, or approximately 81%. Acting DRL Assistant Secretary Lisa Peterson delivered remarks via pre-recorded video, outlining the U.S. approach to the recommendations received and further explaining the Biden Administration's priorities on racial justice, nondiscrimination, migration, climate change, and COVID-19 response, among others.

Agenda Item 7: The United States continues to oppose the HRC's one-sided and biased approach towards Israel through its stand-along Israel-specific Agenda Item 7. During HRC 46, two resolutions were merged under Agenda Item 2 (resolutions on accountability and the human rights situation in the Palestinian territories), leaving only three resolutions in Agenda Item 7 (Israeli Settlements, Self-Determination for Palestinians, and Human Rights in the Golan). The number of nations speaking against Israel during the Item 7 debate also decreased.

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On March 24, 2021, the United States provided a general statement at the end of the 46th session of the Human Rights Council ("HRC"), which included the U.S. legal position on resolutions. The end-of-session general statement is available at

https://geneva.usmission.gov/2021/03/24/46th-human-rights-council-end-of-session-statement/ and follows.

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On February 8, the United States was pleased to announce its re-engagement with the UN Human Rights Council (HRC) as an observer state following our withdrawal in June 2018. During the 46th session, the United States co-sponsored 17 resolutions on crucial human rights situations, from Belarus to South Sudan, from Myanmar to North Korea, and on important human rights issues, such as defending freedom of religion or belief. We delivered more than 40 national statements on key human rights concerns around the world, including condemning abuses in China, Iran, Russia, Sri Lanka, Syria, Venezuela, and Yemen, among others, and demanding accountability for those who violate or abuse human rights. We co-sponsored more than 12 joint statements, including a standalone joint statement on human rights abuses in Egypt. Most notably given our own history, we led the joint statement on Countering Racism and Racial Discrimination, which calls for a proactive approach to address systemic racism, both at home and abroad. This statement galvanized the global community to make real progress on stamping out the continuing evils of racism and garnered more than 155 co-signers.

We take this opportunity to elaborate on the statement the United States delivered during the HRC plenary on March 24, 2021, and to provide important points of clarification with respect to the resolutions that the United States co-sponsored during the 46th regular session and the 29th special session of the Human Rights Council. The 18 resolutions the United States co-sponsored at these two sessions are listed at the end of this statement.

As a general matter, we underscore that HRC resolutions are nonbinding documents that do not create rights or obligations under international law. HRC resolutions do not change the current state of conventional or customary international law and do not change the body of international law applicable to any particular situation discussed or referred to in a resolution. We do not read resolutions to imply that States must join or implement obligations under international instruments to which they are not a party, and any reaffirmation of prior instruments in these resolutions applies only to those States that affirmed them initially. We understand abbreviated references to certain human rights in HRC resolutions to be shorthand references for the more accurate and widely accepted terms used in the applicable treaties or the Universal Declaration of Human Rights, and we maintain our longstanding positions on those rights.

The United States strongly supports the condemnation of harassment, intimidation, gender-based violence, and other acts that can amount to human rights violations or abuses, but believes it is important for resolutions to accurately characterize these terms, consistent with U.S. law and our international obligations. We note that U.S. co-sponsorship of HRC resolutions does not imply endorsement of the views of special rapporteurs or other special procedures mandate-holders as to the contents or application of international law or U.S. obligations thereunder.

The United States does not accept that sanctions, in and of themselves, are tantamount to violations of human rights. Among other legitimate purposes, targeted sanctions can play an indispensable role in countering breaches of international law and in responding to human rights violations and abuses. The United States flatly rejects the notion that Zionism equals racism.

Specific Points of Clarification

2030 Agenda for Sustainable Development: The United States recognizes the 2030 Agenda as a voluntary global framework for sustainable development that can help put the world on a more sustainable and resilient path and advance 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. We support the 2030 Agenda and are committed to working toward the achievement of its Sustainable Development Goals. 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 institutions and processes, including negotiations, and does not prejudge or serve as precedent for decisions and actions underway in other fora. For example, the 2030 Agenda does not represent a commitment to provide new market access for goods or services. The Agenda also does not interpret or alter any World Trade Organization agreement or decision, including with respect to the Agreement on Trade-Related Aspects of Intellectual Property Rights. Further, citizen-responsive governance, including respect for human rights, sound economic policy and fiscal management, government transparency, and the rule of law, are essential to the implementation of the 2030 Agenda.

The "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.

Economic, Social, and Cultural Rights: 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.

Freedom of Expression and Freedom of Religion or Belief: The United States strongly supports the freedoms of expression and religion or belief. We oppose any attempts to unduly limit the exercise of these fundamental freedoms. We strongly believe that these fundamental freedoms are mutually reinforcing and that the protection of freedom of expression is critical for protecting freedom of religion or belief.

COVID-19-Related Measures: The International Covenant on Civil and Political Rights (ICCPR) sets forth the conditions for permissible restrictions on certain human rights, including that any such restrictions must be in conformity with law and necessary in a democratic society for, *inter alia*, the protection of public health. The language in these resolutions in no way alters or adds to those provisions, nor does it inform the United States' understanding of its obligations under the ICCPR. We also note that language in certain resolutions this session appears to construe emergency measures as meaning restrictive measures. However, not all measures responsive to this health emergency restrict the enjoyment of human rights; for example, many States, including the United States, have implemented measures aimed at improving care and providing economic support.

Justice and Accountability: The United States strongly supports calls for justice and accountability for human rights violations and abuses. We understand language regarding the responsibility of States to prosecute violations of international law and human rights abuses to

refer only to those actions that constitute criminal violations under applicable law and note that there are no such violations in some of the bodies of law referenced in certain HRC resolutions. Similarly, we read language regarding the responsibility to provide an effective remedy to apply to those whose human rights have been violated, as appropriate under applicable treaties.

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The United States greatly appreciates the close collaboration we enjoyed with numerous allies, partners, and likeminded countries during HRC 46. We look forward to continuing the effort to make lasting progress on promoting respect for human rights around the world; advancing these efforts intersessionally; preparing for the 47th Session of the HRC in June; pursuing our candidacy for a seat on the Council; and promoting the nomination of Professor Gay McDougall for the Committee on the Elimination of Racial Discrimination.

List of resolutions co-sponsored by the United States at the 46th Regular Session and the 29th Special Session of the Human Rights Council:

1. Promotion and protection of human rights in Nicaragua
2. Promoting reconciliation, accountability and human rights in Sri Lanka
3. Freedom of Religion or Belief
4. The right to privacy in the digital age
5. Question of the realization in all countries of economic, social and cultural rights
6. The enjoyment of human rights by persons with albinism (mandate renewal)
7. Torture and other cruel, inhuman or degrading treatment or punishment:
8. Human rights, democracy and the rule of law
9. Situation of human rights in Myanmar
10. Situation of human rights in the Democratic People's Republic of Korea
11. Situation of human rights in the Islamic Republic of Iran (Special Rapporteur mandate renewal)
12. Situation of human rights in the Syrian Arab Republic (Commission of Inquiry mandate renewal)
13. Situation of human rights in South Sudan (Human Rights Commission mandate renewal)
14. Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath
15. Technical assistance and capacity-building for Mali in the field of human rights
16. Cooperation with Georgia
17. 10th anniversary of the Voluntary Technical Assistance Trust Fund to support the Participation of Least Developed Countries and Small Island Developing States in the Work of the Human Rights Council
18. Human rights implications of the crisis in Myanmar (at the 29th Special Session)

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c. 47th Session

On July 14, 2021, the State Department issued a fact sheet summarizing key outcomes of the 47th session of the HRC. The fact sheet is available at https://www.state.gov/key-outcomes-at-the-47th-session-of-the-un-human-rights-council/ and excerpted below.

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At the 47th session of the UN Human Rights Council (HRC), June 21 – July 14, the United States pushed forward on priority issues as an observer state while actively pursuing election to the Council for the 2022-2024 term. We continued to model the integrity we intend to bring to Council leadership, recognizing that we are most credible and effective in our international engagement when we remain forthright about our own human rights struggles. During HRC 47, the United States helped advance resolutions, joint statements, and interventions responding to dire human rights situations.

Countering Systemic Racism: Building off the U.S.-led joint statement on racial justice at HRC 46, the United States looks forward to cooperating with a new mechanism on systemic racism to advance racial justice and equality in the context of law enforcement. We welcome the High Commissioner's report underscoring that systemic racism demands a systemic response and calling for an agenda that promotes accountability and redress for victims.

Elimination of Violence Against Women and Girls: The United States co-sponsored a resolution on "Accelerating efforts to eliminate all forms of violence against women and girls: preventing and responding to violence against women and girls with disabilities," led by Canada. The resolution urges stakeholders to address the multiple and intersecting forms of discrimination that women and girls with disabilities face. We also support the ongoing work of the Special Rapporteur on Violence Against Women, Dubravka Simonovic.

Human Rights on the Internet: The United States re-joined the core group and served as a main co-sponsor for a resolution on the promotion, protection, and enjoyment of human rights on the Internet, along with Sweden, Brazil, Nigeria, and Tunisia. The resolution affirms that the same rights people have offline must be protected online and includes thematic focuses on bridging the digital divide and the importance of the internet during the COVID-19 pandemic.

Ethiopia's Tigray Region: The United States co-sponsored the EU-led resolution on human rights in the Tigray region of Ethiopia, which calls for an immediate cessation of hostilities, the swift, verifiable withdrawal of Eritrean troops, and the holding accountable those responsible for human rights abuses and violations. The resolution builds upon the ongoing OHCHR-Ethiopian Human Rights Commission (EHRC) joint investigation, requests the High Commissioner keep the Council updated on progress of the joint investigation, and keeps the situation in Ethiopia's Tigray region on the HRC's agenda for upcoming sessions.

The United States also co-sponsored resolutions on the human rights situations in **Eritrea, Belarus, and Syria**, along with resolutions on the **Right to Education; Right to Education for Girls; Civil Society Space; Preventable Maternal Mortality and Morbidity; Human Rights of Migrants; New and Emerging Digital Technologies and Human Rights; and Technical Assistance and Capacity Building for Ukraine.**

Joint Statements: Overall, the United States signed onto 16 thematic or country-specific joint statements. The United States joined 43 countries in co-signing a Canada-led joint statement expressing concern over human rights abuses in **Xinjiang, Tibet, and Hong Kong**. The United States also signed onto country-specific joint statements on **Belarus, Iraq, Nicaragua,** and **Venezuela.** We led a statement on **the 10th anniversary of the UN Guiding Principles (UNGPs) on Business and Human Rights (BHR)**, signed by 50 countries**.** We supported a Norway-led joint statement reaffirming the UN's role in promoting and

defending **democracy**, which garnered signatures from 64 countries. We also joined statements on the **Freedom Online Coalition; announcing the creation of the Group of Friends on Sexual Orientation and Gender Identity; disinformation and freedom of expression; violence against transgender women; female genital mutilation; sexual and reproductive health and rights; promoting human rights through sport; and the economic rights of women.**

Side Events: On June 22, the United States co-hosted a side event on the global **#MeToo movement** with the Executive Director of Georgetown's Institute for Women, Peace, and Security, Melanne Verveer. On June 23, the United States led, and 20 countries co-sponsored, its **first-ever side event on the human rights of transgender women**, highlighting the violence and structural, legal, and intersectional barriers faced by transgender women of color. On July 1, the United States led a side event on the impact of **Hong Kong's National Security Law** on its one-year anniversary, garnering 20 government and nine NGO co-sponsors.

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On July 15, 2021, the United States posted online an end-of-session general statement on the 47th session of the HRC, which includes U.S. legal positions on resolutions from the session. The HRC 47 general statement appears below and is available at https://geneva.usmission.gov/2021/07/15/us-statement-hrc-47-end-of-session/.

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During the 47th session of the UN Human Rights Council (HRC), the United States co-sponsored 13 resolutions on crucial human rights situations including in Belarus, Eritrea, Ethiopia (Tigray), Syria, and Ukraine, and on important human rights issues, such as human rights on the internet, the negative impact of corruption on the enjoyment of human rights, efforts to eliminate violence against women and girls with disabilities, preventing maternal mortality and morbidity, and the human rights of migrants.

We delivered over 35 national statements on key human rights concerns around the world, including condemning abuses and calling for accountability in Belarus, Burma, Eritrea, Nicaragua, Syria, and Venezuela. Our joint statement on business and human rights—and the need for future efforts to build upon the success of the Guiding Principles on Business and human rights to enjoy genuine multistakeholder participation—garnered 50 co-sponsors from all regions of the world. We co-sponsored more than 16 Joint Statements, including a text we led with Norway reaffirming the UN's role in promoting and defending democracy, which garnered signatures from 64 countries. We joined 43 countries in co-signing a Canada-led joint statement expressing concern over the People's Republic of China's human rights abuses in Xinjiang, Tibet, and Hong Kong. We also joined statements on the Freedom Online Coalition, disinformation and freedom of expression, violence against transgender women, female genital mutilation, sexual and reproductive health and rights, business and human rights, sport and human rights, and economic rights of women. We pledge to cooperate with the new mandate on systemic racism and law enforcement created this session.

We take this opportunity to elaborate on the statement the United States delivered during the HRC plenary on July 14, 2021, and to provide important points of clarification with respect to the resolutions that the United States co-sponsored during the 47th session of the Human Rights Council. The 13 resolutions the United States co-sponsored at this session are listed at the end of this statement.

As a general matter, we underscore that HRC resolutions are nonbinding documents that do not create rights or obligations under international law. HRC resolutions do not change the current state of conventional or customary international law and do not change the body of international law applicable to any particular situation discussed or referred to in a resolution. We do not read references in resolutions to specific principles, including proportionality and precaution, to imply that States have an obligation under international law to apply or act in accordance with those principles. Nor do we read resolutions to imply that States must join or implement obligations under international instruments to which they are not a party, and any reaffirmation of prior instruments in these resolutions applies only to those States that affirmed them initially. We understand abbreviated references to certain human rights in HRC resolutions to be shorthand references for the more accurate and widely accepted terms used in the applicable treaties or the Universal Declaration of Human Rights, and we maintain our longstanding positions on those rights. We also reiterate our long-standing position that the International Covenant on Civil and Political Rights (ICCPR) applies only to individuals who are both within the territory of a State Party and subject to its jurisdiction.

The United States strongly supports the condemnation of harassment, gender-based violence, excessive use of force, and other acts that can amount to human rights violations or abuses, but believes it is important for resolutions to accurately characterize these terms, consistent with U.S. law and our international obligations. We note that U.S. co-sponsorship of HRC resolutions does not imply endorsement of the views of special rapporteurs or other special procedures mandate-holders as to the contents or application of international law or U.S. obligations thereunder. Finally, the United States understands joint statements are intended to express the common belief of the States issuing the statement and not to create any legal rights or obligations under international law.

Specific Points of Clarification

2030 Agenda for Sustainable Development: The United States recognizes the 2030 Agenda as a voluntary global framework for sustainable development that can help put the world on a more sustainable and resilient path and advance 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. We support the 2030 Agenda and are committed to working toward the achievement of its Sustainable Development Goals. 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 institutions and processes, including negotiations, and does not prejudge or serve as precedent for decisions and actions underway in other fora. For example, the 2030 Agenda does not represent a commitment to provide new market access for goods or services. The Agenda also does not interpret or alter any World Trade Organization agreement or decision, including with respect to the Agreement

on Trade-Related Aspects of Intellectual Property Rights. Further, citizen-responsive governance, including respect for human rights, sound economic policy and fiscal management, government transparency, and the rule of law, are essential to the implementation of the 2030 Agenda.

The "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.

Economic, Social, and Cultural Rights: As the International Covenant on Economic, Social, and Cultural Rights (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" and to guarantee, in accordance with Article 2(2), that the rights "will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." 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. Therefore, we believe that these resolutions should not try to define the content of those rights. The United States is not a party to the ICESCR, and the rights contained therein are not justiciable as such in U.S. courts.

COVID-19-Related Measures: The ICCPR sets forth the conditions for permissible restrictions on certain human rights, including that any such restrictions must be in conformity with law and necessary in a democratic society for, inter alia, the protection of public health. The language in these resolutions in no way alters or adds to those provisions, nor does it inform the United States' understanding of its obligations under the ICCPR. We also note that language in certain resolutions this session appears to construe emergency measures as meaning restrictive measures. However, not all measures responsive to this health emergency restrict the enjoyment of human rights; for example, many States, including the United States, have implemented measures aimed at improving care and providing economic support.

Justice and Accountability: The United States strongly supports calls for justice and accountability for human rights violations and abuses. We understand language regarding the responsibility of States to prosecute violations of international law and human rights abuses to refer only to those actions that constitute criminal violations under applicable law.

Right to Education: The United States strongly supports the realization of the right to education. As educational matters in the United States are primarily determined at the state and local levels, we understand that when resolutions call on States to strengthen various aspects of education, including with respect to access to quality education, curricula and textbooks, teacher training, materials, and methods, educational processes, and other areas and aspects of education, this is done in terms consistent with our respective federal, state, and local authorities. With respect to education references to private providers, we also understand them consistent with these respective authorities and underscore the importance of education as a public good but note that private providers can offer students a viable educational option. We support encouraging all providers to deliver education consistent with its importance as a public good and take seriously the responsibility of States to uphold legal standards and monitor and regulate education providers as appropriate.

Technology Transfer: The United States firmly considers that strong protection and enforcement of intellectual property provides critical incentives needed to drive the innovation that will address the health, environmental, and development challenges of today and tomorrow. The United States understands that references to dissemination of technology and transfer of, or access to, technology are to voluntary technology transfer on mutually agreed terms, and that all

references to access to information and/or knowledge are to information or knowledge that is made available with the authorization of the legitimate holder. The United States underscores the importance of regulatory and legal environments that support innovation.

Secretary-General's Call to Action for Human Rights: The United States supports the goals of the Secretary-General's Call to Action for Human Rights to the extent that it supports promotion of, respect for, and protection of human rights enshrined in international human rights law. To the extent that the Call to Action addresses "rights" that have no basis in international human rights law, the United States does not believe the Call to Action establishes rights under international law or otherwise creates any legal obligations on the part of Member States, nor does the United States support negotiation of a legally binding instrument on lethal autonomous weapons systems at this time.

International Humanitarian Law: The United States is deeply committed to promoting respect for international humanitarian law (IHL) and the protection of civilians in armed conflict. We note that IHL and international human rights law are in many respects complementary and mutually reinforcing. However, we understand that, with respect to references in these resolutions to both bodies of law in situations of armed conflict, such references refer to those bodies of law only to the extent that each is applicable. We do not necessarily understand references to conflict, IHL, or IHL terms of art in these resolutions to mean that, as a matter of law, an armed conflict exists in a particular country or to supplant States' existing obligations under IHL.

International Refugee Law: The United States strongly supports and advocates for the protection of refugees and other displaced persons around the world, and we urge all States to respect the principle of non-refoulement. In underscoring our support for this principle, we wish to clarify that U.S. international obligations with respect to non-refoulement are the provisions contained in Article 33 of the 1951 Convention relating to the Status of Refugees (applicable to the United States by its incorporation in the 1967 Protocol relating to the Status of Refugees) and in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. We note that we understand references to international refugee law in certain resolutions to be referring to the obligations of States under the relevant treaties to which they are party.

Sanctions: The United States does not accept that sanctions, in and of themselves, are tantamount to violations of human rights. Among other legitimate purposes, targeted sanctions can play an indispensable role in countering breaches of international law and in responding to human rights violations and abuses.

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The United States greatly appreciates the close collaboration we enjoyed with numerous allies, partners, and likeminded countries during HRC 47. We look forward to continuing the effort to make lasting progress on promoting respect for human rights around the world; advancing these efforts intersessionally; preparing for the 48th Session of the HRC in September; and pursuing our candidacy for a seat on the Council for the 2022-2024 term.

List of resolutions co-sponsored by the United States at the 47th Regular Session of the Human Rights Council:

Civil Society Space: The Road to Recovery and the Essential Role of Civil Society
Elimination of Violence Against Women and Girls
The Promotion, Protection, and Enjoyment of Human Rights on the Internet
The Right to Education

Realization of the Equal Enjoyment of the Right to Education by Every Girl
Preventable Maternal Mortality and Morbidity and Human Rights
The Human Rights of Migrants
New and Emerging Digital Technologies and Human Rights
The Situation of Human Rights in the Tigray Region of Ethiopia
The Situation of Human Rights in Eritrea
The Situation of Human Rights in Belarus
The Situation of Human Rights in the Syrian Arab Republic
Cooperation with and Assistance to Ukraine in the Field of Human Rights

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d. 48th Session

On October 12, 2021, the State Department issued a fact sheet summarizing key outcomes of the 48th session of the HRC. The fact sheet is excerpted below and available at https://www.state.gov/key-outcomes-at-the-48th-session-of-the-un-human-rights-council/. The U.S. Mission in Geneva also published the fact sheet on its website at https://geneva.usmission.gov/2021/10/12/key-outcomes-at-the-48th-session-of-the-un-human-rights-council/.

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At the 48th session of the UN Human Rights Council (HRC), September 13-October 11, the United States advanced country-specific and thematic actions to promote greater respect for the human rights and fundamental freedoms of women and girls, LGBTQI+ persons, indigenous persons, members of ethnic and religious minority groups, older persons, and other marginalized and vulnerable groups. The United States continued to support the Council's role of shining a spotlight on countries of concern and promoting accountability for governments that abuse human rights. We also condemned reprisals against human rights defenders. Placing human rights at the center of U.S. foreign policy, we pushed forward on key issues as an observer state, while actively pursuing election to the Council for the 2022-2024 term.

Afghanistan: The United States co-sponsored a resolution on the "Situation of human rights in Afghanistan" sponsored by Slovenia on behalf of the EU. The resolution establishes a Special Rapporteur to monitor the human rights situation in Afghanistan as it develops and expresses deep concern about the continued reports of human rights abuses in Afghanistan.

Burundi: The United States supported EU efforts to transition from a Commission of Inquiry to a Special Rapporteur in recognition of some improvements in the human rights situation in Burundi. The resolution ensures continued robust reporting on human rights violations and abuses in Burundi.

Syria: As part of the core group on Syria, the United States co-sponsored a resolution which addressed ongoing human rights violations and abuses in Syria, which included updated language on Dara'a and reiterated the urgent call for the release of arbitrarily held detainees. The United States welcomed the United Nations resuming its official accounting of

the deaths of hundreds of thousands of civilians in the conflict. The United States supported a side event with Syrian opposition and civil society groups on the urgent and dire situation for detainees.

Human Rights of Indigenous People: The United States co-sponsored a resolution presented by Guatemala and Mexico focused on the negative effects of the COVID-19 pandemic and the climate crisis on indigenous peoples. The resolution notes the importance of protecting indigenous women, girls, and human rights defenders against human rights abuses. It also requests a 2022 workshop on enhancing the participation of indigenous peoples in the work of the HRC.

Human Rights of Older Persons: The United States co-sponsored the older persons resolution, which highlights discrimination against older persons and the challenges they face with regard to accessibility, education, employment, food security, health care, participation in broader society, and violence, abuse, and neglect.

Mandate of the Special Rapporteur on Climate Change: The United States is committed to global action to tackle the climate crisis. We look forward to engaging constructively with the newly created special rapporteur on the promotion and protection of human rights in the context of climate change.

Yemen: We support the UN-led efforts to end the conflict in Yemen. The Group of Eminent Experts' documentation helps ensure that a peace process includes diverse Yemeni voices and perspectives. We are disappointed that the HRC failed to renew the GEE for Yemen mandate, which provided accurate and critical reporting on human rights abuses in Yemen. The United States will continue to support accountability for Yemen, and the UN-led process to end the conflict in Yemen, and for inclusive peace efforts that include diverse Yemeni perspectives. Accountability for human rights abuses is critical to lasting peace, and we will seek a new UN mandate on accountability for Yemen.

The United States also co-sponsored resolutions on the human rights situation in **Somalia**, along with resolutions on **Equal Participation in Political and Public Affairs; Consequences of Child, Early, and Forced Marriage; Technical Cooperation and Capacity Building in the Field of Human Rights;** and **Cooperation with the UN in the Field of Human Rights.**

The United States strongly opposed several resolutions which sought to introduce vague language with no agreed meaning that implies human rights are held by groups rather than individuals, undermining respect for human rights and long-standing frameworks in the United Nations system. These resolutions undermine the HRC's focus on the universality of human rights and fundamental freedoms by subordinating individually held human rights to development and economic progress.

Joint Statements: The United States signed onto 12 thematic or country-specific joint statements. The United States also led a joint statement co-signed by 48 countries expressing concern over human rights abuses in **Ethiopia's Tigray region** and joined over 40 countries in co-signing a UK-led joint statement on the expulsion of seven UN representatives from Addis Ababa. We also joined **47 countries** on another EU-led joint statement on **Afghanistan. Additionally,** we signed onto country-specific joint statements on **Nicaragua,** and two statements **condemning Russia's purported annexation and temporary occupation of Ukraine's sovereign territory in Crimea**: We also joined statements on **Anti-Semitism; the Diversity of Families;** two statements each on **Special Procedures** and **the Responsibility to Protect; Rights of Intersex Individuals; and Women,**

Peace, and Diplomacy. To mark Sudan's transition off the agenda of the HRC, we signed a UK-led statement commending progress achieved on human rights in the past two years and encouraging other States to take a similar approach.

Side Events: We also participated in the side events on **Syria addressing those detained and disappeared** on September 29 and on the **Role of Media in the Human Rights Council** on September 30.

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On October 13, 2021, the United States provided a general statement at the end of the 48th session of the Human Rights Council. The statement is available at https://geneva.usmission.gov/2021/10/13/un-human-rights-council-48th-end-of-session-general-statement/?_ga=2.83195030.1256323148.1638456108-935910213.1582658717 and follows.

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During this 48th session of the UN Human Rights Council (HRC), the United States co-sponsored 11 resolutions on human rights situations in Afghanistan, Burundi, Somalia, Syria, Yemen, and on important human rights issues, such as Equal Participation in Political and Public Affairs; Consequences of Child, Early, and Forced Marriage; Human Rights of Indigenous People; Human Rights of Older Persons; Technical Cooperation and Capacity Building in the Field of Human Rights; and Cooperation with the UN in the Field of Human Rights. We look forward to engaging constructively with the newly created special rapporteur on the promotion and protection of human rights in the context of climate change. The United States is deeply disappointed that the HRC failed to renew the Group of Eminent Experts mandate in Yemen, which has provided accurate, critical reporting on human rights abuses. The United States also continues to push back against delegations insisting that states cannot interfere in the "domestic affairs" of others by criticizing their human rights records. Professed concerns about sovereignty cannot be used as a shield to prevent scrutiny from the Council, and states have a responsibility to promote and protect human rights.

We delivered more than 38 national statements on key concerns around the world, including condemning abuses and calling for accountability in Afghanistan, Burundi, Myanmar, Nicaragua, South Sudan, Syria, Ukraine, Venezuela, and Yemen. We also co-signed more than 14 joint statements, including a statement on Nicaragua and two statements condemning Russia's attempted annexation and temporary occupation of Crimea, as well as thematic human rights issues, such as Anti-Semitism; the Diversity of Families; the Human Rights of Intersex Individuals; Special Procedures; the Responsibility to Protect; and Women, Peace, and Diplomacy. The United States led a joint statement co-signed by 48 countries expressing concern over human rights abuses in Northern Ethiopia, including the Tigray region, and joined over 40 countries in co-signing a UK-led statement on the expulsion of seven senior UN representatives from Addis Ababa. We also joined 47 countries in a EU-led joint statement on Afghanistan.

We take this opportunity to provide important points of clarification with respect to certain resolutions adopted by the Human Rights Council at its 48th regular session, in particular

the resolutions that the United States co-sponsored. The 11 resolutions the United States co-sponsored at this session are listed at the end of this statement.

As a general matter, we underscore that HRC resolutions are nonbinding documents that do not create rights or obligations under international law. HRC resolutions do not change the current state of conventional or customary international law and do not change the body of international law applicable to any particular situation discussed or referred to in a resolution. We do not read references in resolutions to specific principles, including proportionality, to imply that States have an obligation under international law to apply or act in accordance with those principles. Nor do we read resolutions to imply that States must join or implement obligations under international instruments to which they are not a party; any reaffirmation of prior instruments in these resolutions applies only to those States that affirmed them initially. We understand abbreviated references to certain human rights in HRC resolutions to be shorthand references for the more accurate and widely accepted terms used in the applicable treaties or the Universal Declaration of Human Rights, and we maintain our long-standing positions on those rights. We also reiterate our long-standing position that the International Covenant on Civil and Political Rights (ICCPR) applies only to individuals who are both within the territory of a State Party and subject to its jurisdiction.

The United States strongly supports the condemnation of harassment, gender-based violence, and other acts that can amount to human rights violations or abuses, but believes it is important for resolutions to accurately characterize these terms, consistent with U.S. law and our international obligations. We note that U.S. co-sponsorship of HRC resolutions does not imply endorsement of the views of special rapporteurs or other special procedures mandate-holders as to the contents or application of international law or U.S. obligations thereunder. Finally, the United States understands joint statements are intended to express the common belief of the States issuing the statement and not to create any legal rights or obligations under international law, nor necessarily to constitute statements of legal views.

Specific Points of Clarification

2030 Agenda for Sustainable Development (2030 Agenda): The United States recognizes the 2030 Agenda as a voluntary global framework for sustainable development that can help put the world on a more sustainable and resilient path and advance 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. We support the 2030 Agenda and are committed to working toward the achievement of its Sustainable Development Goals. 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 institutions and processes, including negotiations, and does not prejudge or serve as precedent for decisions and actions underway in other fora. For example, the 2030 Agenda does not represent a commitment to provide new market access for goods or services. The Agenda also does not interpret or alter any World Trade Organization agreement or decision, including with respect to the Agreement on Trade-Related Aspects of Intellectual Property Rights. Further, citizen-responsive governance, including respect for human rights, sound economic policy and fiscal management,

government transparency, and the rule of law, are essential to the implementation of the 2030 Agenda.

The "Right to Development": The "right to development," is not recognized in any of the core UN human rights conventions, and, in any case, does not have an agreed international meaning.

Economic, Social, and Cultural Rights: As the International Covenant on Economic, Social, and Cultural Rights (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 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. Therefore, we believe that these resolutions should not try to define the content of those rights. The United States is not a party to the ICESCR, and the rights contained therein are not justiciable as such in U.S. courts.

COVID-19-Related Measures: The ICCPR sets forth the conditions for permissible restrictions on certain human rights, including that any such restrictions must be in conformity with law and necessary in a democratic society for, inter alia, the protection of public health. The language in these resolutions in no way alters or adds to those provisions, nor does it inform the United States' understanding of its obligations under the ICCPR.

COVID-19 Vaccine Access: We continue to promote global cooperation, for example, by hosting the September 22 Global COVID-19 Summit at which the United States announced a commitment to supply an additional 500 million doses, boosting our global commitment to 1.1 billion doses. The United States wishes to clarify that we are trying to facilitate access to safe and effective COVID-19 vaccines, therapeutics, and diagnostics. Multilateral and regional efforts to improve global access should rely on products that have been listed for emergency use or prequalified by the World Health Organization, or that have been authorized by stringent regulatory authorities, such as the Food and Drug Administration or European Medicines Agency. Unsafe, ineffective, or fake vaccine products could have adverse public health consequences and undermine confidence in the global response effort and in safe and effective COVID-19 tools.

Global Public Goods: The United States understands that references to immunization against COVID-19 as a global public good for health refer to the global public health benefit resulting from extensive immunization of the global population.

Access and Communication with International Bodies: The "right to unhindered access to and communication with international bodies," which is not recognized in any of the core UN human rights conventions, does not have an agreed international meaning. We note that the United Nations and other international bodies have a wide array of policies, rules, and regulations that may be appropriate in placing limitations on access to those bodies. We likewise note that States hosting regional and international bodies and mechanisms have applicable laws, including immigration laws, and processing requirements that may be appropriate in placing limitations on entry into those States. Therefore, we believe that these resolutions should not try to define in a general manner access to such bodies.

Justice and Accountability: The United States strongly supports calls for justice and accountability for human rights violations and abuses. We understand language regarding the responsibility of States to prosecute those responsible for violations of international law and human rights abuses to refer only to those actions that constitute criminal violations under

applicable law, and understand references to State "obligations" to prosecute in light of applicable international obligations.

Right to Education: The United States strongly supports the realization of the right to education. As educational matters in the United States are primarily determined at the state and local levels, we understand that when resolutions attempt to define or prescribe various aspects of education, or call on States to strengthen or modify them, this is done in terms consistent with our respective federal, state, and local authorities. Such aspects of education include, but are not limited to: quality education; curricula and textbooks; teacher training; materials and methods; educational policies, programs, and processes; and other areas and aspects of education.

Technology Transfer: The United States firmly considers that strong protection and enforcement of intellectual property provides critical incentives needed to drive the innovation that will address the health, environmental, and development challenges of today and tomorrow. The United States understands that references to dissemination of technology and transfer of, or access to, technology are to voluntary technology transfer on mutually agreed terms, and that all references to access to information and/or knowledge are to information or knowledge that is made available with the authorization of the legitimate holder. The United States underscores the importance of regulatory and legal environments that support innovation.

International Humanitarian Law: The United States is deeply committed to promoting respect for international humanitarian law (IHL) and the protection of civilians in armed conflict. We note that IHL and international human rights law are in many respects complementary and mutually reinforcing. However, we understand that, with respect to references in these resolutions to both bodies of law in situations of armed conflict, such references refer to those bodies of law only to the extent that each is applicable. We do not necessarily understand references to conflict, IHL, or IHL terms of art in these resolutions to mean that, as a matter of law, an armed conflict exists in a particular country or to supplant States' existing obligations under IHL.

International Refugee Law: The United States strongly supports and advocates for the protection of refugees and other displaced persons around the world, and we urge all States to respect the principle of non-refoulement, while also supporting safe, dignified, and sustainable repatriation or return of migrants ineligible to remain. In underscoring our support for this principle, we wish to clarify that U.S. international obligations with respect to non-refoulement are the provisions contained in Article 33 of the 1951 Convention relating to the Status of Refugees (applicable to the United States by its incorporation in the 1967 Protocol relating to the Status of Refugees) and in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. We note that we understand references to international refugee law in certain resolutions to be referring to the obligations of States under the relevant treaties to which they are party.

Recognition of a Right to a Clean, Healthy, and Sustainable Environment: The United States is committed to taking ambitious action to address environmental challenges, including continuing our work with international partners to share our experience with concrete domestic actions to protect the environment. We also recognize that climate change and environmental degradation impact the enjoyment of human rights and affirm that when taking action to address environmental challenges and climate change, States should respect their respective human rights obligations. Nevertheless, the United States has consistently reiterated that there are no universally-recognized human rights specifically related to the environment, and we do not believe there is a basis in international law to recognize a "right to a clean, healthy,

and sustainable environment," either as an independent right or a right derived from existing rights. Furthermore, we do not consider the resolution introduced in this session recognizing a right to clean, healthy and sustainable environment to be an appropriate means of attempting to elaborate a new and undefined right, and we do not see this resolution as altering the content of international law or establishing a precedent in other fora.

References to Human Rights "Violations" in Connection with Non-State Actors: The United States notes that generally only States have obligations under international human rights law and, therefore, the capacity to commit violations of human rights. References in HRC resolutions to human rights "obligations" in connection with non-State actors, or "violations" of human rights by such actors – including in the resolution on the situation of human rights in Afghanistan–should not be understood to imply recognition by the United States or any other State that such actors constitute a government or bear obligations under the international human rights treaties to which the State is a party. Nevertheless, the United States remains committed to promoting accountability for human rights abuses by non-state actors.

UN Declaration on the 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 the 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.

Sanctions: The United States does not accept that sanctions, in and of themselves, are tantamount to violations of human rights. Among other legitimate purposes, targeted sanctions can play an indispensable role in responding to human rights violations and abuses and threats to peace and security.

The United States greatly appreciates the close collaboration we enjoyed with numerous allies, partners, and likeminded countries during HRC 48. We look forward to continuing the effort to make lasting progress on promoting respect for human rights around the world; advancing these efforts intersessionally; preparing for the 49th Session of the HRC; and pursuing our candidacy for a seat on the Council for the 2022-2024 term.

List of resolutions co-sponsored by the United States at the 48th Regular Session of the Human Rights Council:

Situation of Human Rights in Afghanistan
Situation of Human Rights in Burundi
Assistance to Somalia in the Field of Human Rights
Situation of Human Rights in the Syrian Arab Republic
Situation of Human Rights in Yemen
Human Rights of Indigenous Peoples
Human Rights of Older Persons
Equal Participation in Political and Public Affairs
Consequences of Child, Early, and Forced Marriage
Technical Cooperation and Capacity Building in the Field of Human Rights
Cooperation with the UN in the Field of Human Rights

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6. Country-specific Issues

a. Ethiopia

On April 2, 2021, the foreign ministers of the G7 (Canada, France, Germany, Italy, Japan, the United Kingdom and the United States of America and the High Representative of the European Union) issued a joint statement on the situation in Tigray, Ethiopia. The joint statement appears below, and as a State Department media note at https://www.state.gov/g7-foreign-ministers-statement-on-the-situation-in-tigray-ethiopia.

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We, the G7 Foreign Ministers of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States of America and the High Representative of the European Union are strongly concerned about recent reports on human rights violations and abuses and violations of international humanitarian law in Tigray.

We condemn the killing of civilians, sexual and gender-based violence, indiscriminate shelling and the forced displacement of residents of Tigray and Eritrean refugees. All parties must exercise utmost restraint, ensure the protection of civilians and respect human rights and international law.

We recognize recent commitments made by the Government of Ethiopia to hold accountable those responsible for such abuses and look forward to seeing these commitments implemented.

We note that the Ethiopian Human Rights Commission (EHRC) and the Office of the United Nations High Commissioner for Human Rights (OHCHR) have agreed to conduct a joint investigation into the human rights abuses committed by all parties in the context of the Tigray conflict. It is essential that there is an independent, transparent and impartial investigation into the crimes reported and that those responsible for these human rights abuses are held to account.

We urge parties to the conflict to provide immediate, unhindered humanitarian access. We are concerned about worsening food insecurity, with emergency conditions prevailing across extensive areas of central and eastern Tigray.

We welcome the recent announcement from Prime Minister Abiy that Eritrean forces will withdraw from Tigray. This process must be swift, unconditional and verifiable.

We call for the end of violence and the establishment of a clear inclusive political process that is acceptable to all Ethiopians, including those in Tigray and which leads to credible elections and a wider national reconciliation process.

We the G7 members stand ready to support humanitarian efforts and investigations into human rights abuses.

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On November 6, 2021, Australia, Belgium, Canada, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, the Netherlands, New Zealand, Norway, Sweden, the United Kingdom and the United States issued a joint statement commending the Office of the United Nations High Commissioner for Human Rights ("OHCHR") and the Ethiopian Human Rights Commission ("EHRC") for their joint effort to investigate allegations of human rights violations and abuses, and of serious violations of international humanitarian law and international refugee law, committed by parties to the conflict in the Tigray region of Ethiopia between November 3, 2020, and June 28, 2021. The joint statement is available as a State Department media note at https://www.state.gov/joint-statement-on-the-release-of-the-ohchr-ehrc-joint-investigation/, and excerpted below.

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Notwithstanding the considerable challenges faced in gaining access to places, people and documentation, we commend OHCHR and EHRC for their impartial and transparent work. We also underscore the value of the investigation's collection and documentation of human rights abuses and violations, and violations of international humanitarian law, for the purpose of supporting justice and accountability on behalf of victims and survivors. We underscore the concern expressed by High Commissioner Bachelet regarding continued restrictions on access for humanitarian organizations.

It is imperative to ensure meaningful and systematic accountability of those responsible for such abuses and violations. The report demonstrates the need for further investigations into abuses and violations documented in the report as well as into allegations arising since June 28, 2021.

The findings of the investigation included in the joint report are grave, and there are reasonable grounds to believe that abuses and violations of human rights, and violations of international humanitarian law, such as those involving attacks on civilians and civilian objects, unlawful or extra-judicial killings and executions, torture and other forms of ill-treatment, arbitrary detention, abductions and enforced disappearances, and sexual and gender-based violence, have taken place. The authors of the report conclude that some of these violations and abuses may amount to crimes against humanity and war crimes. These acts have resulted in suffering and distress as well as an atmosphere of terror and widespread fear among the civilian population. The report highlights widespread impunity for those responsible for these acts and lack of access to support for those who have been targeted, as well as for witnesses.

We strongly encourage all parties to the conflict to accept and implement the findings and recommendations. It is critical that all those responsible for violations and abuses of human rights and violations of international humanitarian law referenced in the report are held to account, and the governments of Ethiopia and Eritrea should ensure there are credible investigations.

In that regard, we acknowledge the Government of Ethiopia's commitment to provide redress to victims of the violations and abuses identified in the report, noting, in particular, the need for redress and support for victims of gender-based atrocities. We urge a similar

commitment be made by the Government of Eritrea and the Tigray People's Liberation Front, and all other parties to the conflict.

We also welcome the Government of Ethiopia's commitment to a transitional justice process and its decision to establish a special prosecutor's office and a dedicated judicial bench to oversee cases involving defendants accused of committing the violations referenced in the joint report.

All parties must comply with their obligations under international humanitarian law, including with respect to the protection of civilians and humanitarian personnel. We also call for the immediate withdrawal of Eritrean forces in Ethiopia and underline the need for the Government of Eritrea to ensure accountability for violations and abuses committed by its forces in Tigray.

Truth, justice and accountability for victims and survivors requires more than investigations and prosecutions. We call on governing authorities to expand health services for survivors, including psychological support and sexual and reproductive health care, and support for community-based care, including by ceasing actions that continue to hinder humanitarian access. We reiterate our call for an inclusive national dialogue, which includes the full, equal and meaningful participation of women and youth, peacebuilders and community leaders.

Now, more than ever, the findings in the report make it abundantly clear that, as the war in northern Ethiopia rages on, the human toll of the conflict will continue to mount, not only through the conflict but also through starvation. As the risk of further atrocities increases, we call on all parties to immediately cease hostilities, end impunity for attacks on humanitarian personnel, and cease other actions that continue to hinder the delivery of urgent life-saving assistance to the people impacted. All parties must enter into negotiations without preconditions on a durable ceasefire and commit to achieving a durable peace, underscored by justice and accountability, that will enable future efforts towards reconciliation. Justice and accountability are crucial components of sustainable peace.

We support the stability, unity and territorial integrity of Ethiopia. We look forward to working with the African Union's High Representative for the Horn of Africa and with the United Nations in efforts to cease hostilities, end impunity and support a lasting solution to issues of peace and security.

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On December 6, 2021, the State Department issued as a media note, available at https://www.state.gov/joint-statement-on-detentions-in-ethiopia/, the joint statement on detentions in Ethiopia signed by the governments of Australia, Canada, Denmark, the Netherlands, the United Kingdom, and the United States. The joint statement is excerpted below.

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We… are profoundly concerned by recent reports of the Ethiopian government's detention of large numbers of Ethiopian citizens on the basis of their ethnicity and without charge. The Ethiopian government's announcement of a State of Emergency on November 2 is no justification for the mass detention of individuals from certain ethnic groups.

Reports by the Ethiopian Human Rights Commission (EHRC) and Amnesty International describe widespread arrests of ethnic Tigrayans, including Orthodox priests, older people, and mothers with children. Individuals are being arrested and detained without charges or a court hearing and are reportedly being held in inhumane conditions. Many of these acts likely constitute violations of international law and must cease immediately. We urge unhindered and timely access by international monitors.

We reiterate our grave concern at the human rights abuses and violations, such as those involving conflict related sexual violence, identified in the joint investigation report by the Office of the United Nations High Commissioner for Human Rights and the EHRC, and at ongoing reports of atrocities being committed by all parties to the conflicts. All parties must comply with their obligations under international humanitarian law, including those regarding the protection of civilians and humanitarian and medical personnel.

It is clear that there is no military solution to this conflict, and we denounce any and all violence against civilians, past, present and future. All armed actors should cease fighting and the Eritrean Defense Forces should withdraw from Ethiopia. We reiterate our call for all parties to seize the opportunity to negotiate a sustainable ceasefire without preconditions. Fundamentally, Ethiopians must build an inclusive political process and national consensus through political and legal means, and all those responsible for violations and abuses of human rights must be held accountable.

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b. Afghanistan

On August 24, 2021, Under Secretary of State for Civilian Security, Democracy, and Human Rights Uzra Zeya delivered the U.S. statement at the special session of the Human Rights Council on the serious human rights concerns and situation in Afghanistan. Under Secretary Zeya's statement is excerpted below and available at https://geneva.usmission.gov/2021/08/24/special-session-on-afghanistan/?_ga=2.184317862.1256323148.1638456108-935910213.1582658717.

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The United States welcomes the Council's urgent attention on the dire human rights situation in Afghanistan and thanks the OIC for its efforts.

The protection of civilians, including women and girls, academics, journalists, human rights defenders, and members of ethnic, religious, and other minority groups, must remain paramount. We condemn attacks on them and those seeking to aid them, including UN staff and humanitarian aid providers. Such attacks must stop immediately, and all Afghan nationals and foreign nationals who wish to depart must be allowed to do so safely

Hard-won advancements in respect for human rights and fundamental freedoms over the last twenty years – particularly for women and members of minority groups – must be maintained.

We call on all parties to allow safe, unhindered access for humanitarian personnel and agencies to provide life-saving assistance to the increasing number of Afghans in need.

A sustainable end to the conflict in Afghanistan can only be achieved through an inclusive, just, and durable political settlement that upholds the human rights of all Afghans.

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c. Burma

On February 12, 2021, Chargé d'Affaires Mark Cassayre delivered the U.S. statement at the HRC special session on the human rights implications of the crisis in Myanmar. The U.S. statement is available at https://geneva.usmission.gov/2021/02/12/us-statement-at-the-hrc-special-session-on-the-human-rights-implications-of-the-crisis-in-myanmar/ and includes the following:

> The United States condemns the military's February 1 coup against the democratically-elected government of Myanmar. We stand with the people of Myanmar in calling for the immediate restoration of the country's democratic institutions.
>
> We ask all Council members to join the United States and others to:
>
> 1. Urge the military to immediately release all those unjustly detained, including politicians, civil society representatives, journalists, foreign nationals, and human rights defenders.
>
> 2. Urge the military and police to restore power to the democratically-elected government, demonstrate respect for human rights and fundamental freedoms, and refrain from further violence against peaceful protesters.
>
> 3. Urge the military to lift all restrictions on access to information, including by maintaining telecommunications and internet access.
>
> 4. Join us in promoting accountability for those responsible for the coup, including through targeted sanctions.

d. Sudan

On November 5, 2021, Robert J. Riley delivered the U.S. statement at a special session of the HRC on human rights concerns and the situation in Sudan. The statement follows, and is available at https://geneva.usmission.gov/2021/11/05/special-session-of-the-human-rights-council-on-sudan/?_ga=2.116726918.1256323148.1638456108-935910213.1582658717.

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The United States strongly supports this special session and condemns the Sudanese military takeover. Sudan's human rights situation and democratization was on a positive trajectory before the military takeover.

We call for the immediate restoration of Sudan's civilian-led transitional government, including a return to the transitional framework laid out in the 2019 Constitutional Declaration and the 2020 Juba Peace Agreement.

We also call for the safety and immediate release of those detained in connection with the military takeover, including release of Prime Minister Hamdok from de facto house arrest.

Lastly, we call on the Military and associated security forces to refrain from any further violence against peaceful protestors, including the use of lethal force, allow unhindered access to medical care, and to restore the Internet.

The United States remains inspired by the Sudanese people's unwavering demand for liberty, peace, and justice. We will continue our full-throttle efforts to support their democratic aspirations.

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e. China's policies in Xinjiang

On October 21, 2021, France delivered a joint statement on behalf of a cross-regional group, including the United States, on the human rights situation in Xinjiang. The statement was published online on the website of the U.S. Mission to the UN at https://usun.usmission.gov/cross-regional-joint-statement-on-the-human-rights-situation-in-xinjiang/. The joint statement of Albania, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Eswatini, Finland, France, Germany, Honduras, Iceland, Ireland, Italy, Japan, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Marshall Islands, Monaco, Montenegro, Nauru, Netherlands, New Zealand, Northern Macedonia, Norway, Palau, Poland, Portugal, San Marino, Slovakia, Slovenia, Spain, Sweden, Turkey, United Kingdom, and the United States follows.

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We are particularly concerned about the situation in the Xinjiang Uyghur Autonomous Region.

Credible-based reports indicate the existence of a large network of "political re-education" camps where over a million people have been arbitrarily detained. We have seen an increasing number of reports of widespread and systematic human rights violations, including reports documenting torture or cruel, inhuman and degrading treatment or punishment, forced sterilization, sexual and gender-based violence, and forced separation of children. There are severe restrictions on freedom of religion or belief and the freedoms of movement, association and expression as well as on Uyghur culture. Widespread surveillance disproportionately continues to target Uyghurs and members of other minorities.

We also share the concerns expressed by UN Special Procedures in their 29 March statement and the letter published by UN experts describing collective repression of religious and ethnic minorities.

We thus call on China to allow immediate, meaningful and unfettered access to Xinjiang for independent observers, including the UN High Commissioner for Human Rights and her Office, and relevant special procedure mandate holders, as well as to urgently implement CERD's eight recommendations related to Xinjiang. We welcome the High Commissioner's announcement to present her findings to date and encourage publication as soon as possible. In view of our concerns about the human rights situation in Xinjiang, we call on all countries to respect the principle of non-refoulement. We also call on China to ratify without delay the ICCPR.

We urge China to ensure full respect for the rule of law and to comply with its obligations under national and international law with regard to the protection of human rights.

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B. DISCRIMINATION

1. Race

a. CERD Report

On June 2, 2021, the United States submitted a report containing its combined tenth, eleventh, and twelfth periodic reports to the Committee on the Elimination of Racial Discrimination ("CERD"). The report contains input from over a dozen federal agencies, and sets forth U.S. undertakings under the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), along with related measures to address racial discrimination, from the date of the last U.S. report in 2013 through the present. The report is available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fUSA%2f10-12&Lang=en.

b. Joint Statement on Racism

On March 19, 2021, Acting Secretary of State for Democracy, Human Rights and Labor Lisa Peterson delivered a cross-regional joint statement at the HRC on countering racism and racial discrimination, which was joined by 156 states. The joint statement on racism follows and is available at https://geneva.usmission.gov/2021/03/19/joint-statement-on-racism/.

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Madame President, I have the honor to deliver this cross-regional statement on behalf of more than 150 states.*

Countering racism and racial discrimination, xenophobia, and related intolerance, and tackling racial inequality, are challenges faced by every State, which can be overcome through solidarity and cooperation.

The ongoing pandemic has exposed and exacerbated many longstanding inequities. As protests have reminded us, the pursuit of racial justice and equality demands vigilance, not complacency. As Nelson Mandela urged in his 1994 address to the General Assembly, "The very fact that racism degrades both the perpetrator and the victim commands that, if we are true to our commitment to protect human dignity, we fight on until victory is achieved."

Combatting racism and racial discrimination means acknowledging and addressing the legacy of past transgressions, which often manifest themselves in systemic racism. In many cases, it means actively reviewing and revising long-standing practices and policies to ensure they treat all individuals equally. It requires a proactive, systematic approach to embedding fairness and inclusivity in decision-making processes, and redressing inequities in policies that serve as barriers to equal opportunity. It means eliminating barriers to political participation and, in doing so, strengthening the foundations of democracy.

We welcome the efforts of UN entities, such as the special procedures, UN Committee on the Elimination of Racial Discrimination, and OHCHR, to address the issue of racism and racial discrimination, including police brutality against Africans, people of African descent, and persons belonging to other marginalized populations, as well as the effects of racial discrimination in propagating inequality. We also welcome the High Commissioner's statement that the implementation of HRC 43/1 will reflect and amplify the voices of victims, their families, and communities.

Recalling the twentieth anniversary of the adoption of the Durban Declaration and Program of Action, we are committed to working within our nations and with the international community to address and combat racism, racial discrimination, xenophobia, and related intolerance, while upholding freedom of expression. Moreover, we call upon all states to ratify and fully implement the ICERD.

A great deal more needs to be done; many of our own countries suffer from historical inequities that, decades and even centuries later, still cast long shadows over the present day. But we believe that with resolve and cooperation, we can make a lasting difference globally.

*** Signatories (at time of delivery):**

Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Benin, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cabo Verde, Cameroon, Canada, Central African Republic, Chad, Chile, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czechia, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Eswatini, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau, Guyana, Honduras, Hungary, Iceland, India, Indonesia, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Federal States of Micronesia, Moldova, Monaco, Montenegro, Morocco, Mozambique, Namibia, Netherlands, New Zealand, Niger, Nigeria, North Macedonia, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Rwanda, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Sao Tome and Principe,

Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Somalia, South Africa, South Sudan, Spain, Sudan, Suriname, Sweden, Switzerland, United Republic of Tanzania, Thailand, Timor-Leste, Togo, Tunisia, Turkey, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States of America, Uruguay, Uzbekistan, Vanuatu, Zambia, and Zimbabwe

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c. Election of Gay McDougall to the CERD

On June 24, 2021, a press statement by Secretary Blinken welcomed the election of Gay McDougall to the UN Committee on the Elimination of Racial Discrimination. The statement follows and is available at https://www.state.gov/the-election-of-gay-mcdougall-to-the-un-committee-on-the-elimination-of-racial-discrimination/.

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I would like to congratulate law professor Gay McDougall on her election as an independent expert to serve on the UN Committee on the Elimination of Racial Discrimination (CERD). Advancing racial equity and justice is a top priority for the United States, and in our pursuit of those ideals at home and around the world, the United States was proud to nominate her to serve a third term on the Committee.

The Committee is an important UN platform for addressing global systemic racism. It is charged with the critical work of monitoring 182 States parties' compliance with their treaty obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The United States takes our ICERD treaty obligations seriously and submitted our outstanding reports to the CERD Committee on June 2.

Professor McDougall is a globally acclaimed expert in international human rights law, a Fordham University law professor, and will serve as a principled and independent voice on the Committee. She has successfully served on this Committee in the past, and I am confident she will continue to bring the important perspective of American jurisprudence towards the goal of eliminating global and systemic racism.

* * * *

d. Secretary Blinken's Statement on Ending Systemic Racism

On July 13, 2021, Secretary Blinken issued a press statement on U.S. leadership on human rights and ending racism. https://www.state.gov/u-s-leadership-on-human-rights-and-ending-systemic-racism/.

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This Administration is deeply dedicated to addressing racial injustice and inequities at home and abroad. On the global stage, the United States is leading by example.

Last month, the UN's High Commissioner for Human Rights released a report on racism and police brutality against Africans and people of African descent at the hands of law enforcement around the world, which includes examination of such cases in the United States. As the President has repeatedly made clear, great nations such as ours do not hide from our shortcomings; they acknowledge them openly and strive to improve with transparency. In so doing, we not only work to set the standard for national responses to these challenges, we also strengthen our democracy, and give new hope and motivation to human rights defenders across the globe.

It is in this context that the United States intends to issue a formal, standing invitation to all UN experts who report and advise on thematic human rights issues. As a first step, we have reached out to offer an official visit by the UN Special Rapporteur on contemporary forms of racism and the UN Special Rapporteur on minority issues. I also welcome the UN Human Rights Council's adoption today in Geneva of a resolution to address systemic racism against Africans and people of African descent in the context of law enforcement. I look forward to engaging with the new mechanism to advance racial justice and equity.

Responsible nations must not shrink from scrutiny of their human rights record; rather, they should acknowledge it with the intent to improve. I urge all UN member states to join the United States in this effort, and confront the scourge of racism, racial discrimination, and xenophobia. Because when all people – regardless of their race or ethnicity – are free to live up to their full potential, our collective security is strengthened.

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e. Permanent Forum for People of African Descent (PFPAD)

On August 2, 2021, Ambassador Thomas-Greenfield delivered remarks on the adoption of a resolution establishing the Permanent Forum for People of African Descent. Her remarks follow and are available at https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-on-the-adoption-of-a-resolution-establishing-the-permanent-forum-for-people-of-african-descent/.

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The United States strongly supports the creation of the Permanent Forum for People of African Descent. We fully engaged in the modalities to shape its mandate. The Biden-Harris Administration has put dismantling systemic racism and achieving racial justice at the forefront of our agenda. Because ultimately, racism is a problem in every society, and that means every society needs to grapple with it. Recently, you have seen us do this grappling across multilateral fora. At the 46th regular session of the Human Rights Council, we led a joint statement on combating racism and racial discrimination, signed by over 155 countries. We welcomed cooperation with the investigative mechanisms established in the Human Rights Council

Resolution 47/21. And Secretary of State Blinken announced that we will facilitate visits to the United States by the Special Rapporteurs on Racism and on Minorities.

Mr. President, today, the United Nations has reached another important milestone on this collective journey: the establishment of a Permanent Forum for People of African Descent. This forum represents the full acknowledgement that, at long last, we are compelled to give voice to the dynamic challenges and aspirations of People of African Descent around the world. This forum is universal in its purview; and it is forward-looking in its agenda. It creates a new and necessary space, for all People of African Descent, to come together and build a better future.

There are a few details I want to be clear about.

First, we want to emphasize that our strong support for this resolution does not change the United States position on Durban. The creation of this forum is one step – among many – the UN System and Member States are taking to combat all forms of racism, racial discrimination, xenophobia, and intolerance. So, the Permanent Forum is far bigger than any one issue, program, or conference. And so, it is inappropriate for the establishment of this forum to be housed under an individual conference agenda item. So, while this is being adopted under its current agenda item, our position on the Durban Declaration and Program of Action remains the same.

Second, we want to stress that the mandate of the Forum does not include the elaboration of a UN declaration. The purview of developing UN declarations remains with Member States. The Forum's consideration of a UN declaration on People of African Descent would only be a part of the broader consideration by Member States.

Finally, Mr. President, racism and intolerance are sadly universal; our approach to eliminating them must be too. So, we will continue to defend all groups who face discrimination – including indigenous people, women and girls, LGBTQI+ persons, people with disabilities, and so many more. And we will elevate their perspectives, their rights, and their fights whenever and wherever we get a chance.

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f. Election of Justin Hansford to the PFPAD

On December 17, 2021, a press statement by Secretary Blinken welcomed the election of Justin Hansford to the PFPAD. The statement follows and is available at https://www.state.gov/the-election-of-justin-hansford-to-the-permanent-forum-on-people-of-african-descent/.

> I congratulate Howard University Professor Justin Hansford on his election to serve on the UN Permanent Forum on People of African Descent (PFPAD) for the 2022-2024 term.
>
> The United States has made advancing racial justice a top priority. We strongly supported the establishment of the PFPAD to improve the quality of life and livelihoods of African descendant people globally. Professor Justin Hansford is a leading scholar and activist in the fields of racial justice, human rights, and law and social movements. He is also the founder and Executive Director of the Thurgood Marshall Civil Rights Center at Howard University School of Law. I am confident Professor Hansford will help the PFPAD fulfill its important mission to

contribute to the full economic, political, and social equity and inclusion of African descendant people worldwide.

f. Third Committee

On October 27, 2021, Jason Mack, U.S. counselor for economic and social affairs, delivered remarks at a Third Committee interactive dialogue with the special rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance. The remarks are available at https://usun.usmission.gov/remarks-at-a-third-committee-interactive-dialogue-with-special-rapporteur-on-contemporary-forms-of-racism-racial-discrimination-xenophobia/ and excerpted below.

* * * *

Thank you, Madame Special Rapporteur, for your sobering assessment of the state of racism and racial discrimination globally. We still have much work to do and welcome your visit to the United States.

No one should be prevented from achieving their full potential because of the color of their skin, where they were born, the religion they practice, or any other such trait.

The United States enacted laws and amended its Constitution to address its most glaring forms of racial discrimination. Still, more must be done to reach America's full promise of equality for all.

We recognize that a country that values the dignity of all its citizens equally is a more prosperous society. We also recognize the indispensable role of civil society as partners in this regard. As you noted in your recent report on actions taken to combat the glorification of Nazism, civil society can help raise awareness, support victims, and identify enduring, inclusive ways to counter racial discrimination, xenophobia, extremism, and related intolerance.

Addressing systemic racism globally is a moral imperative for all of us, so that every human being can live and thrive to the fullest extent possible.

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On October 28, 2021, Jason Mack, U.S. counselor for economic and social affairs, delivered remarks at a Third Committee interactive dialogue on the International Convention on the Elimination of All Forms of Racial Discrimination. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-third-committee-interactive-dialogue-on-the-international-convention-on-the-elimination-of-all-forms-of-racial-discrimination/.

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Thank you, Chair, for this opportunity to discuss the International Convention on the Elimination of All Forms of Racial Discrimination and its implementation.

We appreciate the election of Professor McDougall and recognize her incredible prior work on the Committee, her expertise, and her steadfast commitment to human rights.

Unfortunately, racism and racial discrimination continue to plague our world. The COVID-19 pandemic revealed and exacerbated existing inequities, including those along racial lines. As we recover from this terrible pandemic, the United States is committed to building back our communities and economy even better than before. Let us honor those we lost by building more inclusive, more resilient, and equitable societies.

On June 2, 2021, the United States submitted its most recent periodic report to the Committee, which details the measures we have undertaken to address racial discrimination. While we recognize we still have much work to do to counter systemic racism, we are proud of the progress we have made and are committed to advancing racial equity.

We are committed to leading by example on this critical issue and look forward to welcoming official visits by the Special Rapporteur on Minority Issues next month and the Special Rapporteur on Racism next year.

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g. Durban Declaration and Program of Action

On September 22, 2021, Ambassador Thomas-Greenfield issued a formal statement announcing that the United States would not participate in the events related to the 20th anniversary of the Durban Declaration. The statement follows and is available at https://usun.usmission.gov/statement-by-ambassador-linda-thomas-greenfield%E2%80%AFon-u-s-participation-in-events-related-to-the-anniversary-of-the-durban-declaration/.

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The United States will not participate in the United Nations 20th Anniversary Commemoration of the Durban Declaration and Program of Action (DDPA) consistent with longstanding U.S. policy going back multiple administrations. The United States remains opposed to the anti-Israel and anti-Semitic underpinnings of the Durban process, and has longstanding freedom of expression concerns with the DDPA.

We are deeply and profoundly committed to advancing racial justice and equity and the elimination of racial discrimination, xenophobia, and discrimination in all forms. It is a top priority for me, and it is a top priority for the Biden-Harris Administration.

Racism is a problem in every society. Every country has an obligation to address racial inequality and injustice, both internally and multilaterally. We very much look forward to continuing to work in collaboration with our fellow member states on these critical issues in more inclusive fora.

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On November 15, 2021, Advisor Sofija Korac provided the U.S. explanation of vote for the resolution entitled "Global Call for Concrete Action for the Elimination of Racism, Racial Discrimination, Xenophobia, and Related Intolerance and the Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action." The U.S. statement follows and is available at https://usun.usmission.gov/explanation-of-vote-for-the-a-global-call-for-concrete-action-for-the-elimination-of-racism-racial-discrimination-xenophobia-and-related-intolerance/.

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The United States is committed to countering racism and racial discrimination in all its forms, at home and abroad. In his first weeks in office, President Biden put forward a whole-of government strategy to embed racial justice and equity for marginalized populations across Federal agencies, policies, and programs. At the 46th session of the Human Rights Council, the United States led a joint statement signed by 158 countries condemning racism and racial discrimination and resolving to do more to address systemic racism. The United States is committed to working with partners to promote racial and ethnic equity, as we host the Summit for Democracy in December and approach the final two years of the International Decade for People of African Descent. The United States also strongly supported the creation of a Permanent Forum for People of African Descent.

The United States believes the International Convention on the Elimination of All Forms of Racial Discrimination provides comprehensive protections in this area and constitutes the most relevant international framework to address all forms of racial discrimination. 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. We remain convinced that the best antidote to offensive speech is a combination of robust legal protections against discrimination and hate crimes; proactive government outreach to racial and religious minority communities; and the vigorous protection of freedom of expression, both online and offline.

As in previous years, we deeply regret that we cannot support this resolution, which does not genuinely focus on countering racism, racial discrimination, xenophobia and related intolerance. Among our concerns are the resolution's endorsement of the Durban Declaration and Program of Action (DDPA), the outcome of the Durban review conference and its endorsement of overbroad restrictions on freedom of speech and expression. We reject any effort to advance the "full implementation" of the DDPA. We believe this resolution serves as a vehicle to prolong divisions , rather than providing an inclusive way forward for the international community to counter the scourge of racism and racial discrimination.

In addition, the United States cannot accept the resolution's call for States to consider withdrawing reservations to Article 4 of the CERD. Further, this resolution has no effect as a matter of international law. We also reject the resolution's call for "former colonial Powers" to provide reparations "consistent with" the DDPA.

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2. Gender

a. Women, Peace, and Security

On July 1, 2021, the State Department issued a press statement by Secretary Blinken on the release of the 2021 Women, Peace, and Security ("WPS") Report. The 2021 WPS Report is available at https://www.whitehouse.gov/wp-content/uploads/2021/07/USG_Women_Peace_Security_WPS_Congressional_Report_FINAL6.30.2021-Updated-July-16.pdf. The statement is excerpted below and available at https://www.state.gov/release-of-the-2021-women-peace-and-security-wps-report/.

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Women are a powerful force for peace and essential partners in advancing international security. The United States has long championed the safe, meaningful participation of women in our diplomatic, development, and defense efforts. As underscored by the Women, Peace, and Security (WPS) Act of 2017 and our support of UN Security Council Resolution 1325 and other relevant WPS resolutions, the United States recognizes and promotes the essential role of women in political and security arenas. This includes women's essential role in the prevention, management, and resolution of conflict, and their contributions to stabilization efforts, peacekeeping, and post-conflict relief and recovery. We also remain firmly committed to advancing the human rights of women and girls as a core element of our foreign policy.

In conjunction with the Departments of Defense and Homeland Security, as well as the U.S. Agency for International Development, the Department of State is proud to release its first public report on the implementation of the 2019 U.S. Strategy on WPS and the Department's 2020 WPS Implementation Plan. This marks the first time that the Department has led a comprehensive data-driven monitoring, evaluation, and learning exercise on our WPS efforts. Over the past year, the Department has made significant progress in implementing this vision, including: support for more than 14,000 women to build capacity for peace and reconciliation, training for more than 43,000 women in security and criminal justice sectors, and support for access to gender-based violence prevention and response services for nearly 488,000 individuals during Fiscal Years 2019 and 2020. …

The United States is proud to continue its long-standing role as a global champion for women on the frontlines of policy, peace, and security decision-making processes and advancing the safety of women and girls. We know that when women are engaged in peace and security efforts, we are all safer, more prosperous, and more secure.

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b. Commission on Status of Women

The two-week Commission on the Status of Women session started March 16, 2021 with a pre-recorded U.S. national statement delivered by Vice President of the United States Kamala Harris. The United States negotiated with other participants on agreed conclusions on the theme of "Women's full and effective participation and decision-making in public life, as well as the elimination of violence, for achieving gender equality and the empowerment of all women and girls."

On March 26, 2021, the U.S. Mission to the UN submitted for the record its explanation of position on the adoption of the CSW 2021 Agreed Conclusions. The U.S. statement follows, and is available at https://usun.usmission.gov/explanation-of-position-on-the-adoption-of-the-csw-2021-agreed-conclusions-long-form/.

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The United States thanks the CSW Chair, our facilitator, and our colleagues for their efforts on arriving at consensus on these Agreed Conclusions. The document contains important observations and recommendations on the themes of women's participation and decision-making. If implemented, certain recommendations have the potential of effective real improvements on the ground.

We are pleased to see language on indigenous women and girls, women and girls with disabilities, and women and girls living with HIV included in various issues related to social protection in this text. Women and girls from these marginalized groups often experience additional discrimination related to social protection. Drawing attention to their challenges helps mainstream their concerns across the UN system.

The United States welcomes the references to women human rights defenders in the text. Civil society plays an important role 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. Strong, vibrant civil societies are critical to having strong, successful countries. We encourage all states to work together with relevant regional, UN, and civil society mechanisms to create an enabling environment for civil society and to ensure human rights defenders are able to carry out their work without the threat of violence.

SPECIFIC EOP CONCERNS

2030 Agenda

We underscore that the 2030 Agenda is non-binding and does not create or affect rights or obligations under international law, and that its implementation is without prejudice to the independent mandates of other processes and institutions.

Economic and Trade Issues

The term "illicit financial flows" has no agreed-upon international meaning. We prefer to focus on the underlying illegal activities that produce these financial streams. Technical experts with the appropriate expertise and mandate should lead on how best to identify and combat revenue streams from illegal activities. It is not appropriate to consider illicit financial flows generically in the CSW.

All sources of finance should be used effectively to accelerate the achievement of equality between women and men and the empowerment of women and girls, so Official Development Assistance (ODA) should not be singled out.

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 are a legitimate means of achieving foreign policy, national security, and other objectives. The United States uses sanctions in a manner consistent with international law, including the UN Charter, with specific objectives in mind. These include using sanctions as a means to promote a return to rule of law or democratic systems, to promote human rights and fundamental freedoms, or to prevent threats to international peace and security. We again register our concern that language in this document in effect seeks to call into question the ability of members of the international community to respond effectively and by non-violent means against threats to democracy, human rights, or international peace and security. In sum, we believe that economic sanctions can be an appropriate, effective, legitimate, and peaceful tool to respond to threats.

Education

The United States supports the goal of equal access to education, including having women and girls receive high-quality education. Within the federal structure of the United States, education is primarily a state and local responsibility. We will address the education-related goals of this document as appropriate and consistent with U.S. law and the authorities of its federal, state, and local governments.

"Equal Pay for Equal Work or Work of Equal Value"

The United States had hoped that the phrase "equal pay for equal work or work of equal value" would have appeared consistently throughout the Agreed Conclusions. This is negotiated consensus language from the 1995 Beijing Platform for Action. We understand that the phrase intends to promote pay equity between men and women. The United States implements it by observing the principle of "equal pay for equal work."

The United States continues to work toward pay equality, including for our U.S. national sports teams who have had so much success on the international stage. We call upon countries to recognize the full value of women's skills and their significant contributions to the labor force, acknowledge the injustice of wage inequality, and join efforts to achieve equal pay.

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 justifiable 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.

International Conventions and Conferences

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. 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. We understand abbreviated or imprecise references to certain human rights to be shorthand references for the more accurate and widely accepted terms used in the applicable treaties, and we maintain our longstanding position on those rights. Moreover, this text does not create or elaborate any new rights under international law.

Policy Space

We note that references to "policy space" do not affect potential constraints under international law or agreements that apply to any such "policy space." Countries should not use "policy space" as an excuse to not develop and implement measures "achieve gender equality and the empowerment of women and girls."

Quotas/Affirmative Action/Temporary Special Measures

With respect to quotas, affirmative action measures, and temporary special measures, the U.S. position is that each country must determine for itself whether such measures are appropriate. We do not believe it is a useful exercise for these Agreed Conclusions to urge the use of quotas and rigid numerical targets, particularly in the context of political representation and government employment, without consideration for domestic anti-discrimination legal frameworks and obligations under international law to ensure every citizen has an equal right and opportunities, without discrimination, to take part in the conduct of public affairs. The best way to improve the situation of women and girls is through legal and policy reforms that end discrimination against women and promote and provide equal access to opportunities.

Right to Development

Our view about the "right to development" are long-standing and well known. The term lacks an internationally accepted definition.

Sexual and Gender-Based Violence (GBV)/Intimate Partner Violence (IPV)

We support references to "gender-based violence" or "sexual and gender-based violence," a more inclusive term rather than the binary "violence against women." We also support references to intimate partner violence. It is important to recognize that violence takes place within families, and also in situations in which individuals in a relationship live together in close quarters.

Sexual and Reproductive Health and Rights (SRHR)

The United States advocated to strengthen commitments on sexual and reproductive health and rights in these Agreed Conclusions. Promoting women's sexual and reproductive health and rights are fundamental to women's empowerment. The United States sees this as a critical area we must address if we are to build back better for everyone. Through expanding U.S. global health assistance and partnerships, we seek to increase women's and girls' access to critical health services. Investing in women's health and well-being, including their sexual and reproductive health, saves lives, reduces poverty, and allows women greater opportunities that are critical to achieving gender equality. The United States remains committed to improving health outcomes and empowering women and girls so that they can realize their full potential and help drive economic and social development.

SOGI/Women and Girls in All Their Diversity

While the United States strongly supports references in the text to "women and girls in all their diversity," we regret the lack of an explicit reference to sexual orientation and gender

identity. LGBTI women and girls face significant additional challenges across all societies that deserve explicit inclusion.

Traditional and Ancestral Knowledge

Regarding paragraph pp, the United States does not support using the term "protecting" in connection with traditional knowledge because of uncertainty over the scope of such terms and the extent that such terms may imply the existence of legal rights not recognized, or not recognized to the same extent, in U.S. law.

We have concerns about inclusion of a new concept of "ancestral knowledge," apparently distinct from "traditional knowledge," and question the utility of introducing such a concept, which appears to lack a clearly defined or accepted meaning.

Unpaid Care Work

We recognize the importance of unpaid care work and have released periodic time-use surveys and estimates of the monetary value of unpaid work, but do not factor the value of unpaid work into our core national accounts, including gross domestic product (GDP).

Violence, Harassment/Sexual Harassment, and Abuse

The United States strongly supports the condemnation of harassment, intimidation, gender-based violence, and other acts that can amount to human rights violations or abuses, but believes it is important for resolutions to accurate characterize these terms, consistent with U.S. law and our international obligations. The United States would have preferred that the Agreed Conclusions use the terms "violence," "abuse," and "harassment," or "sexual harassment," in appropriate places throughout the document to be precise about which acts the relevant language covers.

While reprehensible, all of the acts cited in various paragraphs discussing violence, including "privacy violations" in paragraph 27, are not acts of violence as defined by U.S. law. In U.S. law, the term violence refers to physical force or the threat of physical force. Words alone, even when hateful, are generally protected by freedom of expression. The United States robustly protects freedom of expression, both online and offline, because the cost of stripping away individual rights is far greater than the cost of tolerating hateful words. Equating speech with violence can also undermine and weaken efforts to address actual physical and sexual violence against women and girls which is a serious problem.

Women and Girls' Participation

We disagree with some delegations who have suggested that girls are not involved in participation and decision-making activities. In my own country, there are numerous examples of girls' participation. Many may be familiar with the Girl Scouts, which aims to build girls' leadership, confidence, and commitment to bettering communities. We also note that some member states appoint youth advisers to particular UN sessions.

Women, Peace, and Security

We would have preferred greater emphasis on women, peace, and security and an explicit mention of Security Council Resolution 1325. Women peacebuilders contribute to preventing and ending conflict, countering terrorism and violent extremism, and rebuilding societies. To everyone's detriment, women continue to be excluded from conflict and reconstruction processes.

We look forward to participating in next year's Commission session, when we will once again join in discussions on how to best remove barriers to the empowerment of women and girls.

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c. Joint Statement on Afghanistan

On August 18, 2021, the State Department published as a media note the joint statement on the situation of women and girls in Afghanistan, co-signed by Albania, Argentina, Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, European Union, Honduras, Guatemala, North Macedonia, New Zealand, Norway, Paraguay, Senegal, Switzerland, the United Kingdom, and the United States of America. The joint statement follows and is available at https://www.state.gov/joint-statement-on-the-situation-of-women-and-girls-in-afghanistan/.

> We are deeply worried about Afghan women and girls, their rights to education, work and freedom of movement. We call on those in positions of power and authority across Afghanistan to guarantee their protection.
>
> Afghan women and girls, as all Afghan people, deserve to live in safety, security and dignity. Any form of discrimination and abuse should be prevented. We in the international community stand ready to assist them with humanitarian aid and support, to ensure that their voices can be heard.
>
> We will monitor closely how any future government ensures rights and freedoms that have become an integral part of the life of women and girls in Afghanistan during the last twenty years.

d. Women's Health

On January 28, 2021, President Biden issued a "Memorandum on Protecting Women's Health at Home and Abroad," which rescinded the Mexico City Policy. Protecting Women's Health at Home and Abroad, 86 Fed. Reg. 33,077 (June 24, 2021). For background on the Mexico City Policy, see *Digest 2009* at 186-89. The Presidential Memorandum is available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/memorandum-on-protecting-womens-health-at-home-and-abroad/.

On January 28, 2021, the State Department released a statement by Secretary Blinken on the Biden Administration's prioritization of sexual and reproductive health and reproductive rights in U.S. foreign policy. The statement is excerpted below and available at https://www.state.gov/prioritizing-sexual-and-reproductive-health-and-reproductive-rights-in-u-s-foreign-policy/.

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Today, President Biden signed a Presidential Memorandum revoking the January 23, 2017 Presidential Memorandum on the Mexico City Policy. Pursuant to President Biden's memorandum, the previous administration's Protecting Life in Global Health Assistance policy has also been rescinded.

In the Biden-Harris administration, the empowerment and protection of women and girls, including promoting their sexual and reproductive health and reproductive rights, is a central part of U.S. foreign policy and national security. Today's action by President Biden will help improve the lives of women and children around the world by expanding the base of partners implementing U.S. health assistance and increasing access to critical health services, including HIV/AIDS care for key populations, family planning information and services, and effective tuberculosis diagnosis and treatment.

Pursuant to President Biden's memorandum, and consistent with applicable law, the State Department is also taking the necessary steps to make $32.5 million appropriated by Congress available in 2021 to support the United Nations Population Fund (UNFPA). UNFPA's work is essential to the health and well-being of women around the world and directly supports the safety and prosperity of communities around the globe, especially in the context of the global COVID-19 pandemic.

As the largest donor to both maternal health and voluntary family planning programs, including the provision of life-saving health care services in crisis settings, the United States will continue its efforts to make pregnancy and childbirth safer by strengthening health systems to provide women with integral health services, including increased access to maternal health care and voluntary family planning. The United States will also partner with governments, the private sector, and international and non-governmental organizations to improve health outcomes and empower women and girls so that they can realize their full potential and help drive social and economic development.

Finally, the United States will withdraw co-sponsorship and signature from the Geneva Consensus Declaration in a timely and appropriate manner. Under President Biden's leadership, the United States is re-engaging multilaterally to protect and promote the human rights of all women and girls, consistent with the long-standing global consensus on gender equality and sexual and reproductive health and reproductive rights.

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In the January 28, 2021 Presidential Memorandum on Protecting Women's Health at Home and Abroad, President Biden proclaimed that, "It is the policy of my Administration to support women's and girls' sexual and reproductive health and rights in the United States, as well as globally." *Id*. The United States first set forth legal views on the phrase "sexual and reproductive health and rights" ("SRHR") in a statement it delivered at the Second Regular Session of the UN Women Executive Board on September 15, 2015. The Biden Administration maintains the views articulated in 2015 on the legal significance of this phrase. This 2015 statement is excerpted below.

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The United States strongly supports UN Women's mandate to help member states promote gender equality, to lead and coordinate the UN system's work on gender, and to promote accountability. We note that in the recent negotiations on the 2030 Agenda for Sustainable Development, the United States, with many of our international partners, successfully advocated for a stand-alone goal on gender equality. We are very pleased, moreover, that gender-equality and empowerment of women is also considered a cross-cutting issue across the 2030 Agenda. We look forward to collaborating with UN Women and other member states in ensuring this important priority is fully supported as we move toward achieving the goals by 2030.

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The United States will continue to join forces across the board to achieve all the priorities of UN Women's mandate. We especially commend the efforts of UN Women to end gender-based violence and intend to continue our support for its initiatives. UN Women's attention to the issue of violence against indigenous women and girls and violence against women who are targeted because of their sexual orientation and gender identity is critical. There is still much work to be done, however, in all areas of the UN Women mandate. The United States strongly supports the work of UN Women on political participation, economic empowerment, humanitarian action, women, peace and security, and sexual and reproductive health and rights.

In this regard, we are pleased that UN Women's leaders have spoken strongly and publicly about the importance of sexual and reproductive health and rights. UN Women's written documents use this phrase as well. The United States will now begin using this phrase and will refer also to "sexual rights." Our understanding of the term "sexual rights" draws heavily from paragraph 96 of the Platform for Action adopted at the 1995 Beijing Women's Conference. That language characterizes the human rights of women to include rights relating to sexuality and stresses equality between men and women in matters of sexual relations and sexuality. As a result, the United States understands the term "sexual rights" to include all individuals' "right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination, and violence." With further reference to paragraph 96 of the Beijing Platform of Action, we note that "equal relationships between [individuals] in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behavior and its consequences." Finally, we wish to clarify that the United States will use the term "sexual rights" or "sexual and reproductive health and rights" to express rights that are not legally binding. Sexual rights are not human rights and they are not enshrined in international human rights law; our use of this term does not reflect a view that they are part of customary international law. It is, however, a critical expression of our support for the rights and dignity of all individuals regardless of their sex, sexual orientation, or gender identity.

In conclusion, as we work to achieve the goals of the 2030 Agenda, gender equality and empowerment of women and girls will continue to play an important part. The empowerment of women, across the life-cycle, is a known driver of development that will be crucial to addressing the U.S. government's priority of resolving the "unfinished business" of the Millennium Development Goals in the areas of health, nutrition, education, environmental sustainability, and poverty. Full and effective support for/coordination on the Beijing Declaration and Platform for Action is essential for achieving gender equality and the empowerment of women and girls.

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The January 28, 2021 Presidential Memorandum also directed the U.S. withdrawal from the "Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family." *Id*. at 33,078. As discussed in *Digest 2020* at 240, the United States initiated and signed the Geneva Consensus Declaration ("GCD"). The process occurred outside of the formal UN system; it was not negotiated in Geneva. In 2021, the United States withdrew from the GCD and notified GCD members at the UN and in capitals. The Biden-Harris Administration assessed that the GCD undermined UN multilateral efforts on women's rights and SRHR and efforts to advance gender equality and global health through the 2030 Agenda for Sustainable Development.

On February 6, 2021, State Department Spokesperson Ned Price issued a statement in observance of the international day of zero tolerance to female genital mutilation or cutting. The statement, below, is available at https://www.state.gov/observance-of-the-international-day-of-zero-tolerance-to-female-genital-mutilation-cutting/.

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The United States in recent years has joined the international community on February 6 in observing the International Day of Zero Tolerance to Female Genital Mutilation/Cutting (FGM/C). The United States remains committed to ending this egregious human rights abuse and supporting survivors of FGM/C, both at home and around the world.

According to the United Nations, more than four million women and girls are at risk of FGM/C globally each year, and the COVID-19 pandemic appears to have exacerbated the incidence of FGM/C due to economic drivers and loss of social protections. In this environment, it is more important than ever to renew our efforts to end FGM/C.

The United States recognizes that holding perpetrators accountable is essential both to punish human rights abusers and deter future instances of such abuse. That is why, on January 5, 2021, the United States signed into law the Strengthening the Opposition to Female Genital Mutilation Act (STOP FGM Act). This legislation strengthened the criminality of FGM/C and ensures that domestic violations of FGM/C can be prosecuted in federal court – and is one of the ways the United States can lead the world by example. Respect for women's human rights is essential to sustained peace, prosperity, and security, and the United States will continue to work toward a future in which all women and girls are afforded enjoyment of their human rights.

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3. Sexual Orientation and Gender Identity

On February 4, 2021, Secretary Blinken issued a press statement on advancing the human rights of lesbian, gay, bisexual, transgender, queer, and intersex ("LGBTQI+") persons around the world. The press statement is excerpted below and available at

https://www.state.gov/advancing-the-human-rights-of-lesbian-gay-bisexual-transgender-queer-and-intersex-persons-around-the-world/.

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Today, President Biden signed a Presidential Memorandum directing all U.S. government departments and agencies engaged abroad to ensure that U.S. diplomacy and foreign assistance promote and protect the human rights of lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) persons around the world.

The struggle to end violence, discrimination, criminalization, and stigma against LGBTQI+ persons is a global challenge that remains central to our commitment to promote human rights and fundamental freedoms for all individuals. In the Biden-Harris administration, the United States will lead by the power of our example and pursue a policy to end violence and discrimination on the basis of sexual orientation, gender identity or expression, or sex characteristics. Today's action by President Biden demonstrates the U.S. government's firm commitment to advance this goal.

Pursuant to President Biden's memorandum, the Department of State in coordination with relevant federal agencies will use a broad range of diplomatic and programmatic tools and resources to protect vulnerable LGBTQI+ refugees and asylum seekers; combat criminalization of individuals on the basis of LGBTQI+ status or conduct; ensure that our diplomacy and foreign assistance promote and protect the human rights of LGBTQI+ persons and advance nondiscrimination; and allow swift U.S. responses to human rights violations and abuses of LGBTQI+ persons.

Working with Congress, the State Department is taking the necessary steps to provide $10 million in Fiscal Year 2021 funds for the Global Equality Fund (GEF). The GEF provides emergency assistance to human rights defenders and human rights programming support to grassroots LGBTQI+ organizations to catalyze positive change and draws its strength from the support and partnership of an international coalition of like-minded governments, businesses, and foundations.

Under President Biden's leadership, the United States will work with like-minded governments and strengthen civil society advocacy to fully support and advance the human rights of LGBTQI+ persons. Our international partners can be assured that advancing human rights for all individuals, with no exception or caveat, is a U.S. foreign policy priority.

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On December 16, 2021, the U.S. Mission to the UN released a statement by Ambassador Linda Thomas-Greenfield on the first-ever consensus adoption of a UN resolution referencing sexual orientation and gender identity. The statement is excerpted below and available at https://usun.usmission.gov/statement-on-the-first-ever-consensus-adoption-of-a-un-resolution-referencing-sexual-orientation-and-gender-identity/.

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The United States celebrates the adoption of our biennial resolution on "Strengthening the Role of the United Nations in Promoting Democratization an Enhancing Periodic and Genuine Elections," which passed by consensus today in the United Nations General Assembly. This resolution is vital in authorizing the UN's continued work in providing election support to those countries seeking assistance around the world. But its adoption today also marks an historic moment.

This is the first time in the UN's 76-year history that any UN body has adopted by consensus a text referencing "sexual orientation and gender identity." This landmark moment is not only historic for the broader LGBTQI+ movement, but draws attention to the challenges LGBTQI+ persons face in voting and running for office and underscores the critical role the international community can play in addressing these barriers.

We have seen an alarming trend of laws, policies and regulations that discriminate against citizens on the basis of their marginalization, such as their disability, race, and ethnicity. This resolution states clearly that individuals should not be barred from running for office or from voting on the basis of their identity. The resolution also seeks to promote the universality of democratic values based on the free will of the people and their full participation in all aspects of public affairs, including the need for free and fair elections for all citizens.

The United States is proud to have facilitated the text that led us to this moment, and we will continue to work with countries in the UN LGBTI Core Group, members of civil society, and others, to ensure that the human rights of all individuals, regardless of sexual orientation and gender identity, are realized.

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On September 22, 2021, Ambassador Thomas-Greenfield delivered remarks at the UN LGBTI Core Group event on the margins of UN General Assembly 76 on the decriminalization of sexual orientation and gender identity. Her remarks are excerpted below and are available at https://usun.usmission.gov/remarks-by-ambassador-thomas-greenfield-at-the-un-lgbti-core-group-event-on-margins-of-unga76-on-decriminalization-of-sexual-orientation-and-gender-id/.

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Right now, over 70 countries criminalize LGBTQI status or conduct. For millions of people, it is illegal for them to be who they are. To love who they love. We need to repeal and eliminate these laws.

For our part, the United States is using our diplomacy, our foreign assistance, and every tool we have to protect human rights, empower civil society, and support local LGBTQI+ movements.

The UN LGBTI Core Group is vital to this work. We need more countries to join this committed group. Together, let's do everything we can to protect human rights and promote equality for all.

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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 2021 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 2021 report are the governments of Afghanistan, Burma, the Democratic Republic of the Congo, Iran, Iraq, Libya, Mali, Nigeria, Pakistan, Somalia, South Sudan, Sudan, Syria, Turkey, Venezuela, and Yemen.

The CSPA list is included in the TIP report, available at https://www.state.gov/reports/2021-trafficking-in-persons-report/. 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 8, 2021, 86 Fed. Reg. 57,525 (Oct. 18, 2021), the President determined that:

> 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 Iraq, Nigeria, Pakistan, and Turkey; to waive in part 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 that the CSPA would restrict such assistance or support; to waive in part the application of the prohibition in section 404(a) of the CSPA with respect to Libya, Somalia, and Yemen to allow for the provision of IMET and PKO assistance and support provided pursuant to 10 U.S.C. 333, to the extent that the CSPA would restrict such assistance or support; to waive in part 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 that the CSPA would restrict such assistance; and, to waive the application of the prohibition in section 404(a) of the CSPA with respect to allowing for the issuance of licenses for direct commercial sales related to other United States Government assistance for the above countries…

2. Rights of the Child

On November 18, 2021, Nicholas Hill, deputy U.S. representative to ECOSOC, delivered the U.S. explanation of position for the rights of the child resolution. The U.S. explanation of position is excerpted below and available at https://usun.usmission.gov/explanation-of-position-for-the-rights-of-the-child-resolution/.

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The United States joins consensus on this resolution to underscore its commitment to respecting the human rights of children and the priority we place on our domestic and international efforts to protect and promote the well-being of children. In joining consensus today, we wish to clarify our views and note our concerns with certain elements of this resolution.

The United States recognizes that the Convention on the Rights of the Child (CRC) provides the relevant framework for States Parties to the CRC. However, the United States does not understand references in this resolution to obligations or principles derived from the CRC, including references to the principle of the best interests of the child, as suggesting that the United States has obligations in that regard. We also note the resolution inaccurately characterizes certain obligations under the CRC.

Regarding preambular paragraph 16, the United States reads it to refer to punishment that rises to the level of child abuse, in line with domestic law.

With regards to preambular paragraph 17, we note that while children should have the ability to be heard, there is no general right to be heard.

With respect to preambular paragraph 11 and operative paragraphs 6, 19 and 43(f) of this resolution, 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." We understand sexual images of children to constitute abuse and exploitation, not pornography, under U.S. domestic law.

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3. Girl Child

Sofija Korac, U.S. advisor for economic and social affairs, delivered the general statement on the girl child resolution at the UN on November 15, 2021. Her statement follows and is available at https://usun.usmission.gov/general-statement-for-the-girl-child-resolution/.

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The United States would like to thank Zambia and Malawi for co-facilitating this text on behalf of the South African Development Community. We are proud to co-sponsor this important text this year.

We are also pleased to see stronger language this year on strengthening of health systems, references to sexual and reproductive health-care services, and girls living with HIV/AIDS.

With regard to this resolution's references to international human rights law, including the Convention on the Rights of the Child and economic, social and cultural rights, as well as to education, we refer you to the U.S. general statement delivered November [5], and the unabridged version of our statement, which will be posted on the U.S. Mission's website on the final day of this session.

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D. SELF-DETERMINATION

On November 9, 2021, Ambassador Richard Mills, U.S. Deputy Representative to the UN, delivered the U.S. explanation of vote on agenda items on decolonization, including U.S. positions on self-determination. Ambassador Mills's statement is excerpted below and available at https://usun.usmission.gov/explanation-of-vote-on-agenda-items-59-63-decolonization/.

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[T]he United States is proud to support the right of peoples to self-determination and we will continue to uphold the full application of Article 73 of the UN Charter. However, the United States must also reiterate our well-known concerns that these resolutions continue to place too much weight on independence as a one-size-fits-all status option for a territory's people in pursuit of their right of self-determination. As was correctly stated by the Declaration on Principles of International Law Concerning Friendly Relations of 1970, the people of a non-self-governing territory may, as an alternative to independence, validly opt for free association or any other political status – including integration with the administering state – provided the people freely determine such status. In other words, the territories can speak for themselves and it is not for this Assembly to press for any particular outcome.

Leaving the decision, whatever it might be, to the free will of the people is the essence of the right of self-determination. Moreover, we are dismayed – in the resolution entitled "Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples" – at the retention in operative paragraph 14 of an outdated call to terminate all military activities and bases in non-self-governing territories. The United States government, as other states, has a sovereign right to carry out its military activities in accordance with its national security interests, and it is, frankly, simplistic to assume that military presence is necessarily harmful to the rights and interests of the people of the territory, or incompatible with their wishes.

With respect to the resolution on "Information from Non-Self-Governing Territories" transmitted under Article 73(e) of the Charter, we underscore that it is for administering states to

determine whether a territory has achieved self-governance under the terms of the Charter, and whether to transmit information under Article 73(e) of the Charter.

Regarding the resolution entitled "The Question of Guam", the United States again express disagreement with the criticism of a U.S. federal court ruling that enjoined Guam's planned plebiscite on self-determination. According to the U.S. court's ruling, which was affirmed on appeal in 2019, the Guamanian law establishing the plebiscite violates U.S. constitutional guarantees against race-based restrictions on the exercise of voting rights. The United States has long supported the right of self-determination for the people of Guam and continues to do so.

In light of this language, we also find it necessary to reiterate the longstanding U.S. view that the right of self-determination of the people of a non-self-governing territory is to be exercised by the whole people, not just one portion of the population. In this connection, we welcome the Assembly's acknowledgment in operative paragraph 5 of the Guam resolution that self-determination decisions should be conducted consistently with applicable human rights obligations and commitments, including the commitments set forth in the Universal Declaration of Human Rights. As we are all aware, among these are important commitments relating to non-discrimination and universal and equal suffrage.

Finally, Madam Chair, the United States reiterates and incorporates by reference the other concerns we have expressed in years past about these resolutions. We stress that the statements in these resolutions, as well as those in prior resolutions of the General Assembly – including Resolution 1514 of 1960 – are nonbinding and do not necessarily state or reflect international law. And any reaffirmation of prior documents in these resolutions applies only to those states that affirmed them initially.

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E. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

1. Safe Drinking Water and Sanitation

On November 15, 2021, Advisor for Economic and Social Affairs Sofija Korac delivered the U.S. explanation of position for the resolution on the human rights to safe drinking water and sanitation. The U.S. statement is excerpted below and available at https://usun.usmission.gov/explanation-of-position-for-the-human-rights-to-safe-drinking-water-and-sanitation-resolution/.

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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. We reiterate the understandings in our statements and explanations of position on this matter at the UN General Assembly and Human Rights Council, most recently in 2019 and 2016 respectively.

The United States joins consensus with the 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. While we respect the importance of promoting access to sanitation and water and that efforts to do so can involve distinctive approaches, we understand this resolution's references to human rights to water and sanitation to refer to the right derived from economic, social, and cultural rights contained in the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The United States is not a party to the ICESCR, and the rights contained therein are not justiciable in U.S. courts. With regard to this resolution's references to the 2030 Agenda, economic, social, and cultural rights, and technology transfers, these issues are addressed in the United States' general statement, to be posted online at the conclusion of this session.

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.

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2. HRC Resolution on Economic, Social, and Cultural Rights

The United States co-sponsored the HRC 46 resolution on the realization of economic, social, and cultural ("ESC") rights. Human Rights Council Res. 46/10 (Apr. 1, 2021), U.N. Doc. No. A/HRC/RES/46/10. Co-sponsorship by the United States of an ESC resolution has been fairly uncommon.

3. Housing

See Chapter 7 for discussion of the U.S. testimony at a hearing at the Inter-American Commission on Human Rights ("IACHR") on the right to housing in the United States.

F. LABOR

See Chapter 7 for discussion of the International Labor Organization ("ILO") special arrangements and procedures for meetings during the pandemic.

On May 28, 2021, the State Department issued a press statement by Department Spokesperson Ned Price regarding measures taken by the United States in response to the use of forced labor in the People's Republic of China. The press statement, on Withhold and Release Orders ("WROs") for seafood products imported from the Dalian Ocean Fishing Company, is excerpted below and available at https://www.state.gov/on-withhold-and-release-orders-wros-for-seafood-products-imported-from-the-dalian-

ocean-fishing-company/. See also Chapter 16 for discussion of the Xinjiang Supply Chain Business Advisory regarding the PRC's use of forced labor and other human rights abuses.

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Today, U.S. Customs and Border Protection, an agency of the Department of Homeland Security, issued **Withhold Release Orders (WROs)** for seafood products imported from the Dalian Ocean Fishing Company, a firm in the People's Republic of China (PRC) for which there is credible evidence of the use of forced labor to harvest its seafood, primarily tuna. As a result, the United States is prohibiting the import of seafood products from this company.

U.S. law forbids the importation of products made with forced labor. Today's action helps stop human rights abusers from profiting from forced labor. It is also another example of the United States taking measures to address harmful fishing practices. In 2020, the Department revoked more than a dozen visas for individuals complicit in illegal, unreported, and unregulated fishing with links to human trafficking.

Reports of the use of forced labor by PRC fishing vessels were described in the Department's **2020 Human Rights Report.** The report noted other PRC firms that abuse migrant workers subjected to forced labor. These workers are forced to work 18 to 22 hours a day, often in illegal, unreported, and unregulated fishing. They are prevented from leaving their ships while facing hunger, restricted communication, inadequate medical care, degrading living and working conditions, physical abuse, and debt-based coercion. The Department of Labor similarly has reported on widespread use of forced labor in the PRC's distant-water fishing fleet.

The United States will promote accountability for those who use forced labor to exploit individuals for profit, and we will work with our international partners to ensure that the voiceless are heard and protected.

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On December 23, 2021, President Biden signed the Uyghur Forced Labor Prevention Act. Pub. L. No. 117-78, 135 Stat. 1525 (2021). See State Department press statement, available at https://www.state.gov/the-signing-of-the-uyghur-forced-labor-prevention-act/. The press statement includes the following:

> The State Department is committed to working with Congress and our interagency partners to continue addressing forced labor in Xinjiang and to strengthen international action against this egregious violation of human rights. This new law gives the U.S. government new tools to prevent goods made with forced labor in Xinjiang from entering U.S. markets and to further promote accountability for persons and entities responsible for these abuses.
>
> Addressing forced labor has been a priority for this Administration. We have taken concrete measures to promote accountability in Xinjiang, including visa restrictions, Global Magnitsky and other financial

> sanctions, export controls, Withhold Release Orders and import restrictions, and the release of a business advisory on Xinjiang – all while rallying allies and partners to take joint action to ensure all global supply chains are free from the use of forced labor, including from Xinjiang.
>
> We will continue doing everything we can to restore the dignity of those who yearn to be free from forced labor. We call on the Government of the People's Republic of China to immediately end genocide and crimes against humanity against the predominantly Muslim Uyghurs and members of other ethnic and religious minority groups in Xinjiang.

For discussion of the Xinjiang-related visa restrictions, Global Magnitsky sanctions, business advisory, and other measures, see Chapter 16.

G. TORTURE AND EXTRAJUDICIAL KILLING

1. Sixth Periodic Report on the International Convention against Torture

On September 24, 2021, the United States submitted to the Committee Against Torture its Sixth Periodic Report on the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As a State Party to the Convention against Torture ("CAT"), the United States is required to file periodic reports with the Committee Against Torture, the treaty body for the CAT, on the legislative, judicial, administrative, or other measures the United States has adopted, which domestically give effect to the provisions of the CAT. In keeping with standard human rights treaty practice, after receiving the report, the Committee will schedule a public hearing. The report is available at https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/CAT_C_USA_6_7602_E.pdf and excerpted below.

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2. The absolute prohibition of torture is of fundamental importance to the United States. The United States has long recognized that the prohibition of torture is a peremptory norm of international law, from which no derogation is permitted,[1] reflecting the condemnation of torture by the international community of States as a whole. The Convention is a means by which States party to it advance this end. As stated in its Preamble, the object and purpose of the Convention is "to make more effective the struggle against torture . . . throughout the world." It has been

[1] *See, e.g.*, Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba, March 10, 2006," page 12, *available at* https://2009-2017.state.gov/documents/organization/98969.pdf; "Draft Articles on State Responsibility, Comments of the Government of the United States of America, March 1, 2001," page 3, *available at* https://2009-2017.state.gov/documents/organization/28993.pdf; "Draft Articles on State Responsibility, Comments of the Government of the United States of America" (Oct. 22, 1997), page 6, *available at* https://2009-2017.state.gov/documents/organization/65781.pdf.

observed that "[t]he States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity."[2] To this end, the United States is committed to performing its obligations under the Convention.

3. Treaty reporting is a way the Government of the United States can inform its citizens and the international community of its efforts to implement those obligations it has assumed, while at the same time holding itself up to the public scrutiny of the international community and civil society. In preparing this report, the United States has taken the opportunity to engage in a process of stock-taking and self-examination. The United States has instituted this process as part of its efforts to improve its communication and consultation on human rights obligations and policies. Thus, this report is not an end in itself, but an important tool in the development of practical and effective human rights strategies by the U.S. Government.

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5. In the spirit of cooperation, the United States has provided detailed and thorough answers to the questions posed by the Committee, whether or not the questions or information provided in response to them bear directly on obligations arising under the Convention. For example, as the United States has previously stated, while "torture and ill-treatment can, under certain circumstances, involve acts by 'private' or 'non-State' actors . . . without the state action requirement found in Articles 1 and 16, such action is beyond the scope of the Convention."[3] To the extent that certain of the Committee's questions suggest that purely private conduct falls within the scope of the United States' obligations under the Convention, this suggestion has no basis in the text of the Convention and does not reflect the agreement of the States Parties. As another example, information is provided regarding relevant U.S. practice regardless of whether the practice falls within the territorial scope of the Convention as a legal matter. The United States has also included information in response to issues that have no substantive relation to the Convention, for example, with respect to refugee resettlement and asylum procedures.

* * * *

2. Election of U.S. Candidate to the Committee Against Torture

On October 11, Professor Todd Buchwald was elected to the UN Committee Against Torture. Professor Buchwald was elected with the second highest vote total, with 103 out of 158 ballots. This was the first time a U.S. candidate received over 100 votes in an election for the Committee. In an October 11, 2021 press statement, available at https://www.state.gov/the-election-of-todd-buchwald-to-the-un-committee-against-torture/, Secretary Blinken congratulated Professor Buchwald and said:

> Advancing human rights and rule of law through multilateral re-engagement is a top priority for the United States, and in our pursuit of those ideals at home and

[2] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422, at 449, ¶ 68.

[3] Observations by the United States of America on Committee Against Torture General Comment No. 2: Implementation of Article 2 by States Parties (Nov. 3, 2008), ¶ 18.

around the world, we were proud to nominate Professor Buchwald. The Committee Against Torture is an important UN platform for addressing torture and is charged with the critical work of monitoring 171 States parties' compliance with their treaty obligations under the Convention Against Torture. The United States takes seriously its obligations as a State Party to this treaty and submitted its sixth periodic report to the Committee on September 24.

H. BUSINESS AND HUMAN RIGHTS

1. UN Guiding Principles

On June 16, 2021, the State Department issued a statement by Secretary Blinken, available at https://www.state.gov/10th-anniversary-of-the-un-guiding-principles-on-business-and-human-rights/, regarding the 10th anniversary of the UN Guiding Principles on Business and Human Rights. The statement follows.

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Today marks the tenth anniversary of the unanimous endorsement by the UN Human Rights Council of the UN Guiding Principles on Business and Human Rights (UNGPs). These principles recognize a three-pronged approach to protecting human rights in the context of business activity: States have the duty to protect human rights; businesses have a responsibility to respect human rights; and victims affected by business-related human rights issues should have access to remedy. We commemorate the achievements made over the last decade in these areas, and take heed of the substantive work that still needs to be done toward realization of these principles.

Businesses can provide crucial support for democratic principles, including respect for human and labor rights. They have the capacity to help shape society and the environment – raising local wages, improving working conditions, building trust with communities, and operating sustainably. As a result, businesses have a key role in addressing human rights abuses, including throughout their value chains.

Looking ahead to the next decade, we must go further in shaping the business and human rights agenda. This will take concerted efforts by governments, businesses, and other stakeholders. Doing so is not only the right thing to do but the smart thing to do. We know that companies thrive and economies prosper when there is strong rule of law and adherence to human rights and fundamental freedoms as well as respect for international labor, environmental, and technical standards, good governance, and accountable institutions. Businesses in the rapidly evolving emerging technology sector have a particular opportunity to shape its deployment and establish guardrails against misuse. There also needs to be more attention on the leverage wielded by investors, including private equity, venture capital firms, and multilateral development banks to address human rights abuses, including those committed against environmental defenders. That is why today I am pleased to announce that the State Department,

working with the White House and other federal departments and agencies, will soon begin the process of updating and revitalizing the United States' National Action Plan (NAP) on Responsible Business Conduct.

The Department is renewing its commitment to advance business and human rights under the framework set out in the UNGPs, and in comparable provisions in the OECD Guidelines for Multinational Enterprises, which were updated 10 years ago as well. As we look forward to the next decade under the UNGPs, we recognize there is still much work to be done. The success of future efforts to build upon the UNGPs will depend upon maintaining the approaches that have made them such a success.

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On June 28, 2021, at the interactive dialogue with the Working Group on Transnational Corporations at HRC 47 in Geneva, U.S. Legal Adviser James Bischoff delivered a statement on behalf of the United States and 49 other States (Albania, Argentina, Armenia, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Croatia, Cyprus, Czech Republic, Colombia, Denmark, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Netherlands, Norway, Poland, Portugal, Republic of Korea, Romania, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom, Uruguay) regarding the UN Guiding Principles. The joint statement follows and is available at https://geneva.usmission.gov/2021/06/30/item-3-interactive-dialogue-with-the-working-group-on-transnational-corporations/.

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We thank the Working Group for its report. The UNGPs created a common understanding of the duties of governments and responsibilities of businesses through the three-pillar framework. To highlight a few achievements:

Protect: Over 50 States have adopted or are developing National Action Plans and many have adopted laws to strengthen accountability, including on due diligence, supply chain transparency, and environmental protection.

Respect: A growing number of businesses are integrating human rights considerations into business management and conducting human rights due diligence based on the UNGPs. Corporate benchmarking and reporting have generated a "race to the top" toward stronger protective frameworks.

Remedy: States have created new mechanisms to ensure access to remedy where business operations have adversely affected human rights, and businesses are increasingly developing operational-level grievance mechanisms and remediation processes. The Working Group and OHCHR have produced a robust body of best practices.

As the Working Group acknowledges in its report, one key factor behind the wide acceptance of the UNGPs has been the multistakeholder dialogue that led to their development

and that has characterized their implementation. The success of efforts to build upon them in the next decade will depend upon maintaining this approach.

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2. Negotiations for an Instrument on Business and Human Rights

The United States engaged in the annual negotiating session in 2021 on a treaty on business and human rights, an effort led by Ecuador.

As discussed *supra*, the HRC endorsed the nonbinding UN Guiding Principles on Business and Human Rights in 2011 ("UNGPs"). The UN's working group on business and human rights has documented substantial progress in the ten years since endorsement of the UNGPs, which create a common language around the "protect, respect, remedy" framework.

The approach of promoting the UNGPs as the primary framework for addressing human rights in the business context faced a challenge in 2014, when HRC Resolution 26/9 created the Open-Ended Intergovernmental Working Group ("OEIGWG") on Transnational Organizations and Other Business Enterprises with Respect to Human Rights. Human Rights Council Res. 26/9 (July 14, 2014), U.N. Doc. No. A/HRC/RES/26/9. The United States and several other States voted against Resolution 26/9, and several Latin American Group ("GRULAC") States abstained. In its explanation of vote, the United States assailed the resolution as "a threat to the [UNGPs]" that would "create a competing initiative." Until 2021, the United States had not participated in annual OEIGWG sessions chaired by Ecuador and aimed at producing a draft legally binding instrument on business and human rights.

At the seventh session of the OEIGWG in 2021, which took place October 25-29, 2021, the U.S. delegation participated for the first time to share concerns about the substance of the draft text and express openness to considering alternative instruments, binding or nonbinding, such as a binding framework agreement, which could better achieve consensus than the draft legally binding instrument contemplated up to that point by the OEIGWG.

The U.S. statement at the seventh session can be found in the annex to the report of the seventh session with the compilation of the general statements from States and other relevant stakeholders, available at https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx. U.N. Doc. A/HRC/49/65. The U.S. statement follows.

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The U.S. Government's Continued Opposition to the Process for Negotiating the Legally Binding Instrument to Regulate the Activities of Transnational Corporations and other Business Entities and Willingness to Consider Alternative Approaches to Address Shared Concerns, October 25, 2021

This year, for the first time, the U.S. government is participating in these Working Group meetings. While we continue to have serious substantive concerns with the text as well as the process by which this text has been developed thus far, we want to work with the Group to find a collaborative path forward to advance business and human rights.

We wish to thank members of the business and human rights community for their efforts in bringing attention to the important issues this treaty seeks to address.

As President Biden said in his remarks before the 76th Session of the UN General Assembly last month, …"We will strive to ensure that basic labor rights, environmental safeguards, and intellectual property are protected and that the benefits of globalization are shared broadly throughout all our societies," …. Promoting business and human rights is a key component of achieving this aim.

We appreciate the concerns, including those regarding access to remedy, that have motivated support for the treaty process. We also recognize the unacceptable use of violence against human rights defenders working on, among other things, labor, land, environmental and indigenous issues. We are aware of the many reports that this violence is increasing and agree that these issues need to be addressed.

Nevertheless, we continue to believe that the prescriptive approach set out by this draft treaty is not the best way to address these legitimate concerns.

In particular, we remain concerned with the draft Legally Binding Instrument's (LBI) imposition of binding obligations with respect to regulation of business; its extraterritorial application of domestic laws; and its creation of wide-ranging liability for an overly broad, ill-defined range of human rights abuses—all of which may make it difficult, if not impossible, for many states to support or implement the LBI. Furthermore, negotiations around the draft treaty continue to be contentious, resulting in limited participation from key stakeholders—most notably a sizable percentage of States that are home to the world's largest transnational corporations.

We appreciate recent efforts by Ecuador to accommodate a broader range of viewpoints. However, dissenting points of view have not historically been adequately taken into account or reflected in the annual reports. For a business and human rights treaty to be successful at improving corporate accountability worldwide, it needs broad acceptance by all stakeholders—a geographically diverse group of States, including States that domicile significant numbers of transnational corporations; civil society; and businesses.

A consensus-based approach has been critical to the progress made under the UNGPs' "Protect, Respect, and Remedy" framework. As we celebrate the tenth anniversary of the UNGPs, we note the important advances governments, business, and civil society have made in developing and disseminating good practices. Yet, we recognize that there is still much work to be done to foster a world in which businesses and countries see that economic success includes respect for individuals and the planet, with respect for human rights at the center.

Therefore, the United States is open to exploring alternative instruments, binding or nonbinding—such as a legally binding framework agreement—that build upon the UNGPs and are developed in collaboration with, and that ultimately reflect principles that are broadly supported by businesses, civil society, and other relevant stakeholders. We are convinced an

alternative approach would be more effective than the treaty on the table, and we urge the Working Group to reflect this week on how its goals could be achieved through an alternative, consensus-based instrument.

We recognize that many of you here have invested significant time, energy, and effort into the current text, and may find it frustrating that we have decided to participate this week to elaborate in the room on our long-stated position. However, I would like to reassure you that we are here to engage with the Working Group in good faith. We are not the only state with concerns about the treaty, and we seek to collaborate to find a consensus-based way forward, because if the text lacks broad acceptance among all groups of stakeholders it is unlikely to achieve its goal, and worse, it risks undermining, rather than furthering, the important work the international community has made on the UNGPs.

We will not engage in line-by-line negotiations this week, as we continue to oppose the current text as a whole and do not believe that piecemeal improvements to particular provisions hold a reasonable prospect of remedying our concerns, especially our broader concerns about the LBI's prescriptive approach. However, we will provide general comments throughout the week to explain our concerns with the draft as a whole and about particular provisions, and encourage the exploration of alternatives to accomplish what the different sections of the LBI seek to accomplish, with the overall goal of enhancing corporate accountability and access to remedy for human rights abuses, in line with the UNGPs. We encourage the Working Group to take a step back and consider whether it is time to explore alternatives that could achieve multi-stakeholder consensus. Thank you.

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At the seventh session, the United States also provided the following comments on the latest draft of a proposed instrument on business and human rights. The comments of the United States and other participants are available at https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc.

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Preamble

We believe that any business and human rights instrument needs to be consistent with the existing human rights legal framework as well as the UN Guiding Principles. This includes making the fundamental distinction between the roles of government and business, in which governments are acknowledged to have "obligations" and businesses have a nonbinding "responsibility" to respect human rights. The nonbinding Protect, Respect, and Remedy Framework of the UN Guiding Principles recognizes this distinction.

The draft LBI includes, and indeed may be premised on, fundamental misstatements of international law, including asserting in PP 11 and Article 2.1 that business enterprises have "obligations" with respect to human rights.

An alternative instrument could garner greater support by aligning its text more closely with the UN Guiding Principles and accounting for variance in States' treaty obligations.

Definitions (Article 1)

Article 1.2

The United States has significant concerns about how certain terms are defined within the proposed LBI. The definition of "human rights abuse" under Article 1.2 is overly broad and fails to take into account the varying human rights obligations of states. It defines "human rights abuse" as encompassing harm that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, irrespective of whether a state seeking to hold a business enterprise accountable for abusing a right recognizes it.

Moreover, the new draft includes a new purported "right to safe, clean, healthy, and sustainable environment." The United States has consistently reiterated that there are no universally recognized human rights specifically related to the environment, and we do not believe there is a basis in international law to recognize such a right, either as an independent right or as a right derived from existing rights.

Article 1.3

Article 1.3 defines "business activities" as encompassing "any economic or other activity" of any "business enterprises" and thus captures any activity of any kind, regardless of the size or nature of the business as long as the activity is carried out by a "natural or legal person," and in this third revision now includes "any business relationship." As a result, the scope of activity is vague and virtually unlimited.

With the input of all stakeholders, an alternative approach could clearly define the scope of business activities and human rights to be covered in way that promotes corporate accountability and remedy while also allowing businesses a reasonable amount of predictability.

Purpose (Article 2)

We recognize the value of articulating a purpose or objective for an instrument on business and human rights. However, as stated in the U.S. comments on Article 1, Article 2.1 mischaracterizes international law by asserting that private actors have human rights obligations. Any business and human rights treaty needs alignment with international law and the UNGPs to garner the broad multi-stakeholder support necessary for its success.

Scope (Article 3)

Articles 3.1-3.2

The LBI lacks internal consistency when identifying the range of actors and activity intended to be covered. As mentioned previously, the definition of "business activities" is so broad that it can capture any act by a business enterprise, which would be overinclusive and extend far beyond the reach of what anyone would want a business and human rights treaty to address. At the same time, Article 3.2 provides a significant loophole in how states may treat business enterprises domestically and thus undermine the LBI's universal applicability by allowing states to, for example, treat state-owned enterprises differently from other businesses.

Article 3.3

The scope of rights intended to be covered by the LBI is inconsistent with international human rights law and is imprecise. Article 3.3 indicates that the scope of the LBI is to cover "all internationally recognized human rights binding on the State Parties" to the LBI but then goes on to list a number of sources for such rights that do not in and of themselves create legally binding obligations, including the nonbinding Universal Declaration of Human Rights and ILO Declaration on Fundamental Principles and Rights at Work. Moreover, the reference to customary international law should be more specific, given the variations in understanding as to what human rights obligations constitute customary international law. We encourage

consideration of alternatives that provide for a clear and practical scope and are better aligned with the broader human rights law framework.

Rights of Victims (Article 4)

The United States recognizes the importance of respecting and promoting human rights in the context of the conduct of business. However, the text of Articles 4 is too prescriptive to work in diverse legal systems. For example, it introduces remedies that might not be available in many legal systems.

Protection of Victims (Article 5)

We recognize that governments must meet their obligations to protect and promote respect for human rights, and that business enterprises should respect human rights, and we condemn attacks on human rights defenders. However, the text of Article 5 is too prescriptive to work in diverse legal systems. For example, it imposes requirements to hold private offenders accountable in ways that are not aligned with international human rights law. We would be interested in exploring an alternative approach that would be more in line with the existing UN human rights framework, the UNGPs, and more flexible to accommodate different domestic legal systems. For example, an instrument could establish a framework that lays out broad commitments for the parties with protocols that parties could choose to join.

Prevention (Article 6)

Due diligence occupies a central role in the UNGPs as a mechanism through which businesses operationalize the corporate responsibility to respect human rights. We note the emergence of corporate human rights due diligence laws in jurisdictions around the world. The United States has several laws encouraging or requiring companies to carry out due diligence, including a requirement to disclose whether their products contain conflict minerals by carrying out supply chain due diligence. It is not clear that an instrument mandating the adoption of such laws and prescribing their specific terms, including extending the due diligence to cover all business relationships of a business enterprise, makes sense in this context and could in fact hinder this progress. An alternative approach based on broad-based stakeholder input could involve better defining due diligence expectations, best practices, and lessons learned, and encouraging dialogue in this area.

Access to Remedy (Article 7)

We recognize the importance of effective remedy as set out in the UNGPs. However, as with Articles 4 and 5, the text is too prescriptive to readily accommodate the diversity of domestic legal systems and thus to secure the needed consensus support. We encourage the Working Group to consider whether there is an alternative approach that could offer States more flexibility in how they improve access to effective remedy.

Broad Scope of Liability (Article 8)

As with Article 7, we recognize the importance of effective remedy for victims of human rights abuses in the business context. However, we do not believe that such prescriptive rules regarding legal liability is an appropriate way to improve access to remedy given the diversity of legal systems, and we urge the Working Group to step back and consider whether there is a more flexible approach.

Adjudicative Jurisdiction (Article 9)

The extraterritorial application of national laws as contemplated by the draft is problematic for the United States and changes in the most recent revision only heighten this concern. A treaty promoting such extraterritorial jurisdiction is not going to obtain broad stakeholder support.

Statute of Limitations (Article 10)

We recognize the importance of improving access to remedy, but we do not see Article 10 as an effective way of doing so. It would dispense with the statute of limitations "with respect to all violations of international law which constitute the most serious crimes of concern for the international community as a whole." Without further defining what constitutes "the most serious crimes," the standard would be subject to different interpretations, and thus it may be impossible to define the scope of activity for which the statute of limitations should be dispensed. A robust multistakeholder process might allow for a more complete examination of what might be viable, accounting for what various domestic legal systems permit.

Applicable Law (Article 11)

Article 11 contains an expansive choice of law provision that is designed to displace domestic choice of law provisions, and with the third revised draft, the choice of law provision has become even broader—further increasing the ambiguity as to what laws of govern over the operations of any given business enterprise. A treaty mandating such broad application of foreign law in domestic courts is unlikely to garner significant support.

Mutual Legal Assistance (Article 12)

The United States lauds efforts by governments to help other governments to promote respect for human rights in the context of business activities. Article 12's state obligations to provide legal assistance "to the fullest extent possible under domestic and international law" is far too prescriptive, and without allowing for states to take domestic and other foreign policy priorities into account is unlikely to garner significant support.

Consistency with International Law (Article 14)

The United States supports addressing business and human rights in a manner consistent with states' obligations under international law. It would be inappropriate, however, to impose such broad sweeping mandates on states with respect to existing and future agreements, especially in light of the ambiguities in what would constitute "human rights obligations" under the LBI.

Oversight Body Challenges (Article 15)

The United States has consistently supported multilateral action to promote respect for human rights by transnational corporations, as it has through the UNGPs. Any proposal to establish a new treaty body of 12 independent experts would entail significant additional outlays in the UN budget, and thus the implications and consequences need to be considered carefully. Additionally, the treaty body provisions are not a modern best practice.

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I. INDIGENOUS ISSUES

On April 19, 2021, Secretary of the Interior Deb Haaland delivered remarks at the UN Permanent Forum on Indigenous Issues. She spoke in Keres to introduce and conclude her remarks. Her remarks are transcribed below and available at https://usun.usmission.gov/remarks-by-secretary-of-the-interior-deb-haaland-at-the-un-permanent-forum-on-indigenous-issues/.

* * * *

Good afternoon, esteemed colleagues, leaders, and friends. I'm Deb Haaland, Secretary of the United States Department of the Interior and proud citizen of the Pueblo of Laguna. Today, I'm sharing my recorded remarks from the ancestral homelands of the Anacostan and Piscataway people.

At this moment, our world is facing a global pandemic. It's a crisis that puts a spotlight on the disparities that exist in Indigenous and marginalized communities across our nations and calls us to address the interlocking challenges of injustice and the climate emergency. I believe we can meet this moment with solutions that uplift communities everywhere with the power of Indigenous resilience, language, and knowledge. With Indigenous knowledge, our world can usher in a new era of peace, justice, and strong institutions to meet this moment and move our planet toward a more sustainable future. Our ancestors lived sustainably and survived famine and drought with the understanding that future generations would rely on their hard work and sacrifice in moments like these.

Why are we here? Because we have an obligation to the future. I learned this in my mother's Pueblo household, in my grandparents' cornfield on the Pueblo of Laguna, and meeting with Indigenous people from across the globe. It is Indigenous resilience and worldview that every government, country, and community can learn from, so that we manage our lands, waters, and resources not just across budget years, but across generations.

I want to give credit to the Indigenous women who are meeting this moment with grassroots efforts, defending our Earth against human causes of climate change around the world. Women and young people lead efforts in all areas of justice. We must protect these defenders.

President Biden recognizes that each of the challenges we face impacts another and requires comprehensive solutions. We've unleashed a whole-of-government approach: to use nature-based solutions to conserve 30 percent of our U.S. lands and oceans by 2030 as part of an international push for conservation restoring balance to lands, animals, plants, waters, and all living things that sustain life; to closely coordinate with U.S. indigenous communities in our COVID-19 response efforts; to partner globally, ensuring Indigenous Peoples and all marginalized communities have access to vaccines, testing, and treatment; to put the full weight of our federal government in a cross-departmental and interagency Missing and Murdered Unit, and continue to cooperate with Canada and Mexico, and other Member States, to combat violence against Indigenous Women and Girls; and to work with the international community on our repatriation efforts to realize a global commitment of honoring and caring for all Indigenous Peoples, their lands, languages, cultural heritage, and sacred spaces.

I strongly affirm the United States' support for the UN Declaration on the Rights of Indigenous Peoples, and our commitment to advancing Indigenous Peoples' rights at home and abroad. The Declaration guides us – where appropriate – to improve our laws and policies within the structure of the U.S. Constitution and international obligations. We need enhanced participation and meaningful engagement of Indigenous Peoples throughout our UN bodies.

President Biden's Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships outlines our commitment to respect Tribal sovereignty and governance, fulfill federal trust and treaty responsibilities, and engage in regular, meaningful, and robust consultation with Tribal Nations. Our first White House Council on Native American Affairs

meeting of this administration will be held this Friday, and I hope to address Indigenous issues through this Council.

I am honored to be the first Native American U.S. Cabinet secretary, and fully understand my responsibility to future generations, and Indigenous Peoples everywhere.

Though this difficult moment has been thrust upon us, it's an opportunity to usher in a new era of peace, justice, and strong institutions. But we will only rise to this moment by acknowledging the collective power of Indigenous Peoples, and by doing it together.

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J. FREEDOM OF ASSOCIATION AND PEACEFUL ASSEMBLY

1. Cuba

On July 26, 2021, the governments of Austria, Brazil, Colombia, Croatia, Cyprus, Czech Republic, Ecuador, Estonia, Guatemala, Greece, Honduras, Israel, Latvia, Lithuania, Kosovo, Montenegro, North Macedonia, Poland, Republic of Korea, Ukraine, and the United States of America issued a joint statement on Cuba, condemning mass arrests and detentions of protestors and calling on the government of Cuba to respect universal rights and freedoms of the people of Cuba. The State Department issued a July 26 statement by Secretary Blinken reiterating the condemnation and sharing the joint statement. The State Department press statement including Secretary Blinken's statement is available at https://www.state.gov/united-states-and-concerned-nations-stand-together-for-the-cuban-people/ and the State Department media note conveying the joint statement is available at https://www.state.gov/joint-statement-on-cuba/. The joint statement includes the following:

> On July 11, tens of thousands of Cuban citizens participated in peaceful demonstrations across the country to protest deteriorating living conditions and to demand change. They exercised universal freedoms of expression and assembly, rights enshrined in the Universal Declaration of Human Rights, the American Convention on Human Rights, the Inter-American Democratic Charter, and the European Convention on Human Rights.
>
> We call on the Cuban government to respect the legally guaranteed rights and freedoms of the Cuban people without fear of arrest and detention. We urge the Cuban government to release those detained for exercising their rights to peaceful protest. We call for press freedom and for the full restoration of Internet access, which allows economies and societies to thrive. We urge the Cuban government to heed the voices and demands of the Cuban people.
>
> The international community will not waver in its support of the Cuban people and all those who stand up for the basic freedoms all people deserve.

On September 24, 2021, The State Department issued a statement by Secretary Blinken on the repression and mass arrests of peaceful protestors in Cuba. The

statement is excerpted below and available at https://www.state.gov/repression-and-mass-arrests-of-peaceful-cuban-protestors/.

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Starting on July 11, tens of thousands of Cubans in dozens of cities and towns throughout their country took to the streets to peacefully demand respect for their human rights and fundamental freedoms. In response, Cuban security forces violently repressed the protests, arresting hundreds of demonstrators simply for exercising their rights of freedom of expression and peaceful assembly. Demonstrators and human rights advocates have since been convicted in summary proceedings that lack fair trial guarantees. Some have reported physical abuse while in regime custody. Others remain incommunicado or are being held without formal charges.

Today marks the end of high-level general debate at the United Nations, where world leaders came together to address the General Assembly on the most pressing issues facing our peoples and nations today. Among these is the universal imperative to respect the human rights of all people. It is vital that the international community speak out against the repression and mass arrests of Cuban protestors; demand the release of those unjustly imprisoned there; and support the Cuban people's desire to determine their own future. We urge the Cuban government, a member of the UN Human Rights Council, to respect the human rights and fundamental freedoms of the Cuban people, enshrined in the Universal Declaration on Human Rights.

Cubans deserve a chance to exercise their rights and voice their aspirations without fear of violence or imprisonment. The United States will continue to support the Cuban people, and will continue to take action to promote accountability for the Cuban government's human rights abuses.

* * * *

On November 14, 2021, Secretary Blinken issued a further statement, calling for respect for human rights and peaceful demonstrations in Cuba planned for November 15. The statement includes the following, and is available in full at https://www.state.gov/calling-for-respect-for-human-rights-and-peaceful-demonstrations-in-cuba-on-november-15/:

> On November 15, Cubans will again call on their government to hear their aspirations for a better future. The Cuban government has already made clear that it does not want to listen; the regime has denied permission for the protests, dismissed opposition supporters from their jobs, and threatened dissenters with imprisonment. We strongly condemn these intimidation tactics. We call on the Cuban government to respect Cubans' rights, by allowing them to peacefully assemble and use their voices without fear of government reprisal or violence, and by keeping Internet and telecommunication lines open for the free

exchange of information. We urge the Cuban government to reject violence, and instead, embrace this historic opportunity to listen to the voices of their people.

We call on our democratic partners to echo our support for Cuban demonstrators seeking to exercise their fundamental rights and freedoms. It is imperative for the international community to champion these universal rights whenever and wherever they are threatened. We must speak with one voice, calling on the Cuban government to respect those exercising their rights in peaceful protest on November 15, and to release all those unjustly detained.

The United States stands with the people of Cuba. We commend their bravery and unwavering pursuit of democracy, prosperity, and fundamental rights and freedoms. The United States will continue to pursue measures that both support the Cuban people and promote accountability for the Cuban regime's repression and human rights violations.

2. Hong Kong

See Chapter 9 for discussion of Secretary Blinken's statements on Hong Kong, including his April 16, 2021 statement condemning as politically-motivated the sentencing of Hong Kong pro-democracy leaders for unlawful assembly. The statement is available at https://www.state.gov/sentencing-of-hong-kong-pro-democracy-activists-for-unlawful-assembly/.

3. Russia

On January 23, 2021, the State Department issued a press statement condemning the government of Russia's tactics against peaceful protests and journalists. The statement is excerpted below and available at https://www.state.gov/protests-in-russia/.

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…Prior to today's events, the Russian government sought to suppress the rights to peaceful assembly and freedom of expression by harassing protest organizers, threatening social media platforms, and pre-emptively arresting potential participants. This follows years of tightening restrictions on and repressive actions against civil society, independent media, and the political opposition.

Continued efforts to suppress Russians' rights to peaceful assembly and freedom of expression, the arrest of opposition figure Aleksey Navalny, and the crackdown on protests that followed are troubling indications of further restrictions on civil society and fundamental freedoms. Russians' rights to peaceful assembly and to participate in free and fair elections are enshrined not only in the country's constitution, but also in Russia's OSCE commitments, the Universal Declaration of Human Rights, and in its international obligations under the International Covenant on Civil and Political Rights.

We call on Russian authorities to release all those detained for exercising their universal rights and for the immediate and unconditional release of Aleksey Navalny. We urge Russia to

fully cooperate with the international community's investigation into the poisoning of Aleksey Navalny and credibly explain the use of a chemical weapon on its soil.

The United States will stand shoulder-to-shoulder with our allies and partners in defense of human rights – whether in Russia or wherever they come under threat.

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K. FREEDOM OF EXPRESSION

1. Joint Statements

In July 2021, the Freedom Online Coalition, a coalition of 32 governments, including the United States, issued a joint statement at the 47th session of the HRC regarding freedom of expression online. The statement is excerpted below and available at https://freedomonlinecoalition.com/joint-statements/.

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The Internet should be guided by policies that promote the free flow of information and that protect human rights and foster innovation, creativity, and economic growth. The Freedom Online Coalition will continue to advance these goals worldwide. The Coalition believes that digital technologies and, in particular the Internet, provide a unique platform that enable[s] individuals to exercise their human rights more fully, including the freedom to hold and express opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The Coalition is deeply concerned with the growing trend of state-sponsored actions to curb these freedoms. This includes the use of arbitrary or unlawful surveillance practices; partial or complete Internet shutdowns and network disruptions as well as online content regulation and censorship that are inconsistent with human rights law. The Coalition is also alarmed by the manipulation of information and spread of disinformation by both State and non-State actors to undermine the international rules-based order and erode support for the democracy and human rights that underpin it.

Shutdowns and state-sponsored network disruptions may silence political opposition, limit peaceful protests and prevent human rights defenders from documenting abuses. Moreover, arbitrary network disruptions are inconsistent with the targets of the Sustainable Development Goals, undermine the economic benefits of the Internet and disrupt access to essential services such as health care.

Internet censorship can deprive individuals, whose voices are not equally represented by mainstream media sources, of the core platforms where they access educational resources, express themselves and interact with each other. Censorship often affects women and girls and other individuals who may face multiple and intersecting forms of discrimination.

The Coalition calls on all governments to immediately end Internet shutdowns and to refrain from content restrictions or actions that restrict civic space online and offline, in violation of states' obligations under international human rights law. All governments should act in a

manner that ensures a free, open, interoperable, reliable and secure Internet, and fully respects human rights including the freedom of expression.

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On July 10, 2021, the State Department issued, as a media note available at https://www.state.gov/media-freedom-coalition-statement-on-hong-kongs-apple-daily/, the Media Freedom Coalition's statement on the forced closure of the Apple Daily newspaper in Hong Kong. The governments of Australia, Austria, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Iceland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Slovakia, Switzerland, United Kingdom, United States of America signed the statement. The statement follows.

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The undersigned members of the Media Freedom Coalition express their strong concerns about the forced closure of the Apple Daily newspaper, and the arrest of its staff by the Hong Kong authorities. The use of the National Security Law to suppress journalism is a serious and negative step which undermines Hong Kong's high degree of autonomy and the rights and freedoms of people in Hong Kong, as provided for in the Hong Kong Basic Law and the Sino-British Joint Declaration.

The action against Apple Daily comes against a backdrop of increased media censorship in Hong Kong, including pressure on the independence of the public broadcaster and recent legal action by the Hong Kong authorities against journalists.

We are highly concerned by the possible introduction of new legislation that is intended or could risk being used to eliminate scrutiny and criticism by the media of the government's policies and actions.

Freedom of the press has been central to Hong Kong's success and international reputation over many years. Hong Kong and mainland Chinese authorities should fully respect and uphold this important right, in line with China's international legal obligations.

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The Media Freedom Coalition issued a joint statement on media freedom in Russia on October 28, 2021, which is excerpted below and available at https://www.state.gov/joint-statement-on-media-freedom-coalition-on-media-freedom-in-russia/. The governments of Australia, Canada, Czech Republic, Denmark, Estonia, France, Germany, Greece, Iceland, Latvia, Lithuania, Netherlands, New Zealand, North Macedonia, Slovakia, Slovenia, Ukraine, United Kingdom, and United States of America signed the joint statement.

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The undersigned members of the Media Freedom Coalition express their deep concern about the Russian government's intensifying harassment of independent journalists and media outlets in Russia. Media freedom is vital to the effective functioning of free and open societies and is essential to the protection of human rights and fundamental freedoms.

This year has seen the Russian authorities systematically detain journalists and subject them to harsh treatment while they reported on protests in support of imprisoned opposition figure Aleksey Navalny. In April, the office of student journal DOXA was searched in relation to spurious charges and four editors were then subjected to severe restrictions on their freedom. On June 29, Russian authorities raided the apartments of staff members of investigative news website Proekt on the same day the outlet published an investigation into alleged corrupt practices by Russia's Interior Minister. Proekt was added to Russia's list of "undesirable foreign organizations," the first media entity to receive that designation. In addition, Russian occupation authorities in Crimea have held Radio Free Europe/Radio Liberty (RFE/RL) reporter Vladislav Yesypenko since March and have reportedly tortured him in detention. On July 15, Yesypenko was indicted on specious charges and faces up to 18 years' imprisonment. On October 8, Russian authorities applied the label of "media foreign agent" to the international investigative journalism project Bellingcat, known for its investigation of the poisoning of Navalny.

In an unambiguous effort to suppress Russians' access to independent reporting, the Russian government introduced onerous labeling requirements for so-called "media foreign agents" last year. Since then, it has charged RFE/RL with more than 600 violations, resulting in fines totaling more than $4.4 million. Russian authorities rejected RFE/RL's appeals of initial fines in March and froze the local bank accounts of RFE/RL's Moscow bureau on May 14, placing the bureau at risk of bankruptcy. It increasingly appears the Russian government intends to force RFE/RL to end its decades-long presence in Russia, just as it has already forced the closure of several other independent media outlets in recent years.

In addition to RFE/RL, authorities have applied the "media foreign agent" label to independent Russian outlets operating within or near Russia's borders, including Meduza, Important Stories, VTimes, The Insider, Mediazona, OVD-Info, Medium Orient, PASMI news, Moscow Digital Media and TV channel Dozhd, undercutting their ability to operate. As a result of this crackdown, VTimes was forced to announce its closure less than a month after its designation. Over the past four months, Russian authorities added dozens more Russian journalists to their "foreign agent" list. According to the Committee to Protect Journalists, 10 journalists are currently imprisoned in Russia simply for carrying out their work. We also note the Russian authorities' decision to expel BBC Journalist Sarah Rainsford – a retrograde step that further damages the cause of media freedom in Russia.

The September 17-19 Duma elections in the Russian Federation were preceded by Russian government restrictions towards journalists and media workers. Journalists and media workers were threatened and forcibly expelled from polling stations. These actions contradict Russia's international commitments.

While concerns related to freedom of expression and the safety of journalists in Russia have intensified, they are not new. We stand in solidarity with independent Russian journalists who assume personal risk in carrying out their professional activities, and we honor the memory of those reporters whose intrepid work has cost them their lives, including Natalia Estemirova, Anna Politkovskaya, and Paul Klebnikov. We congratulate Dmitry Muratov, editor-in-chief of Novaya Gazeta, on winning the 2021 Nobel Peace Prize. This award underlines the important

work all independent journalists and media workers in the Russian Federation have done for years, fighting for human rights, including freedom of expression.

We reiterate our condemnation of the Russian government's targeting and harassment of independent journalists and media outlets. We urge the Russian Federation to comply with its international human rights commitments and obligations and to respect and ensure media freedom and safety of journalists. We call on the Russian government to cease its repression of independent voices, end the politically motivated proceedings against journalists and media organizations, and release all those who have been unjustly detained.

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2. U.S. Statements

On May 2, 2021, Secretary Blinken issued a statement to mark World Press Freedom Day on May 3. His statement follows and is available at https://www.state.gov/world-press-freedom-day/.

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Tomorrow, the United States joins the international community in celebrating World Press Freedom Day. Information and knowledge are powerful tools, and a free and independent press is the core institution connecting publics to the information they need to advocate for themselves, make informed decisions, and hold governmental officials accountable. The United States advocates for press freedom online and offline, and for the safety of journalists and media workers worldwide.

Freedom of expression and access to factual and accurate information provided by independent media are foundational to prosperous and secure democratic societies. Under the Universal Declaration of Human Rights, freedom of expression includes the right of all individuals "to seek, receive and impart information and ideas through any media and regardless of frontiers." But the outlook for the rights of journalists today is harrowing.

That's one reason we announced, in response to the brutal murder of Jamal Khashoggi, the "Khashoggi Ban" — to help deter threatening behavior against the media. The Department's 2020 Country Reports on Human Rights Practices released in March cites dozens of cases of media workers who have been harassed, attacked, and even killed for their work. The Committee to Protect Journalists (CPJ) reported that in 2020, the number of journalists killed in retaliation for their reporting more than doubled, with Mexico and Afghanistan seeing the largest number of killings. According to CPJ, the number of journalists jailed for their reporting in 2020 reached the highest level since the organization began keeping track, with the People's Republic of China, Turkey, and Egypt imprisoning the most reporters last year. In Russia, authorities continue to restrict independent reporting, including Radio Free Europe/Radio Liberty.

Unfortunately, the pandemic has provided a pretext for repressive governments to intensify pressure on independent media. It is exactly in that kind of hostile environment that the exercise of freedom of expression, especially by members of the press, becomes even more crucial in alerting the public to abuses and corruption and in countering dangerous

misinformation and disinformation. We call on all governments to ensure media safety and protect journalists' ability to do their jobs without fear of violence, threats, or unjust detention.

In our increasingly digital world, press freedom and the free flow of information require Internet freedom. We are concerned by governments' increased efforts to deprive the public of information and knowledge by controlling Internet access and censoring content, including through the widespread use of network restrictions – some as long as 18 months – that make it impossible for journalists to conduct independent reporting. Governments must not shut down, block, throttle, censor, or filter services, as these actions undermine and unduly restrict the rights of peaceful assembly and freedoms of association and expression, disrupt access to essential services, and negatively impact the economy.

The United States condemns the use of partial or complete government-imposed Internet shutdowns, among other tactics, to prevent the exercise of freedom of expression online and restrict the ability of independent journalists to serve the public. We urge governments to investigate and seek accountability for all crimes against journalists and media workers. The United States is committed to working in partnership with members of the media, the private sector, non-governmental organizations, and other concerned governments to support access to information and defend freedom of expression and the brave journalists who face intimidation, harassment, arrest, and violence in exercising their rights.

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On June 10, 2021, the State Department issued a statement on Nigeria's Twitter suspension. The statement, available at https://www.state.gov/nigerias-twitter-suspension/, follows.

> The United States condemns the ongoing suspension of Twitter by the Nigerian government and subsequent threats to arrest and prosecute Nigerians who use Twitter. The United States is likewise concerned that the Nigerian National Broadcasting Commission ordered all television and radio broadcasters to cease using Twitter.
>
> Unduly restricting the ability of Nigerians to report, gather, and disseminate opinions and information has no place in a democracy. Freedom of expression and access to information both online and offline are foundational to prosperous and secure democratic societies.
>
> We support Nigeria as it works towards unity, peace, and prosperity. As its partner, we call on the government to respect its citizens' right to freedom of expression by reversing this suspension.

L. FREEDOM OF RELIGION OR BELIEF

1. U.S. Statements

Religious Freedom in Russia

On February 25, 2021, the State Department issued a press statement regarding U.S. concerns about religious freedom in Russia. The statement, available at https://www.state.gov/religious-freedom-concerns-in-russia/, includes the following:

> We are disturbed by reports that a Russian court sentenced Valentina Baranovskaya and her son, Roman Baranovsky, to terms of two and six years in a Russian penal colony, respectively, simply for being practicing Jehovah's Witnesses. The sentencing of Valentina, a 69-year-old stroke victim, is particularly cruel. It also marks the first time a Russian court has sentenced a female Jehovah's Witness.
>
> The decision by the Russian court is the latest development in an ongoing crackdown on members of religious minority groups in Russia. Since the Russian Supreme Court designated the Jehovah's Witnesses an "extremist" organization in 2017, 52 Jehovah's Witnesses have been imprisoned for exercising their beliefs, including Alexandr Ivshin, who was recently given a record-length 7.5 year sentence for a Jehovah's Witness by a Russian court.
>
> We urge Russia to lift its ban on Jehovah's Witnesses and to respect the right of all to exercise their freedom of thought, conscience, and religion or belief.

On July 9, 2021, the State Department spokesperson issued a statement regarding Russia's continuing repression of members of religious minority groups. The statement follows and is available at https://www.state.gov/russias-continuing-repression-of-members-of-religious-minority-groups/.

> We are deeply concerned by a Russian court's decision to uphold the designation of the Khakassia regional branch of Falun Gong as "extremist" and criminalize the peaceful practice of their spiritual beliefs. Russian authorities harass, fine, and imprison Falun Gong practitioners for such simple acts as meditating and possessing spiritual texts.
>
> We urge the Russian government to end its practice of misusing the "extremist" designation as a way to restrict human rights and fundamental freedoms. We continue to call on Russia to respect the right of freedom of religion or belief for all, including Falun Gong practitioners and members of other religious minority groups in Russia simply seeking to exercise their beliefs peacefully.

> Yesterday's decision is another example of Russian authorities labeling peaceful groups as "extremist," "terrorist," or "undesirable" solely to stigmatize their supporters, justify abuses against them, and restrict their peaceful religious and civic activities. The Russian government has done so against a number of groups, whose members face home raids, extended detention, excessive prison sentences, and harassment for their peaceful religious practices. Earlier this year, another Russian court designated three organizations affiliated with imprisoned opposition figure Aleksey Navalny as "extremist," further demonstrating Russia's arbitrary and expansive application of this label.

2. Joint Statements

Statement on Jehovah's Witnesses

On December 17, 2021, the Office of International Religious Freedom released a joint statement from members of the International Religious Freedom or Belief Alliance concerning the increased repression of Jehovah's Witnesses in several countries. The joint statement is excerpted below and available at https://www.state.gov/international-religious-freedom-or-belief-alliance-statement-on-jehovahs-witnesses/. Other cosignatories on the statement along with the United States are: Australia, Brazil, Denmark, Greece, Latvia, Lithuania, Poland, Slovakia, the Netherlands, Ukraine, and the United Kingdom.

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We uphold the right of Jehovah's Witnesses to practice their religion and their beliefs and their ability to adhere to being apolitical and pacifist without fear, harassment, discrimination, or persecution.

In countries around the world, governments investigate, detain, arrest, and imprison Jehovah's Witnesses on account of their religious beliefs. They are falsely designated as "extremist." Officials conduct home raids against Jehovah's Witnesses, place them in prolonged pre-trial detention and require excessive prison sentences due to their religious practices and beliefs, and deny citizenship under domestic law. They also are subjected to violence and discrimination.

We affirm that the right to freedom of religion or belief (FoRB) includes the ability to conscientiously object to military service. We note that the International Covenant on Civil and Political Rights provides that parties may not derogate from their obligations with respect to Article 18 in times of public emergency which threatens the life of a nation. States should not, therefore, discriminate against individuals based on their religious beliefs when considering conscientious objection from military service.

We call upon all states to, where applicable:

- Immediately release all Jehovah's Witnesses jailed for exercising their religious beliefs, including charges for their religious expression, activities, and conscientious objection to military service.
- Immediately end the torture and physical abuse of Jehovah's Witnesses in detention.
- Immediately end home raids against Jehovah's Witnesses.

- Immediately address harassment of and discrimination against Jehovah's Witnesses.
- Immediately eliminate any discrimination against Jehovah's Witnesses in decisions with respect to citizenship and/or issuance of national identification documents.
- Create space for conscientious objection through non-military alternative civilian service.
- Allow Jehovah's Witnesses access to their religious literature and equal access to legal registration for religion or belief groups.
- Desist from targeting Jehovah's Witnesses with 'anti-extremism' laws and forced conscription.
- Review current "anti-extremism" legislation that severely limits or prohibits all activities of Jehovah organizations.

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3. Third Committee

On October 19, 2021, U.S. Counselor for Economic and Social Affairs Jason Mack delivered remarks at a Third Committee interactive dialogue with the special rapporteur on the right to freedom of religion or belief. Those remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-third-committee-interactive-dialogue-with-the-special-rapporteur-on-the-right-to-freedom-of-religion-or-belief-ahmed-shaheed/.

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Thank you, Special Rapporteur Shaheed. The United States appreciates your continuous efforts to advance freedom of religion or belief.

We support your efforts toward collective action and advocacy between your office and wide-ranging stakeholders, including other UN special mandate holders, to promote respect for freedom of religion or belief for every individual.

We thank you for this year's report on "Anti-Muslim Discrimination and Intolerance." This practical guide offers good practices and strategies to address the safety and security concerns of threatened religious groups.

We continue to witness government targeting of and societal intolerance against individuals because of their religious beliefs. No one should fear harassment, discrimination, or violence for their beliefs.

We must promote accountability for all those involved in violations and abuses of the right to freedom of religion or belief including for government officials, and we highlight the extreme plight of members of religious minority groups in the People's Republic of China, including in Tibet and Xinjiang; Burma, Eritrea, Iran, Russia, and wherever abuses may occur.

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4. U.S. Annual Report

Secretary Blinken and Dan Nadel of the Office of International Religious Freedom addressed the press on the release of the 2020 International Religious Freedom Report, mandated by the International Religious Freedom Act of 1998, as amended, Pub. L. No. 105-292, 112 Stat. 2787 (1998) ("IRF Act") on May 12, 2021. Secretary Blinken's remarks are excerpted below and available at https://www.state.gov/secretary-antony-j-blinken-on-release-of-the-2020-international-religious-freedom-report/. The report is available at https://www.state.gov/reports/2020-report-on-international-religious-freedom/.

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Today, the State Department is releasing the **2020 International Religious Freedom Report**. We've produced this document every year for 23 years. It offers a comprehensive review of the state of religious freedom in nearly 200 countries and territories around the world, and it reflects the collective effort of literally hundreds of American diplomats around the world and our Office of International Religious Freedom here in Washington, led by Dan Nadel, and he'll be taking some questions from you today on the report.

Let me just say a few words about why this report matters. Religious freedom is a human right; in fact, it goes to the heart of what it means to be human – to think freely, to follow our conscience, to change our beliefs if our hearts and minds lead us to do so, to express those beliefs in public and in private. This freedom is enshrined in the Universal Declaration of Human Rights. It's also part of the First Amendment to the U.S. Constitution. Our country's commitment to defending freedom of religion and belief goes back centuries. It continues today.

Religious freedom, like every human right, is universal. All people, everywhere, are entitled to it no matter where they live, what they believe, or what they don't believe. Religious freedom is co-equal with other human rights because human rights are indivisible. Religious freedom is not more or less important than the freedom to speak and assemble, to participate in the political life of one's country, to live free from torture or slavery, or any other human right. Indeed, they're all interdependent. Religious freedom can't be fully realized unless other human rights are respected, and when governments violate their people's right to believe and worship freely, it jeopardizes all the others. And religious freedom is a key element of an open and stable society. Without it, people aren't able to make their fullest contribution to their country's success. And whenever human rights are denied, it ignites tension, it breeds division.

As this year's International Religious Freedom Report indicates, for many people around the world this right is still out of reach. In fact, according to the Pew Research Center, 56 countries, encompassing a significant majority of the world's people, have high or severe restrictions on religious freedom.

To name just a few examples from this year's report, Iran continues to intimidate, harass, and arrest members of minority faith groups, including Baha'i, Christians, Jews, Zoroastrians, Sunni and Sufi Muslims.

In Burma, the military coup leaders are among those responsible for ethnic cleansing and other atrocities against Rohingya, most of whom are Muslim, and other religious and ethnic minorities around the world.

In Russia, authorities continue to harass, detain, and seize property of Jehovah's Witnesses as well as members of Muslim minority groups on the pretense of alleged extremism.

In Nigeria, courts continue to convict people of blasphemy, sentencing them to long-term imprisonment or even death. Yet the government has still not brought anyone to justice for the military's massacre of hundreds of Shia Muslims in 2015.

Saudi Arabia remains the only country in the world without a Christian church, though there are more than a million Christians living in Saudi Arabia. And authorities continue to jail human rights activists like Raif Badawi, who was sentenced in 2014 to a decade in prison and a thousand lashes for speaking about his beliefs.

And China broadly criminalizes religious expression and continues to commit crimes against humanity and genocide against Muslim Uyghurs and members of other religious and ethnic minority groups.

Today, I'm announcing the designation of Yu Hui, former office director of the so-called Central Leading Group Preventing and Dealing with Heretical Religions, of Chengdu, for his involvement in gross violations of human rights, namely, the arbitrary detention of Falun Gong practitioners. Yu Hui and his family are now ineligible for entry into the United States.

I could go on; the examples are far too numerous.

More broadly, we're seeing anti-Semitism on the rise worldwide, including here in the United States as well as across Europe. It's a dangerous ideology that history has shown is often linked with violence. We must vigorously oppose it wherever it occurs.

Anti-Muslim hatred is still widespread in many countries, and this, too, is a serious problem for the United States as well as in Europe.

We have work to do to ensure that people of all faiths and backgrounds are treated with equal dignity and respect.

As this report notes, some countries have taken positive steps forward, and that, too, deserves comment. Last year, the civilian-led transitional government in Sudan repealed apostasy laws and public order laws that had been used to harass members of religious minority groups. Uzbekistan's government has released hundreds of people who have been imprisoned because of their beliefs. Just this past Saturday, Turkmenistan released 16 Jehovah's Witnesses who are conscientious objectors and refused to serve in the military. We understand the authorities will now offer conscientious objectors alternative ways to meet national service requirements.

We want to see more progress like that, and so our promise to the world is that the Biden-Harris administration will protect and defend religious freedom around the world. We will maintain America's longstanding leadership on this issue. We're grateful for our partners, including likeminded governments, the UN Human Rights Council, and networks like the International Religious Freedom of Belief Alliance and the International Contact Group of Freedom of Religion or Belief. We'll continue to work closely with civil society organizations, including human rights advocates and religious communities, to combat all forms of religiously motivated hatred and discrimination around the world.

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5. Designations under the International Religious Freedom Act

On November 29, 2021, the Department of State published the designations of Burma, China, Eritrea, Iran, the Democratic People's Republic of Korea, Pakistan, Russia, Saudi Arabia, Tajikistan, and Turkmenistan as Countries of Particular Concern ("CPC") under the IRF Act. 86 Fed. Reg. 67,780 (Nov. 29, 2021). The Department placed Algeria, Comoros, Cuba, and Nicaragua on a Special Watch List ("SWL") for governments that have engaged in or tolerated "severe violations of religious freedom." *Id.* The "Presidential Actions" or waivers designated for each of the countries designated as CPCs are listed in the Federal Register notice. *Id.* The Department also designated Al-Shabaab, Boko Haram, Hayat Tahrir al-Sham, the Houthis, ISIS, ISIS-Greater Sahara, ISIS-West Africa, Jamaat Nasr al-Islam wal Muslimin, 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.*

On November 17, 2021, Secretary Blinken issued a press statement on the religious freedom designations. The statement is excerpted below and available at https://www.state.gov/religious-freedom-designations/.

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The United States will not waver in its commitment to advocate for freedom of religion or belief for all and in every country. In far too many places around the world, we continue to see governments harass, arrest, threaten, jail, and kill individuals simply for seeking to live their lives in accordance with their beliefs. This Administration is committed to supporting every individual's right to freedom of religion or belief, including by confronting and combating violators and abusers of this human right.

Each year the Secretary of State has the responsibility to identify governments and non-state actors, who, because of their religious freedom violations, merit designation under the International Religious Freedom Act. I am designating Burma, the People's Republic of China, Eritrea, Iran, the DPRK, Pakistan, Russia, Saudi Arabia, Tajikistan, and Turkmenistan as Countries of Particular Concern for having engaged in or tolerated "systematic, ongoing, and egregious violations of religious freedom." I am also placing Algeria, Comoros, Cuba, and Nicaragua on a Special Watch List for governments that have engaged in or tolerated "severe violations of religious freedom." Finally, I am designating al-Shabab, Boko Haram, Hayat Tahrir al-Sham, the Houthis, ISIS, ISIS-Greater Sahara, ISIS-West Africa, Jamaat Nasr al-Islam wal-Muslimin, and the Taliban as Entities of Particular Concern.

The challenges to religious freedom in the world today are structural, systemic, and deeply entrenched. They exist in every country. They demand sustained global commitment from all who are unwilling to accept hatred, intolerance, and persecution as the status quo. They require the international community's urgent attention.

We will continue to press all governments to remedy shortcomings in their laws and practices, and to promote accountability for those responsible for abuses. The United States remains committed to working with governments, civil society organizations, and members of

religious communities to advance religious freedom around the world and address the plight of individuals and communities facing abuse, harassment, and discrimination on account of what they believe, or what they do not believe.

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M. JUDICIAL PROCEDURE AND RELATED ISSUES

1. Arbitrary Detention

On February 15, 2021, Secretary Blinken delivered video remarks on the Declaration Against the Use of Arbitrary Detention in State-to-State Relations. His remarks are excerpted below and available at https://www.state.gov/secretary-of-state-antony-j-blinken-video-remarks-on-the-declaration-against-the-use-of-arbitrary-detention-in-state-to-state-relations/.

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I'm honored to participate in the launch of this initiative, and I'm grateful to Canada for their leadership.

Arbitrary detention in state-to-state relations is a serious problem. Put simply, this is when someone traveling or living abroad – for example, a businessperson, a tourist, or someone visiting family – is detained by the government and falsely charged or sentenced because of the country on their passport. Then they're used to gain leverage in state-to-state relations. They become a bargaining chip – a human pawn.

It's completely unacceptable. And it's already prohibited under international human rights conventions. But some countries still do it, and we as a global community have to stand against it.

This kind of arbitrary detention goes against the human rights of the people being held. It brings anguish to their families. And it's a threat to anyone who travels, works, or lives abroad.

It's time to send a clear message to every government that arbitrarily detains foreign nationals and tries to use them as leverage: this will not be tolerated by the international community.

The fact that so many countries are endorsing this declaration is a sign of its strength. Now let's keep the momentum going. I urge more countries to join us in making it clear that arbitrary detention has absolutely no place in state-to-state relations. Human beings are not bargaining chips. This is a matter of human rights and the rule of law. We'll stand up for both – together.

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2. International Convention for the Protection of All Persons from Enforced Disappearance

On November 9, 2021, U.S. Advisor Korac delivered the U.S. explanation of position at

the Third Committee adoption of the International Convention for the Protection of All Persons from Enforced Disappearance. The U.S. statement follows and is available at https://usun.usmission.gov/explanation-of-position-at-the-third-committee-adoption-of-the-international-convention-for-the-protection-of-all-persons-from-enforced-disappearance//

> The United States is pleased to join consensus on this resolution. Enforced disappearances are devastating to both the victim and their families who are left not knowing the fate of their loved ones.
>
> The United States is not party to the International Convention for the Protection of All Persons from Enforced Disappearance and believes it is important to be clear about the international legal basis of the paragraphs of this resolution, which are specific to the convention. The United States notes that the obligations articulated in PP6, PP7 and PP8 apply only to States that have undertaken these obligations as parties to the Enforced Disappearance Convention, and that this resolution does not create any new rights or obligations.

3. Summary Killings and Enforced Disappearances in Afghanistan

On December 4, 2021, the State Department spokesperson issued as media note a joint Statement by the governments of the United States of America, Australia, Belgium, Bulgaria, Canada, Denmark, Norway, the EU High Representative for Foreign Affairs and Security Policy, Finland, France, Germany, Japan, the Netherlands, New Zealand, North Macedonia, Poland, Portugal, Romania, Spain, Sweden, Switzerland, the United Kingdom, and Ukraine on reports of summary killings and enforced disappearances in Afghanistan. The joint statement is excerpted below and available as a media note at https://www.state.gov/joint-statement-on-reports-of-summary-killings-and-enforced-disappearances-in-afghanistan/.

> We are deeply concerned by reports of summary killings and enforced disappearances of former members of the Afghan security forces as documented by Human Rights Watch and others.
>
> We underline that the alleged actions constitute serious human rights abuses and contradict the Taliban's announced amnesty. We call on the Taliban to effectively enforce the amnesty for former members of the Afghan security forces and former Government officials to ensure that it is upheld across the country and throughout their ranks.
>
> Reported cases must be investigated promptly and in a transparent manner, those responsible must be held accountable, and these steps must be clearly publicized as an immediate deterrent to further killings and disappearances.

N. OTHER ISSUES

1. Privacy

On July 2, 2021, Phillip Riblett delivered the U.S. statement at the 47th session of the HRC at an interactive dialogue with the special rapporteur on privacy in the digital age. The U.S. statement is excerpted below and is available in full at https://geneva.usmission.gov/2021/07/02/interactive-dialogue-with-the-special-rapporteur-on-privacy-in-the-digital-age/?_ga=2.240745738.821611365.1652445646-864647958.1652445646.

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The United States takes its privacy obligations very seriously, so we were pleased to welcome the Special Rapporteur to the United States in 2017 and participated robustly in the country review.

The United States fully complies with Article 17 of the International Covenant on Civil and Political Rights, which imposes an obligation to refrain from arbitrary or unlawful interference with privacy. In the United States, freedom from arbitrary or unlawful interference with privacy is protected by a variety of laws, including the Fourth Amendment to the U.S. Constitution.

In addition to Fourth Amendment protections, the United States takes a strong, effective sectoral approach to privacy protection, with democratically elected legislatures at the state and federal levels enacting privacy laws to address privacy risks in specific situations and provide appropriate resources to enforce them. This tailored approach to privacy improves the fit for particular industries and communities, increasing buy-in and rates of compliance, and maintaining the public trust.

We commend the Special Rapporteur for recognizing that the U.S. system of privacy is not just a "law on the books, but law on the ground" – that is, the law as applied. The U.S. system includes layers of regulation, policy, and procedure to implement law, multiple layers of oversight within and outside agencies, and resources committed to privacy programs.

We invite others to review our detailed response to the Special Rapporteur's U.S. country report, which is posted on the UN website as an annex to the country report.

We thank the Special Rapporteur for his report on artificial intelligence (AI) and privacy and on children's privacy. With the emergence of new AI applications, the protection of privacy is essential to the full enjoyment of human rights. AI technologies have the potential to provide positive contributions to economic, defence, and societal well-being. At the same time, AI applications can be misused by governments for nefarious purposes, including arbitrary or unlawful interference with one's privacy and infringement on freedom of expression and freedom of peaceful assembly and association. These measures can inhibit a vibrant civil society, which is essential to achieving the full respect for human rights.

In light of these concerns, the U.S. Department of State published human rights due diligence guidance for businesses to mitigate the risk their products or services with surveillance capabilities can be misused by governments.

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2. Purported Right to Development

On November 9, 2021, Advisor Korac delivered the U.S. explanation of vote at the Third Committee adoption of the right to development resolution. The statement is excerpted below and available at https://usun.usmission.gov/explanation-of-vote-at-the-third-committee-adoption-of-the-right-to-development-resolution/.

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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 support development efforts across all dimensions. Our commitment is reaffirmed with our strong support for the 2030 Agenda for Sustainable Development.

We see a strong link between human rights and sustainable development, as reflected in the 2030 Agenda's vision of "a world of universal respect for human rights and human dignity, the rule of law, justice, equality, and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential and contributing to shared prosperity."

However, 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" and "people-centered development of the people, by the people, and for the people." This language is promoted by a single Member State and does not have an internationally understood definition. 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 or implies that States can identify the needs of groups rather than fulfilling their human rights obligations for individuals. In the 2030 Agenda, we all made a commitment to leave no one behind, and this integrally means fulfilling all our obligations under international human rights law. It should also be noted that while the United States supports access to safe, effective, affordable and quality essential medicines and vaccines for addressing COVID-19, that access

should not undermine incentives for innovation. Additionally, the United States does not recognize "medicines and vaccines" as themselves being global public goods.

For these reasons, we request a vote, and we will vote against this resolution.

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Cross References

Indication of Sex on U.S. Passports, **Ch. 1.A.2**
Afghan Special Immigrant Visa program, **Ch. 1.B.5.e**
Asylum, Refugee, and Migrant Issues, **Ch. 1.C**
Relocation and evacuation operations in Afghanistan, **Ch. 2.A.2**
Extradition case raising the Convention Against Torture, **Ch. 3.A**
Terrorism and human rights resolution at UN, **Ch. 3.B.1.c**
Trafficking in Persons, **Ch. 3.B.3.b**
Nestle/Cargill *litigation* (Alien Tort Statute), **Ch. 5.B.2**
Virtual meetings due to COVID-19 pandemic, **Ch. 7.A.5**
ILC Draft Articles on Crimes Against Humanity, **Ch. 7.C.2**
OAS on repression in Nicaragua, **Ch. 7.D.1**
Inter-American Commission on Human Rights ("IACHR"), **Ch. 7.D.2**
Suspending operations at Embassy Kabul, **Ch. 9.A.8**
Hong Kong, **Ch. 9.B.5**
Forced Diversion of Ryanair Flight to Minsk, **Ch. 11.A.2**
USMCA rapid response labor mechanism, **Ch. 11.D.2**
ECOSOC briefing on outcomes of UNFCCC COP26, Ch. **12.A.1.e**
ECOSOC adviser's statement on the UN Convention to Combat Desertification, **Ch. 12.A.2**
Sanctions relating to human rights, **Ch. 16. A.1.c(7)** *(Iran);* **Ch. 16.A.2.a** *(China);* **Ch. 16.A.11** *(GloMag and 7031c))*
Afghanistan, **Ch. 17.B.1**
Atrocities prevention, **Ch. 17.C**
Responsibility to Protect, **Ch. 17.C.2**
Atrocities in Xinjiang, **Ch. 17.C.4**
Atrocities in Ethiopia, **Ch. 17.C.5**
International humanitarian law, **Ch. 18.A.5**

CHAPTER 7

International Organizations

A. UNITED NATIONS

1. General

a. President Biden's Address to the General Assembly

On September 21, 2021, President Biden delivered remarks before the 76th session of the UN General Assembly. His remarks are excerpted below and available at https://usun.usmission.gov/remarks-by-president-joseph-r-biden-jr-before-the-76th-session-of-the-united-nations-general-assembly/.

* * * *

Mr. President, Mr. Secretary-General, my fellow delegates, to all those who dedicate themselves to this noble mission of this institution: It's my honor to speak to you for the first time as President of the United States.

We meet this year in a moment of — intermingled with great pain and extraordinary possibility. We've lost so much to … this devastating pandemic that continues to claim lives around the world and impact so much on our existence.

* * * *

Will we work together to save lives, defeat COVID-19 everywhere, and take the necessary steps to prepare ourselves for the next pandemic? …

Will we meet the threat of challenging climate? Or will we suffer the merciless march of ever-worsening droughts and floods, more intense fires and hurricanes, longer heatwaves and rising seas?

Will we affirm and uphold the human dignity and human rights under which nations in common cause, more than seven decades ago, formed this institution?

Will we apply and strengthen the core tenets … of the international system, including the U.N. Charter and the Universal Declaration of Human Rights, as we seek to shape the emergence of new technologies and deter new threats? Or will we allow these universal — those universal principles to be trampled and twisted in the pursuit of naked political power?

In my view, how we answer these questions in this moment — whether we choose to fight for our shared future or not — will reverberate for generations yet to come.

Simply put: We stand, in my view, at an inflection point in history. And I'm here today to share with you how the United States intends to work with partners and allies to answer these questions and the commitment of my new administration to help lead the world toward a more peaceful, prosperous future for all people.

Instead of continuing to fight the wars of the past, we are fixing our eyes on devoting our resources to the challenges that hold the keys to our collective future: ending this pandemic; addressing the climate crisis; managing the shifts in global power dynamics; shaping the rules of the world on vital issues like trade, cyber, and emerging technologies; and facing the threat of terrorism as it stands today.

We've ended 20 years of conflict in Afghanistan. And as we close this period of relentless war, we're opening a new era of relentless diplomacy; of using the power of our development aid to invest in new ways of lifting people up around the world; of renewing and defending democracy; of proving that no matter how challenging or how complex the problems we're going to face, government by and for the people is still the best way to deliver for all of our people.

And as the United States turns our focus to the priorities and the regions of the world, like the Indo-Pacific, that are most consequential today and tomorrow, we'll do so with our allies and partners, through cooperation at multilateral institutions like the United Nations, to amplify our collective strength and speed, our progress toward dealing with these global challenges.

There's a fundamental truth of the 21st century within each of our own countries and as a global community that our own success is bound up with others succeeding as well.

To deliver for our own people, we must also engage deeply with the rest of the world.

To ensure that our own future, we must work together with … our partners — toward a shared future.

Our security, our prosperity, and our very freedoms are interconnected, in my view, as never before. And so, I believe we must work together as never before.

Over the last eight months, I have prioritized rebuilding our alliances, revitalizing our partnerships, and recognizing they're essential and central to America's enduring security and prosperity.

We have reaffirmed our sacred NATO Alliance to Article 5 commitment. We're working with our Allies toward a new strategic concept that will help our Alliance better take on evolving threats of today and tomorrow.

We renewed our engagement with the European Union, a fundamental partner in tackling the full range of significant issues facing our world today.

We elevated the Quad partnership among Australia, India, Japan, and the United States to take on challenges ranging from health security to climate to emerging technologies.

We're engaging with regional institutions — from ASEAN to the African Union to the Organization of American States — to focus on people's urgent needs for better health and better economic outcomes.

We're back at the table in international forums, especially the United Nations, to focus attention and to spur global action on shared challenges.

We are reengaged at the World Health Organization and working in close partnership with COVAX to deliver lifesaving vaccines around the world.

We rejoined the Paris Climate Agreement, and we're running to retake a seat on the

Human Rights Council next year at the U.N.

And as the United States seeks to rally the world to action, we will lead not just with the example of our power but, God willing, with the power of our example.

Make no mistake: The United States will continue to defend ourselves, our Allies, and our interests against attack, including terrorist threats, as we prepare to use force if any is necessary,… to defend our vital U.S. national interests, including against ongoing and imminent threats.

But the mission must be clear and achievable, undertaken with the informed consent of the American people and, whenever possible, in partnership with our Allies.

U.S. military power must be our tool of last resort, not our first, and it should not be used as an answer to every problem we see around the world.

Indeed, today, many of our greatest concerns cannot be solved or even addressed through the force of arms. Bombs and bullets cannot defend against COVID-19 or its future variants.

To fight this pandemic, we need a collective act of science and political will. We need to act now to get shots in arms as fast as possible and to expand access to oxygen, tests, treatments to save lives around the world.

And for the future, we need to create a new mechanism to finance global health security that builds on our existing development assistance, and Global Health …Threat … Council that is armed with the tools we need to monitor and identify emerging pandemics so that we can take immediate action.

Already, the United States has put more than $15 billion toward … the global COVID response. We've shipped more than 160 million doses of COVID-19 vaccine to other countries. This includes 130 million doses from our own supply and the first tranches of the half a billion doses of Pfizer vaccine we purchased to donate through COVAX.

Planes carrying vaccines from the United States have already landed in 100 countries, bringing people all over the world a little "dose of hope," as one American nurse termed it to me. A "dose of hope," direct from the American people — and, importantly, no strings attached.

And tomorrow, at the U.S.-hosted Global … COVID-19 Summit, I'll be announcing additional commitments as we seek to advance the fight against COVID-19 and hold ourselves accountable around specific targets on three key challenges: saving lives now, vaccinating the world, and building back better.

This year has also brought widespread death and devastation from the borderless climate crisis. The extreme weather events that we have seen in every part of the world — and you all know it and feel it — represent what the Secretary-General has rightly called "code red for humanity." And the scientists and experts are telling us that we're fast approaching a "point of no return," in the literal sense.

To keep within our reach the vital goal of limiting global warming to 1.5 degrees Celsius, every nation needs to bring their highest-possible ambitions to the table when we meet in Glasgow for COP26 and then to have to keep raising our collective ambition over time.

In April, I announced the United States' ambitious new goal under the Paris Agreement to reduce greenhouse gas emissions from the United States by 50 to 52 percent below 2005 levels by 2030, as we work toward achieving a clean-energy economy with net-zero emissions by 2050.

And my administration is working closely with our Congress to make the critical investments in green infrastructure and electric vehicles that will help us lock in progress at home toward our climate goals.

And the best part is: Making these ambitious investments isn't just good climate policy, it's a chance for each of our countries to invest in ourselves and our own future. It's an enormous opportunity to create good-paying jobs for workers in each of our countries and to spur long-term economic growth that will improve the quality of life for all of our people.

We also have to support the countries and people that will be hit hardest and that have the fewest resources to help them adapt.

In April, I announced the United States will double our public international financing to help developing nations tackle the climate crisis. And today, I'm proud to announce that we'll work with the Congress to double that number again, including for adaptation efforts.

This will make the United States a leader in public climate finance. And with our added support, together with increased private capital and … from other donors, we'll be able to meet the goal of mobilizing $100 billion to support climate action in developing nations.

As we deal with these crises, we're also encountering … an era of new technologies and possibilities that have the potential to release and reshape every aspect of human existence. And it's up to all of us to determine whether these technologies are a force to empower people or to deepen repression.

As new technologies continue to evolve, we'll work together with our democratic partners to ensure that new advances in areas from biotechnology, to quantum computing, 5G, artificial intelligence, and more are used to lift people up, to solve problems, and advance human freedom — not to suppress dissent or target minority communities.

And the United States intends to make a profound investment in research and innovation, working with countries at all stages of economic development to develop new tools and technologies to help us tackle the challenges of this second quarter of the 21st century and beyond.

We're hardening our critical infrastructure against cyberattacks, disrupting ransomware networks, and working to establish clear rules of the road for all nations as it relates to cyberspace.

We reserve the right to respond decisively to cyberattacks that threaten our people, our allies, or our interests.

We will pursue new rules of global trade and economic growth that strive to level the playing field so that it's not artificially tipped in favor of any one country at the expense of others and every nation has a right and the opportunity to compete fairly.

We will strive to ensure that basic labor rights, environmental safeguards, and intellectual property are protected and that the benefits of globalization are shared broadly throughout all our societies.

We'll continue to uphold the longstanding rules and norms that have formed the guardrails of international engagement for decades that have been essential to the development of nations around the world — bedrock commitments like freedom of navigation, adherence to international laws and treaties, support for arms control measures that reduce … risk and enhance transparency.

Our approach is firmly grounded and fully consistent with the United Nations' mission and the values we've agreed to when we drafted this Charter. These are commitments we all made and that we're all bound to uphold.

And as we strive to deal with these urgent challenges, whether they're longstanding or newly emerging, we must also deal with one another.

All the major powers of the world have a duty, in my view, to carefully manage their

relationships so they do not tip from responsible competition to conflict.

The United States will compete, and will compete vigorously, and lead with our values and our strength.

We'll stand up for our allies and our friends and oppose attempts by stronger countries to dominate weaker ones, whether through changes to territory by force, economic coercion, technological exploitation, or disinformation.

But we're not seeking — I'll say it again — we are not seeking a new Cold War or a world divided into rigid blocs.

The United States is ready to work with any nation that steps up and pursues peaceful resolution to shared challenges, even if we have intense disagreements in other areas — because we'll all suffer the consequences of our failure if we do not come together to address the urgent threats like COVID-19 and climate change or enduring threats like nuclear proliferation.

The United States remains committed to … preventing Iran from gaining a nuclear weapon. We are working with the P5+1 to engage Iran diplomatically and seek a return to the JCPOA. We're prepared to return to full compliance if Iran does the same.

Similarly, we seek serious and sustained diplomacy to pursue the complete denuclearization of the Korean Peninsula.

We seek concrete progress toward an available plan with tangible commitments that would increase stability on the Peninsula and in the region, as well as improve the lives of the people in the Democratic People's Republic of Korea.

We must also remain vigilant to the threat … that terrorism poses to all our nations, whether emanating from distant regions of the world or in our own backyards.

We know … the bitter sting of terrorism is … real, and we've almost all experienced it.

Last month, we lost 13 American heroes and almost 200 innocent Afghan civilians in the heinous terrorist attack at the Kabul airport.

Those who commit acts of terrorism against us will continue to find a determined enemy in the United States.

The world today is not the world of 2001, though, and the United States is not the same country we were when we were attacked on 9/11, 20 years ago.

Today, we're better equipped to detect and prevent terrorist threats, and we are more resilient in our ability to repel them and to respond.

We know how to build effective partnerships to dismantle terrorist networks by targeting their financing and support systems, countering their propaganda, preventing their travel, as well as disrupting imminent attacks.

We'll meet terrorist threats that arise today and in the future with a full range of tools available to us, including working in cooperation with local partners so that we need not be so reliant on large-scale military deployments.

One of the most important ways we can effectively enhance security and reduce violence is by seeking to improve the lives of the people all over the world who see that their governments are not serving their needs.

Corruption fuels inequality, siphons off a nation's resources, spreads across borders, and generates human suffering. It is nothing less than a national security threat in the 21st century.

Around the world, we're increasingly seeing citizens demonstrate their discontent seeing the wealthy and well-connected grow richer and richer, taking payoffs and bribes, operating above the law while the vast majority of the people struggle to find a job or put food on the table or to get their business off the ground or simply send their children to school.

People have taken to the streets in every region to demand that their governments address peoples' basic needs, give everyone a fair shot to succeed, and protect their God-given rights.

And in that chorus of voices across languages and continents, we hear a common cry: a cry for dignity — simple dignity. As leaders, it is our duty to answer that call, not to silence it.

The United States is … committed to using our resources and our international platform to support these voices, listen to them, partner with them to find ways to respond that advance human dignity around the world.

For example, there is an enormous need for infrastructure in developing countries, but infrastructure that is low-quality or that feeds corruption or exacerbates environmental degradation may only end up contributing to greater challenges for countries over time.

Done the right way, however, with transparent, sustainable investment in projects that respond to the country's needs and engage their local workers to maintain high labor and environmental standards, infrastructure can be a strong foundation that allows societies in low- and middle-income countries to grow and to prosper.

That's the idea behind the Build Back Better World.

And together with the private sector and our G7 partners, we aim to mobilize hundreds of billions of dollars in infrastructure investment.

We also — we'll also continue to be the world's largest contributor to humanitarian assistance, bringing food, water, shelter, emergency healthcare, and other vital, lifesaving aid to millions of people in need.

When the earthquake strikes, a typhoon rages, or a disaster anywhere in the world, the United States shows up. We'll be ready to help.

And at a time when nearly one in three people globally do not have access to adequate food — … the United States is committing to rallying our partners to address immediate malnutrition and to ensure that we can sustainably feed the world for decades to come.

To that end, the United States is making a $10 billion commitment to end hunger and invest in food systems at home and abroad.

Since 2000, the United States government has provided more than $140 billion to advance health and strengthen health systems, and we will continue our leadership to drive these vital investments to make peoples' lives better every single day. Just give them a little breathing room.

And as we strive to make lives better, we must work with renewed purpose to end the conflicts that are driving so much pain and hurt around the world.

We must redouble our diplomacy and commit to political negotiations, not violence, as the tool of first resort to manage tensions around the world.

We must seek a future of greater peace and security for all the people of the Middle East.

The commitment of the United States to Israel's security is without question. And …our support for an independent, Jewish state is unequivocal.

But I continue to believe that a two-state solution is the best way to ensure … Israel's future as a Jewish, democratic state living in peace alongside a viable, sovereign, and democratic Palestinian state.

We're a long way from that goal at this moment, but we must never allow ourselves to give up on the possibility of progress.

We cannot give up on solving raging civil conflicts, including in Ethiopia and Yemen, where fighting between …warring parties is driving famine, … horrific violence, human rights violations against civilians, including the unconscionable use of rape as a weapon of war.

We will continue to work with the international community to press for peace and bring an end to this suffering.

As we pursue diplomacy across the board, the United States will champion the democratic values that go to the very heart of who we are as a nation and a people: freedom, equality, opportunity, and a belief in the universal rights of all people.

It's stamped into our DNA as a nation. And critically, it's stamped into the DNA of this institution …

I quote the opening words of the Universal Declaration of Human Rights, quote: "The equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world."

The founding ethos of the United Nations places the rights of individuals at the center of our system, and that clarity and vision must not be ignored or misinterpreted.

The United States will do our part, but we will be more successful and more impactful if all of our nations are working toward the full mission to which we are called.

That's why more than 100 nations united … around a shared statement and the Security Council adopted a resolution outlining how we'll support the people of Afghanistan moving forward, laying out the expectations to which we will hold the Taliban when it comes to respecting universal human rights.

We all must advocate for … the rights of women and girls to use their full talents to contribute economically, politically, and socially and pursue their dreams free of violence and intimidation — from Central America to the Middle East, to Africa, to Afghanistan — wherever it appears in the world.

We all must call out and condemn the targeting and oppression of racial, ethnic, and religious minorities when it occurs in — whether it occurs in Xinjiang or northern Ethiopia or anywhere in the world.

We all must defend the rights of LGBTQI individuals so they can live and love openly without fear, whether it's Chechnya or Cameroon or anywhere.

As we steer our … nations toward this inflection point and work to meet today's fast-moving, cross-cutting challenges, let me be clear: I am not agnostic about the future we want for the world.

The future will belong to those who embrace human dignity, not trample it.

The future will belong to those who unleash the potential of their people, not those who stifle it.

The future will belong to those who give their people the ability to breathe free, not those who seek to suffocate their people with an iron hand.

Authoritarianism — the authoritarianism of the world may seek to proclaim the end of the age of democracy, but they're wrong.

The truth is: The democratic world is everywhere. It lives in the anti-corruption activists, the human rights defenders, the journalists, the peace protestors on the frontlines of this struggle in Belarus, Burma, Syria, Cuba, Venezuela, and everywhere in between.

It lives in the brave women of Sudan who withstood violence and oppression to push a genocidal dictator from power and who keep working every day to defend their democratic progress.

It lives in the proud Moldovans who helped deliver a landslide victory for the forces of democracy, with a mandate to fight graft, to build a more inclusive economy.

It lives in the young people of Zambia who harnessed the power of their vote for the first

time, turning out in record numbers to denounce corruption and chart a new path for their country.

And while no democracy is perfect, including the United States — who will continue to struggle to live up to the highest ideals to heal our divisions, and we face down violence and insurrection — democracy remains the best tool we have to unleash our full human potential.

My fellow leaders, this is a moment where we must prove ourselves the equals of those who have come before us, who with vision and values and determined faith in our collective future built our United Nations, broke the cycle of war and destruction, and laid the foundations for more than seven decades of relative peace and growing global prosperity.

Now we must again come together to affirm the inherent humanity that unites us is much greater than any outward divisions or disagreements.

We must choose to do more than we think we can do alone so that we accomplish what we must, together: ending this pandemic and making sure we're better prepared for the next one; staving off climactic climate change and increasing our resilience to the impacts we already are seeing; ensuring a future where technologies are a vital tool to solving human challenges and empowering human potential, not a source of greater strife and repression.

These are the challenges that … will determine what the world looks like for our children and our grandchildren, and what they'll inherit. We can only meet them by looking to the future.

I stand here today, for the first time in 20 years, with the United States not at war. We've turned the page.

All the unmatched strength, energy, commitment, will, and resources of our nation are now fully and squarely focused on what's ahead of us, not what was behind.

I know this: As we look ahead, we will lead. We will lead on all the greatest challenges of our time — from COVID to climate, peace and security, human dignity and human rights. But we will not go it alone.

We will lead together with our Allies and partners and in cooperation with all those who believe, as we do, that this is within our power to meet these challenges, to build a future that lifts all of our people and preserves this planet.

But none of this is inevitable; it's a choice. And I can tell you where America stands: We will choose to build a better future. We — you and I –- we have the will and capacity to make it better.

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b. Secretary Blinken's address on multilateralism at the UN Security Council

Secretary Antony J. Blinken delivered virtual remarks at the UN Security Council open debate on multilateralism on May 7, 2021. The remarks are excerpted below and available at https://www.state.gov/secretary-antony-j-blinken-virtual-remarks-at-the-un-security-council-open-debate-on-multilateralism/.

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When countries came together after World War II to form the United Nations, virtually all of human history up till then indicated that might made right. Competition inevitably led to collision. The rise of a nation or group of nations necessitated the fall of others.

Then our nations united in choosing a different path. We adopted a set of principles to prevent conflict and alleviate human suffering; to recognize and defend human rights; to foster an ongoing dialogue to uphold and improve a system aimed at benefiting all people.

The most powerful countries bound themselves to these principles. They agreed to a form of self-restraint – as President Truman put it, to deny themselves the license to do always as they pleased – because they recognized that this would ultimately serve not only humanity's interests, but their own. The United States did this, even though it was by far the most powerful nation on Earth at the time. It was enlightened self-interest. We believed other nations' success was critical to ours. And we didn't want less powerful countries feeling threatened and obliged to band together against us.

In the years since, we've faced daunting challenges, from the divisions of the Cold War, the vestiges of colonialism, and the times the world stood by in the face of mass atrocities. And today, conflicts, injustice, and suffering around the globe underscore how many of our aspirations remain unfulfilled.

But no period in modern history has been more peaceful or prosperous than the one since the United Nations was created. We avoided armed conflict between nuclear powers. We helped millions of people emerge from poverty. We advanced human rights as never before.

This bold endeavor, whatever its imperfections, has been an unprecedented achievement. And it's endured because the overwhelming majority of people and nations continue to see it as representing their interests, their values, their hopes.

But now it's in serious jeopardy.

Nationalism is resurgent, repression is rising, rivalries among countries are deepening – and attacks against the rules-based order are intensifying. Now, some question whether multilateral cooperation is still possible.

The United States believes it is not only possible, it is imperative.

Multilateralism is still our best tool for tackling big global challenges – like the one that's forcing us to gather on a screen today rather than around a table. The COVID-19 pandemic has changed life as we know it across the planet, with millions of deaths and devastating impacts on economies, health, education, social progress.

The climate crisis is another massive threat. If we don't move swiftly to cut emissions, the results will be catastrophic.

We built the multilateral system in part to solve big, complex problems like these, where the fates of people around the world are tied together and where no single country – no matter how powerful – can address the challenges alone.

That's why the United States will work through multilateral institutions to stop COVID-19 and tackle the climate crisis, and we will abide by the core principles of the international order as we do.

We'll also work with any country on these issues – including those with whom we have serious differences. The stakes are too high to let differences stand in the way of our cooperation. The same holds true for stemming the spread and use of nuclear weapons, delivering life-saving humanitarian assistance, managing deadly conflicts.

At the same time, we will continue to push back forcefully when we see countries undermine the international order, pretend that the rules we've all agreed to don't exist, or

simply violate them at will. Because for the system to deliver, all countries must abide by it and put in the work for its success.

There are three ways we can do that.

First, all members should meet their commitments – particularly the legally binding ones. That includes the UN Charter, treaties and conventions, UN Security Council resolutions, international humanitarian law, and the rules and standards agreed to under the auspices of the World Trade Organization and numerous international standard-setting organizations.

Let me be clear – the United States is not seeking to uphold this rules-based order to keep other nations down. The international order we helped build and defend has enabled the rise of some of our fiercest competitors. Our aim is simply to defend, uphold, and revitalize that order.

Second, human rights and dignity must stay at the core of the international order. The foundational unit of the United Nations – from the first sentence of the Charter – is not just the nation state. It's also the human being. Some argue that what governments do within their own borders is their own business, and that human rights are subjective values that vary from one society to another. But the Universal Declaration of Human Rights begins with the word "universal" because our nations agreed there are certain rights to which every person, everywhere, is entitled. Asserting domestic jurisdiction doesn't give any state a blank check to enslave, torture, disappear, ethnically cleanse their people, or violate their human rights in any other way.

And this leads me to my third point, which is that the United Nations is based on the principle of the sovereign equality of its member-states.

A state does not respect that principle when it purports to redraw the borders of another; or seeks to resolve territorial disputes by using or threatening force; or when a state claims it's entitled to a sphere of influence to dictate or coerce the choices and decisions of another country. And a state shows contempt for that principle when it targets another with disinformation or weaponized corruption, undermines other countries' free and fair elections and democratic institutions, or goes after journalists or dissidents abroad.

These hostile actions can also threaten the international peace and security that the United Nations Charter obliges this body to maintain.

When UN member-states – particularly permanent members of the Security Council – flout these rules and block attempts to hold accountable those who violate international law, it sends the message that others can break those rules with impunity.

All of us must accept the scrutiny, however difficult, that comes with the commitments we have freely made. That includes the United States.

I know that some of our actions in recent years have undermined the rules-based order and led others to question whether we are still committed to it. Rather than take our word for it, we ask the world to judge our commitment by our actions.

Under the Biden-Harris administration, the United States has already re-engaged vigorously in multilateral institutions. We have rejoined the Paris climate accord, recommitted to the World Health Organization, and we're seeking to rejoin the Human Rights Council. We're engaged in diplomacy to return to mutual compliance with the Joint Comprehensive Plan of Action and to strengthen the nuclear nonproliferation regime. We are by far the largest contributor to COVAX, the best vehicle for the equitable distribution of COVID-19 vaccines, and we're making tens of millions of doses available to others without political considerations.

We're also taking steps, with great humility, to address the inequities and injustices in our own democracy. We do so openly and transparently for people around the world to see, even when it's ugly, even when it's painful. And we will emerge stronger and better for doing so.

Likewise, it's not enough simply to defend the rules-based order we have now. We should improve and build upon it. We need to take into account the change in power dynamics over the past eight decades, not only between countries but within them. We need to address legitimate grievances – particularly unfair trading practices – that have provoked a backlash against an open international economic order in many countries, including in the United States. And we must ensure that this order is equipped to address new problems – like national security and human rights concerns raised by new technologies, from cyber attacks to surveillance to discriminatory algorithms.

Finally, we need to modernize the way we build coalitions and who we include in our diplomacy and development efforts. That means forging non-traditional partnerships across regional lines, bringing together cities, the private sector, foundations, civil society, and social and youth movements.

And we must improve equity within and between our countries and close economic, political, and social gaps that persist based on race, gender, and other parts of our identity that make us who we are.

At the founding of this institution, President Truman said, "This Charter was not the work of any single nation or group of nations, large or small. It was the result of a spirit of give-and-take, of tolerance for the views and interests of others." He said it was proof that nations can state their differences, face them, and find common ground on which to stand.

We continue to have profound differences – among the UN member-states and within this Council. But the United States will spare no effort to find and stand on that common ground with any country that upholds its commitments to the order we founded together, and which we must defend and revitalize together.

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2. Taiwan at the UN

On May 7, 2021, the State Department issued a press statement by Secretary Blinken on restoring Taiwan's appropriate place at the World Health Assembly. The statement is available at https://www.state.gov/restoring-taiwans-appropriate-place-at-the-world-health-assembly/ and excerpted below.

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Beginning on May 24, the world will gather virtually for the 74th annual World Health Assembly (WHA). The Assembly is the decision-making body of the World Health Organization, and it sets the agenda for strengthening international cooperation to end the COVID-19 pandemic and advancing global health and global health security — issues that affect us all. And yet, unless the Organization's leadership takes appropriate action, the Assembly will once again exclude the vital participation of Taiwan.

There is no reasonable justification for Taiwan's continued exclusion from this forum, and the United States calls upon the WHO Director-General to invite Taiwan to participate as an observer at the WHA – as it has in previous years, prior to objections registered by the government of the People's Republic of China.

Global health and global health security challenges do not respect borders nor recognize political disputes. Taiwan offers valuable contributions and lessons learned from its approach to these issues, and WHO leadership and all responsible nations should recognize that excluding the interests of 24 million people at the WHA serves only to imperil, not advance, our shared global health objectives.

Taiwan is a reliable partner, a vibrant democracy, and a force for good in the world, and its exclusion from the WHA would be detrimental to our collective international efforts to get the pandemic under control and prevent future health crises. We urge Taiwan's immediate invitation to the World Health Assembly.

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On October 26, 2021, the Department of State issued a statement by Secretary Blinken in support of Taiwan's participation in the UN system. The statement, available at https://www.state.gov/supporting-taiwans-participation-in-the-un-system/, follows.

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Taiwan has become a democratic success story. Its model supports transparency, respect for human rights, and the rule of law – values that align with those of the United Nations (UN). Taiwan is critical to the global high-tech economy and a hub of travel, culture, and education. We are among the many UN member states who view Taiwan as a valued partner and trusted friend.

As the international community faces an unprecedented number of complex and global issues, it is critical for all stakeholders to help address these problems. This includes the 24 million people who live in Taiwan. Taiwan's meaningful participation in the UN system is not a political issue, but a pragmatic one.

The fact that Taiwan participated robustly in certain UN specialized agencies for the vast majority of the past 50 years is evidence of the value the international community places in Taiwan's contributions. Recently, however, Taiwan has not been permitted to contribute to UN efforts. Despite the tens of millions of passengers traveling annually through its airports, Taiwan was not represented at the International Civil Aviation Organization (ICAO) triennial assembly. Although we have much to learn from Taiwan's world-class response to the COVID-19 pandemic, Taiwan was not at the World Health Assembly. Members of civil society from around the world engage every day in activities at the UN, but Taiwan's scientists, technical experts, business persons, artists, educators, students, human rights advocates, and others are blocked from entry and participating in these activities simply because of the passports they hold.

Taiwan's exclusion undermines the important work of the UN and its related bodies, all of which stand to benefit greatly from its contributions. We need to harness the contributions of

all stakeholders toward solving our shared challenges. That is why we encourage all UN Member States to join us in supporting Taiwan's robust, meaningful participation throughout the UN system and in the international community, consistent with our "one China" policy, which is guided by the Taiwan Relations Act, the three Joint Communiques, and the Six Assurances.

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3. Rule of Law

On October 8, 2021, Julian Simcock, deputy legal adviser for the U.S. mission to the UN, delivered the U.S. statement at the Sixth Committee meeting at the 76th General Assembly on the rule of law at the national and international level. Mr. Simcock's remarks are excerpted below and available at https://usun.usmission.gov/statement-at-the-76th-general-assembly-sixth-committee-agenda-item-85-debate-on-the-rule-of-law-at-the-national-and-international-level/.

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The United States would like to thank the Secretary-General for his report on this agenda item. We would also like to thank the Rule of Law Coordination and Resource Group and the Rule of Law Unit. The individuals who perform this work often do so under very difficult circumstances – and over the past 19 months, they have been called upon to do so amidst a global pandemic. We are deeply grateful for their efforts.

The Secretary-General's report identifies a number of global trends.

Among the most concerning is the trend toward the politicization of justice institutions and threats to their independence. This is deeply unsettling. In every country, judicial institutions must be allowed to perform their work free from any form of interference. They must be allowed to apply applicable domestic legal frameworks, even when the decisions of a government are at issue. And they must be allowed to conduct their work without fear of reprisal.

Equally worrying is the Secretary General's reporting on attacks against UN personnel serving in peacekeeping operations and special political missions. These personnel operate in challenging and perilous environments. The United States condemns in the strongest terms all acts of violence against United Nations personnel, which may constitute war crimes. And we pay tribute to all personnel who have lost their lives serving with the United Nations.

Having spoken mostly about concerning trends, let me also acknowledge some bright spots. We welcome the UN's e-justice project in Bangladesh, through which it has trained over 1,000 justice actors. Similarly, the UN has analyzed millions of criminal and civil cases in Kazakhstan to generate a mapping system to improve case management. And in Pakistan, it has supported gender-sensitive infrastructure to improve the representation of women in the police force.

With respect to the work before us in the coming weeks, we hope that the Sixth Committee will be able to reach a 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 when we gather here in the Sixth Committee, we do so on the basis of an understanding. That at its best, legal discourse is a substitute for more dangerous ways to approach problems.

In our view, that same understanding is fundamental to preserving the rule of law. If the rule of law is protected, then the rules-based international legal order is also protected, and we are better able to address the global challenges before us.

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4. Universal Postal Union

On December 16, 2021, the Bureau of International Organization Affairs announced the renewal of the charter of the Advisory Committee on International Postal and Delivery Services ("IPODS)" for an additional two years, expiring November 5, 2023. See State Department media note, available at https://www.state.gov/the-bureau-of-international-organization-affairs-announces-the-renewal-of-the-charter-for-the-advisory-committee-on-international-postal-and-delivery-services/. The media note explains the role of IPODS as follows:

> 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.

5. Virtual meetings due to COVID-19 pandemic restrictions

The COVID-19 pandemic presented significant impediments to international organizations' ability to convene periodic meetings, including annual plenary meetings, due to local regulations restricting in-person gatherings and international travel restrictions. At the onset of the pandemic in 2020, some meetings were cancelled entirely or postponed to later in the year or to 2021, in the hope that the situation would improve such that in-person meetings could resume. See *Digest 2020* at 247, describing the postponement of the International Labor Conference ("ILC"), the annual plenary meeting of the International Labor Organization ("ILO"), to 2021, due to what the United States described as "the practical inability of conducting virtually a conference that involves the participation of thousands of government, employer, and worker representatives of nearly all 187 ILO member States."

As it became clear that meeting and travel restrictions would persist for an extended period, the United States and other States urged international organizations to develop procedures for holding meetings virtually or in hybrid form (i.e., meetings with both in-person and virtual attendees), and for conducting decision-making over videoconference or in writing.

On November 13, 2020, the UN General Assembly adopted a special decision-making procedure, including the use of electronic voting, for adopting draft resolutions and decisions when it cannot hold in-person meetings under "the most exceptional circumstances," such as a COVID-19-induced lockdown. U.N. Doc. No. A/75/L.7/Rev.1, available at https://digitallibrary.un.org/record/3890282?ln=en. The UN General Assembly adopted the procedure by a recorded vote of 123 in favor, 19 against, with 29 abstentions, allowing the Assembly to continue its business through electronic voting and other means in such extraordinary situations. Minister Counselor for Legal Affairs Mark Simonoff delivered the U.S. explanation of vote, which follows, and is available at https://usun.usmission.gov/explanation-of-vote-on-a-un-general-assembly-decision-entitled-procedure-for-decision-making-in-the-ga-when-an-in-person-meeting-is-not-possible/.

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The United States thanks Liechtenstein and the core group for their initiative. The UN General Assembly needs to be prepared to take essential operational decisions in the event that the General Assembly is unable to hold in-person meetings in the future. We hope that day will not come again, but it is important to ensure that the General Assembly has the tools it needs for the UN to function. Thus, the United States voted in favor of the decision.

The United States welcomes the decision's provision that "the procedure set out in the present decision shall be applied in as limited a manner as possible and with a particular focus on the continuity of essential functions of the General Assembly." Accordingly, we should commit to using this procedure to adopt "essential operational decisions," such as the adoption of budgets, the extension of mandates and the postponement or cancellation of meetings. It should not be "business as usual" when the General Assembly is unable to meet in person. Each and every Member State will need to exercise self-restraint.

Finally, it is well within the authority of the General Assembly to adopt this decision, and we would hope that all Member States will respect any decisions adopted by the General Assembly under this process, in the unfortunate event that we need to resort to this process in the future.

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The ILO, in a similar vein, developed "special arrangements" for meetings of the Governing Body, the ILO's executive body composed of member States and workers' and employers' delegates. These arrangements supplemented the ordinary rules of procedure and, in case of conflict, superseded them. The first set of special arrangements, available at https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_758724.pdf, employed at the October 2020 Governing Body session, reflected the prevailing hope that the pandemic would subside within a few months.

Specifically, the provision on consensus and voting allowed any Governing Body member and even nonvoting deputy members to block any decision, automatically postponing the matter to the March 2021 session, reflecting a preference to wait to make difficult decisions until members could meet in person (*see* ILO Doc. GB.340/INS/1(Rev.1), ¶ 29(g)) (Nov. 2, 2020). Under the ordinary rules, an unresolvable lack of consensus would trigger a vote. Thus, in October 2020 deputy member Cuba was able to block a high-profile decision condemning Venezuela's rejection of a Commission of Inquiry report on its labor law violations, thereby deferring the matter to March 2021 *(*see *id*. ILO Doc. GB.340/PV ¶¶ 246, 248, 254, 264) (Mar. 16, 2021).

In the interim, the United States and other ILO members worked with the Secretariat to arrive at amendments to the special arrangements, available at https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_774670.pdf, to eliminate this veto and allow for voting by show of hands over videoconference, electronic vote, or correspondence, bringing the procedure as close as possible to the normal rule (*see* ILO Doc. GB.341INS/1, ¶ 32(g)) (Jan. 28, 2021). When the Venezuela decision came up again, Cuba attempted but was unable to block a vote by electronic show of hands (*see* ILO Doc. GB.341/INS/PV, ¶ 85 (June 7, 2021), available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_787245.pdf). The closely divided—and rare—vote resulted in a condemnatory decision (ILO Doc. GB.341/INS/10(Rev.2)/Decision (Mar. 27, 2021), available at https://www.ilo.org/gb/GBSessions/GB341/ins/WCMS_776847/lang--en/index.htm), supported by the United States (see, *e.g.*, ILO Doc. GB.341/INS/PV ¶¶ 333, 372) (June 7, 2021).

ILO members subsequently drew heavily on these amended special arrangements in drafting special arrangements for the virtual ILC in June 2021. ILO Doc. ILC.109/D.1 (May 14, 2021), available at https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_791674.pdf. Holding the ILC virtually was made possible by many months of experience, on the part of the ILO Secretariat and ILO members, in conducting Governing Body and other meetings virtually. At the June 2021 ILC, the ILO adopted decisions strongly supported by the United States, including modernizing amendments to the Statute of the ILO Administrative Tribunal and the ILC's rules of procedure, a resolution on the pandemic's negative effects on the global labor force, and a resolution condemning the Burmese junta's workers' rights violations. The ILC also resolved unfinished business from the postponed 2020 session, including electing new members of the Governing Body and filling a seat on the bench of the Administrative Tribunal that had remained vacant since the 2020 session when the ILC was unable due to the pandemic to meet to reelect the incumbent.

The World Health Organization, World Intellectual Property Organization, and the UN Food and Agriculture Organization, among other UN specialized agencies, developed modified procedures to apply temporarily for their annual assemblies and for certain governing body meetings and for making decisions virtually. See, *e.g.*, World

Health Organization, Special Procedures to Regulate the Conduct of Virtual Meetings of the World Health Assembly, WHO Doc. A74/45 (May 21, 2021), available at https://apps.who.int/gb/ebwha/pdf_files/WHA74/A74_45-en.pdf; UN Food and Agriculture Organization, Arrangements for the 42nd Session of the Conference, FAO Doc. C2021/12 (May 2021), available at https://www.fao.org/3/ne971en/ne971en.pdf.

The UN Security Council initiated a written process for the adoption of its resolutions. While it continued to convene virtually, these virtual discussions did not have the status of formal Security Council meetings, due to the objection of the Russian Federation. Senior Advisor for Special Political Affairs Jeffrey DeLaurentis made remarks about the Security Council's working methods during the pandemic at a Security Council open debate on June 16, 2021. Ambassador Delaurentis's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-working-methods-of-the-security-council/.

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Mr. President, I'd like to thank the briefers for their thoughtful interventions. Ambassador King, we are grateful for your leadership in shepherding productive and pragmatic discussions in the Informal Working Group on Documentation and Other Procedural Matters. Many thanks to Lorraine Sievers for your insightful presentation. You literally wrote the book on Security Council procedure, and we at the U.S. Mission frequently consult your authoritative treatise. It's lovely to see you again. And Karin Landgren, we appreciate your thoughtful briefing, as well as the work of you and your team to provide the Security Council community with the informative Security Council Report.

Mr. President, the Security Council persevered during the pandemic, adapting innovative methods of maintaining continuity so that it could fulfill its vital functions. Most significantly, the Security Council adopted and implemented a written correspondence process for the adoption of its resolutions. Through this essential measure, the Security Council ensured that it could renew peacekeeping mandates and sanctions resolutions, and could respond to the crises of the day, in particular the COVID-19 pandemic itself.

The Security Council was also able to convene virtually through the video teleconference system. Through the utilization of videoconferencing technologies, the world was able to see that the Security Council continued to receive briefings, engage in debates, and perform its role in maintaining international peace and security.

Nonetheless, the United States is concerned that these virtual discussions have not had the status of actual meetings of the Security Council. And because they are not actual meetings of the Security Council, the Council's provisional rules of procedure do not apply to them. Thus, due to the objections of one Council Member as the pandemic began, the Security Council – for well over a year – has not been regularly functioning pursuant to its provisional rules of procedures and has not been holding "meetings."

So, for almost a year and a half, the Council has effectively been unable to take any votes on procedural decisions at all, even when the vast majority of Council members may have supported the decision in question. And Rules 2 and 3 – the fundamental rules requiring the

President of the Council to call a meeting of the Council – have been eroded over the past year and a half. This state of affairs is not acceptable, and we think that Security Council members should address it – even after this horrible pandemic is behind us – so that we will be on a sound legal and procedural footing in the event that the Security Council is unable to meet in person again in the future.

After all, the General Assembly was able to adopt a contingency decision to enable it to vote electronically on resolutions in the event that it is unable to hold in-person meetings. The Security Council should be able to adopt a procedural decision establishing that virtual meetings are indeed meetings of the Security Council, and that the Council's provisional rules of procedure apply to them.

In closing, we would like to express our profound gratitude to the UN Secretariat, and in particular the Security Council Affairs Division, the UN interpreters, and the UN's technical team for your hard work throughout the pandemic. Your tireless and crucial efforts behind the scenes enabled the Council to continue functioning, and for that the international community owes you a debt of thanks.

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B. INTERNATIONAL COURT OF JUSTICE

1. General

Tom Carnahan, U.S. representative to the 76th Session of the UN General Assembly, delivered remarks at the 22nd plenary meeting on the report of the International Court of Justice on October 28, 2021. Mr. Carnahan's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-the-22nd-plenary-meeting-agenda-item-74-report-of-the-international-court-of-justice/.

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We are also pleased to join so many others today in extending our thanks and commendation to you, President Donoghue in your first year as President of the Court, to your fellow judges, and to all of the staff of the ICJ for your tireless dedication to international law and for carrying out the vital role of the Court. The United States also extends its condolences on the passing of Judge James Crawford, a distinguished jurist and scholar of international law whose work made a lasting impact by advancing the peaceful settlement of international disputes.

The International Court of Justice stands at the pinnacle of the international judicial system. We are pleased to continue to recognize the Court's contributions to the realization of the purposes and principles of the United Nations.

As in years past, we see states increasingly turning to the Court and to other regional courts and international judicial tribunals to resolve their disputes.

By providing a trusted channel for states to resolve some disputes up front, and helping to diffuse others before they escalate, the Court continues to fulfill its Chapter Fourteen mandate, play a vital role in promoting and preserving the rule of law, and in advancing international

peace and security through the peaceful resolution of disputes. It is gratifying to know that for those Member States that accept its jurisdiction, the ICJ stands ready to adjudicate their disputes. At the same time, it is important to continue to emphasize that consent is central to maintaining the credibility of the Court's work. In that regard, it is also critical to maintain the distinction between the Court's contentious and advisory jurisdiction as set out in the Statute.

The General Assembly's ability to request advisory opinions is an important one; it allows the General Assembly to seek assistance from the ICJ in carrying out its functions under the UN Charter. However, we must be cautious not to allow this important tool to be misused for political gain or to circumvent the Court's jurisdiction over contentious proceedings.

The advisory function of the ICJ was not intended to settle disputes between states. In conclusion, this year we again commend the efforts of the Court to ensure the continuity of its work in light of the challenges posed by the COVID-19 pandemic. We hope that the Court's experiences in adopting innovations to continue work under these challenging circumstances will prove beneficial in the future.

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

See *Digest 2020* at 282-85 and *Digest 2018* at 220-27 for background on this ICJ case, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran v. U.S.). The records of all oral proceedings in the case are available at https://www.icj-cij.org/en/case/175/oral-proceedings. The records of written proceedings are available at https://www.icj-cij.org/en/case/175/written-proceedings. The Court rejected the U.S. objections to jurisdiction in a February 3, 2021 judgment, available at https://www.icj-cij.org/en/case/175/judgments.

C. INTERNATIONAL LAW COMMISSION

1. Work of the ILC's 72nd Session

On October 26, 2021, Acting Legal Adviser Richard Visek delivered the U.S. statement at the 76th session of the UN General Assembly's Sixth Committee on the report on the work of the International Law Commission's 72nd session. Mr. Visek's remarks are excerpted below and available at https://usun.usmission.gov/statement-at-the-76th-session-general-assembly-sixth-committee-agenda-item-82-report-on-international-law-commission-on-the-work-of-its-72nd-session/.

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The United States remains strongly supportive of the International Law Commission, as it flexibly and effectively conducted its seventy-second session in a new, hybrid fashion due to the

COVID-19 pandemic. The United States takes the work of the ILC very seriously, as evidenced by our detailed comments on ILC work products, and we thank all of the members of the Commission for their continued dedication to that work. We especially thank Ambassador Mahmoud Hmoud, for his chairmanship of the ILC during this challenging year.

Provisional Application of Treaties

Turning to the substance of this year's ILC report, the United States welcomes the completion of the Guide to Provisional Application of Treaties. We express our appreciation to the Special Rapporteur, Ambassador Juan Manuel Gómez Robledo, and other members of the Commission, for their significant contributions to the development of this topic. Moreover, we are appreciative of the consideration given to U.S. comments on prior iterations of the Guide and the Commission's efforts to address those concerns.

The United States is generally supportive of the Guide, whose purpose, as described in Guideline 2, is "to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties." In this respect, the Guide helpfully confirms the basic features of the legal regime concerning provisional application of treaties. In some areas, however, the guidelines and accompanying commentary are neither necessary nor supported by law or State practice. Those areas of concern may give rise to confusion regarding the law and practice on provisional application and in so doing undermine the Guide's purpose.

With respect to Guideline 4, we appreciate the Commission's efforts to address our concerns regarding the potential for confusion arising from statements related to the use of means other than a treaty to establish an agreement to apply a treaty on a provisional basis. In this regard, the guideline previously singled out two possibilities for specific mention: "resolutions adopted by an international organization or at an intergovernmental conference[,] or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned." We were particularly concerned that the guideline appeared to place undue consideration on the venue at which an agreement is reached or the adoption of a resolution rather than on whether all States and international organizations assuming rights and obligations to provisionally apply the treaty have agreed to do so. Resolutions adopted by an international conference, or in other similar fora, 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 revised commentary clearly establishes that the States or international organizations "concerned must consent to provisional application."

With respect, however, to declarations by a State or an international organization that are accepted by other States or concerned international organizations, we reiterate our previous observations that the commentary to the guideline has identified little support in state practice for the use of such declarations to establish the provisional application of treaties. Moreover, the commentary fails to establish persuasively that such declarations are most appropriately understood as implicating the doctrine of provisional application of treaties rather than the law regarding unilateral declarations by States. We note that the commentary describes such declarations as an "exceptional possibility," underscoring the ambiguity of State practice on this point. In light of this concern, we continue to question the soundness of this element of the guideline.

The Guide similarly lacks support in State practice in other areas. Of particular note, the commentary accompanying Guideline 7 expressly addresses "the possibility of formulation of reservations … purporting to exclude or modify the legal effect produced by certain provisions of a treaty that is subject to provisional application" while acknowledging that there is no significant State practice involving reservations in the provisional application context. These and other previously stated concerns notwithstanding, the United States on balance believes that the Guide can serve as a useful reference source for States and international organizations in the negotiation and conclusion of provisions on provisional application.

Protection of the Atmosphere

Regarding the Draft Guidelines on Protection of the Atmosphere, the United States extends our appreciation to Special Rapporteur Shinya Murase for his work on this project. The United States remains concerned about the Draft Guidelines and their accompanying commentaries. At a time when clarity and action in this area are vitally important, the Draft Guidelines have the potential to inhibit progress in international environmental law by creating confusion about its content, including through statements suggestive of new and unfounded international legal obligations. In the interest of brevity, we will highlight a few of the continuing concerns about the Draft Guidelines.

Draft Guidelines 3, 4, and 8 all assert categorically that "States have the obligation" to undertake certain actions. For example, Draft Guideline 3 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." While the United States appreciates the Commission's acknowledgement that the Commission "does not desire . . . to impose on current treaty regimes rules or principles not already contained therein", it's not clear what Draft Guideline 3 adds beyond serving to remind States to comply with their existing legal obligations. Additionally, Guidelines 5, 6, 7, and 8 are essentially recommendatory or hortatory in nature. For example, without authoritative legal foundation, 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." However, none of the sources referenced in the corresponding commentary establishes the asserted general obligation to cooperate. Therefore, the purported obligation in draft Guideline 8(1) is best understood as a recommendation that States cooperate. Similarly, each of draft Guidelines 5, 6, and 7 contains assertions about what states "should be" doing with regard to distinct activities concerning the atmosphere. Thus, the Draft Guidelines are policy recommendations and, as such, should not be a part of the Commission's work.

Finally, the United States appreciates the Commission's acknowledgement that the phrase "common concern of humankind," used in the preamble of the Draft Guidelines, reflects a concern of the entire international community that stands to be affected by atmospheric pollution and degradation and that inclusion of that phrase in the preamble does not create rights and obligations and, in particular, it does not entail erga omnes obligations. We trust that States will keep this in mind when considering whether and how to utilize the Draft Guidelines in their international engagements.

Other topics

Regarding other topics in the ILC report, the United States supports the proposal by ILC member Charles Jalloh to add to the Commission's long-term programme of work the subject "subsidiary means for the determination of rules of international law." Given the ILC's work on

the other provisions of Article 38 of the ICJ Statute, it makes sense to complete the project by examining subsidiary means. We also think this topic may benefit from ILC input, as reliance on subsidiary means has been somewhat unclear and inconsistent in practice.

ILC Election

I would like to close by briefly addressing the upcoming ILC election. Simply put, the ILC historically and currently lacks anything close to gender balance. The statistics are well known – in the 72 years of its existence, the ILC has had just seven female members. In its current composition, the ILC has just four women out of 34 members. Prior to those four, only three women had ever served on the ILC.

There is an opportunity this year to move the ILC in the right direction, so that its membership comes a little closer to reflecting the global community. There are eight women running in this year's election, all well qualified in their own right. This includes the U.S. candidate, Professor Evelyn Aswad, who, if elected, would bring to the commission a valuable combination of government, multilateral, and academic experience. Even if all eight of these candidates are elected, women would still constitute less than a quarter – 8 out of 34 seats – of the membership on the ILC. We can and must do better. In the meantime, the United States expresses its appreciation to the governments nominating or otherwise supporting female candidates for the ILC this year. We also thank and congratulate the seven women who previously served on the ILC, who helped blaze the trail.

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On October 29, 2021, Assistant Legal Adviser Maegan Conklin delivered the U.S. statement at the Sixth Committee meeting on cluster 2 issues in the ILC report on the work of its 72nd session. Ms. Conklin's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-82-report-of-the-international-law-commission-on-the-work-of-its-72nd-session-cluster-2.

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With respect to the topic of "sea-level rise in relation to international law," the United States appreciates the Commission's efforts with respect to issues related to the law of the sea. The issues under consideration are complex, and we recognize the Study Group's laudable efforts to find reliable solutions. The United States recognizes that rising sea levels are a very real threat and is committed to working with others to promote our common goal of protecting maritime zones from challenge and doing so in a manner that we can all support as consistent with international law.

The United States also notes that the Study Group intends to explore a range of additional sources of law on the matter of baselines and maritime zones. In this regard, we would emphasize the universal and unified character of the UN Convention on the Law of the Sea. For example, under existing international law, as reflected in the Convention, coastal baselines are generally ambulatory, meaning that if the low-water line along the coast shifts (either landward or seaward), such shifts may impact the outer limits of the coastal State's maritime zones. We

query whether other sources of law identified by the Study Group could override or alter such universally accepted provisions reflected in the Convention.

The United States notes that it remains supportive of efforts by states to delineate and publish their baselines and the limits of their maritime zones in accordance with international law as reflected in the Law of the Sea Convention. Such a practice provides useful context and clarifies the maritime claims of states, including in relation to future sea-level rise.

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.

I turn now to the topic "Immunity of State Officials from Foreign Criminal Jurisdiction." We note our appreciation for the efforts of Special Rapporteur, Concepcion Escobar Hernandez, on this challenging topic. We welcome also the thoughtful contributions by other members of the Commission.

The United States reiterates the concerns detailed in its prior statements in this Committee. In particular, we do not agree that Draft Article 7 is supported by consistent State practice and opinio juris and, as a result, we do not believe that it reflects customary international law. We also reiterate our view that the Commission should work by consensus on this difficult topic given the serious issues it implicates and the importance of state practice in this sensitive area.

In addition, the prior reports on procedural aspects of immunity reflected significant methodological challenges. There is generally very little visibility into criminal investigations that do not result in prosecutions brought by national authorities (either due to immunity or for other reasons), and case law in this area is sparse. The reports therefore detail proposals for certain procedures without the benefit of significant State practice. With several of the provisions now having been adopted as draft articles despite the concerns we and others have articulated, the United States wishes to underscore that these provisions should not be viewed as codifying existing international law, but instead would at best be viewed as proposals for the development of law. We would urge that the commentary reflect this.

Finally, we note with concern that the Eighth Report addresses the immunities of State representatives before international criminal tribunals, even while recognizing such issues are clearly beyond the mandate of the ILC's project on immunities of State officials before foreign criminal jurisdictions.

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On November 2, 2021, Deputy Legal Adviser Julian Simcock delivered the U.S. statement on cluster 3 issues at the Sixth Committee meeting on the report of the ILC's work of its 72nd session. His remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-82-report-of-the-international-law-commission-on-the-work-of-its-72nd-session-cluster-3.

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I will start our comments today on the succession of States in respect of State responsibility. …

The United States continues to believe that draft guidelines or principles may be the more appropriate form for this topic. The substance of the initial draft articles continues to support this conclusion. For example, paragraph 2 of proposed draft article 16 notes that an injured state "may request" restitution from a successor state in certain circumstances. This permissive language may be appropriate in this area, as State practice is, at best, uneven, and determinations by predecessor or successor states to deny or accept liability are likely driven more by diplomatic and political considerations than by legal ones. To this end, we appreciate that the Special Rapporteur, in his third report, acknowledged that the proposed draft articles constitute the progressive development of international law.

Language provisionally adopted with respect to draft articles 10, 10 bis para. 1, and 11 raises a similar concern. The language that two or more states "shall agree" on how to address an injury appears to be binding, but it is unclear what that legal obligation entails in practice. What is the legal consequence of a breach of this obligation? If one party proposes a means to address an injury to which the other party does not agree, does the failure to agree constitute an internationally wrongful act? Despite the inclusion of seemingly binding language, these draft articles appear to be exhortations to cooperate that seem more appropriately located in guidelines.

We appreciate the efforts of the Special Rapporteur to address composite acts, as compared to continuing acts, in draft article 7 bis. The United States has not formed a position on this draft article but notes that the inclusion of examples or a hypothetical in the commentaries will be helpful for States, courts and tribunals attempting to parse this complex subject in their work.

Finally, the United States agrees with the concerns raised by certain members of the ILC that the draft articles would be improved by avoiding controversial positions or unsettled areas of law that do not need to be addressed in the context of State succession in respect of State responsibility. For example, the fourth report includes language that highlights the ability of an injured state to elect the form of reparation to invoke, and points to the Draft Articles on State Responsibility for Internationally Wrongful Acts and the related commentary to support this election. To the extent this suggests that such an invocation creates an obligation for a responsible state to provide that particular form of reparation, we do not believe this to be supported by the cited draft articles on State responsibility, the related commentary, the cases cited in the commentary, or the discussions of the ILC when the relevant language was initially drafted. We understand that others may have different views on this point or, for example, may have views that do not align with the primacy of restitution. These are complex subjects about which reasonable people may differ. However, these differences do not need to be resolved in the context of State succession in respect of State responsibility and may obscure the important work of the Commission on this topic. We encourage the Special Rapporteur and the Drafting Committee to consider revisions that minimize the need to address these unrelated issues. The United States looks forward to the future work of the Commission on this topic.

I turn now to the topic "General Principles of Law." We have read with great interest the second report produced by Marcelo Vazquez-Bermudez, the special rapporteur for this topic. We join others in thanking him for his clear exposition of the topic and thoughtful, well-researched work in the report. We offer here some reactions and comments for the consideration of the ILC as it continues to make progress on this important topic.

First, the United States would like to reiterate its view that the element of "recognition" is essential to the identification of general principles of law and that the relevant analysis is whether a legal principle is recognized by States, as evidenced by their practice. We share the concerns raised by some members of the Commission about the potential ambiguity introduced by the proposed language "recognized by [the community of nations]" in draft conclusion 2 and believe "recognized by States" would provide better clarity for States, courts, and tribunals as they apply the concept in practice.

In this vein, we encourage the Commission to continue focusing on the need for recognition by States as the core consideration when drawing conclusions about the identification of general principles of law and, indeed, in assessing whether there is sufficient information available from which to draw such conclusions. For example, focusing on state practice in the drafting of commentaries and subsequent conclusions could further elucidate when and how a general principle of law is transposed to the international legal system. It could also provide greater clarity with respect to if, when, and to what extent, the activities of supranational or international organizations contribute evidence of the existence of a general principle of law.

With respect to draft conclusion 7, the United States remains concerned that there is insufficient State practice in the international legal system to determine whether a particular principle "formed within the international legal system" may be considered a general principle of law. We acknowledge and appreciate the admirable efforts of the Special Rapporteur to identify such practice. However, the second report does not alleviate our concerns about the availability and quality of evidence of relevant practice. The report also raises concerns about the lack of objective standards to guide the identification process. Without objective standards, we fear that it will be impossible to achieve the goal — that we share with the Special Rapporteur — of ensuring "that the criteria for determining the existence of a general principle of law . . . be strict and the criteria . . . not be used as an easy shortcut to identifying norms of international law general principles." The lack of objective standards also opens the door for general principles to be used a means to assert claims about international law that are not properly established.

Relatedly, we share concerns expressed by certain members of the ILC about the extent of the reliance on decisions of international criminal courts and tribunals in the second report. International criminal law is often sui generis, and caution must be taken when extrapolating from it to other areas of international law or international law generally. To the extent that there is evidence of State practice that is available from other areas of international law, inclusion from a more representative sampling of international law would greatly enhance the effectiveness of commentaries for the relevant draft conclusions. If such evidence is limited, we encourage the Commission to consider whether there is a sufficient basis for a conclusion concerning existing law and, if not, to clearly identify any resulting conclusion as progressive development of law.

The second report also raises questions related to distinguishing between general principles of law and other sources of international law that merit additional careful consideration. We believe that these questions will be better addressed following a review of the next report of the special rapporteur on the relationship between the sources of international law. We look forward to the future work of the Special Rapporteur and the Commission on this topic.

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2. Draft Articles on Crimes Against Humanity

The United States also provided a statement and an explanation of position on the ILC draft articles on the prevention and punishment of crimes against humanity. Julian Simcock delivered the U.S. statement at the Sixth Committee meeting at the 76th General Assembly on the topic of crimes against humanity on October 13, 2021. The statement is excerpted below and available at https://usun.usmission.gov/statement-at-the-76th-general-assembly-sixth-committee-agenda-item-83-crimes-against-humanity/.

* * * *

The United States has a long and proud history of supporting justice for victims and accountability for those responsible for serious international crimes, including crimes against humanity. The United States was instrumental in the first prosecution of crimes against humanity at Nuremberg and has supported subsequent efforts to prosecute perpetrators of crimes against humanity in ad hoc international criminal tribunals, hybrid criminal tribunals, and the domestic courts of a number of countries.

Seventy five years after the Nuremberg trials, there is no dedicated multilateral treaty on the prevention and punishment of crimes against humanity. By contrast, the prevention and punishment of genocide and war crimes are the subjects of widely-ratified multilateral treaties, which have made a significant contribution to the development of international law. The absence of such a treaty addressing crimes against humanity has left a hole in the international legal framework – and it is one we strongly believe should be addressed.

The Commission's final draft articles on the prevention and punishment of crimes against humanity are an important step in this regard. We would like to thank the Special Rapporteur, Sean Murphy, for his prodigious efforts. He has brought tremendous value to this project, and we particularly appreciate his extensive consultations with Member States and his efforts to take into account their 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 recognize that States have a range of views on the final draft articles and the way forward. As reflected in the comments the United States submitted in 2019, we believe that, notwithstanding their many merits, the draft articles can and should be modified in certain, key respects. However, in our view, that would be best accomplished through further discussion of the draft articles by States in an ad hoc committee with an appropriately robust mandate that recognizes the importance of this project and the gravity of this subject. An ad hoc committee should consider modalities of work that would enable a substantive and thorough exchange of views by States and on the Commission's recommendation for the elaboration of a convention by the General Assembly or by a conference of States on the basis of the final draft articles.

We believe that this approach would have the greatest probability of ensuring that any future convention based on the draft articles would be effective in practice and widely ratified by States. Advancing discussion of this project towards the elaboration of a convention on the

prevention and punishment of crimes against humanity should be our shared goal. Anything less would fall short of filling this critical gap in the international legal framework.

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On November 18, 2021, Mr. Simcock delivered the U.S. explanation of position on crimes against humanity. That statement is excerpted below and available at https://usun.usmission.gov/explanation-of-position-on-agenda-item-83-crimes-against-humanity/.

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Seventy-five years after the Nuremberg trials, there is no dedicated multilateral treaty on the prevention and punishment of crimes against humanity. By contrast, the prevention and punishment of genocide and war crimes are the subjects of widely-ratified multilateral treaties, which have made a significant contribution to the development of international law. The absence of such a treaty addressing crimes against humanity has left a hole in the international legal framework – and it is one we strongly believe should be addressed.

The International Law Commission's final draft articles on the prevention and punishment of crimes against humanity are an important step in this regard. We recognize that States have a range of views on the final draft articles and the way forward. Indeed, the United States believes that notwithstanding their many merits, the draft articles can and should be modified in certain, key respects. We also believe, however, that the method by which to address such concerns is through meaningful dialogue. The United States supports the establishment of a structured process by which to exchange substantive views on the draft articles. Such a process would be fully consistent with the past practices of this Committee.

On the subject of past practices, it is well known that the Sixth Committee has a long tradition of consensus-based decision making. In our view, the success of that practice is based upon an implicit understanding – that our working methods are driven by engagement, not by absolutism. It is incumbent upon us to engage rigorously; to speak in a manner that is internally consistent; to advance arguments that are grounded in fact; to treat words seriously. Allowing for a meaningful discussion of these articles should be our shared goal. We hope that next year will allow us another opportunity to make progress. We look forward to engaging with that objective in mind.

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D. ORGANIZATION OF AMERICAN STATES

1. Nicaragua

On June 16, 2021, the State Department issued a statement by Secretary Blinken welcoming the OAS resolution on Nicaragua, available at

https://scm.oas.org/doc_public/english/hist_21/cp44215e03.docx. The statement is excerpted below and available at https://www.state.gov/the-united-states-welcomes-the-organization-of-american-states-resolution-on-nicaragua/.

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Yesterday, an overwhelming majority of Organization of American States (OAS) member states sent a clear message of support for the Nicaraguan people and their fight for free and fair elections, respect for human rights, and accountability. The resolution approved yesterday condemns the Ortega-Murillo regime's repression in Nicaragua and calls for the immediate release of the four presidential candidates recently detained, along with over 130 other political prisoners. It also concludes that, in the wake of the regime's recent repression and its lack of meaningful electoral reform, the conditions for free and fair elections this November do not exist. The United States strongly supports the OAS Permanent Council's call for President Ortega to take urgent action to restore full respect for human rights and to create the conditions for free and fair elections.

It is time for the Ortega-Murillo regime to change course, respect both its own constitution as well as its commitments under the Inter-American Democratic Charter, and allow the Nicaraguan people to fully exercise their rights—including their right to choose their leaders in free and fair elections. We look forward to continuing to work with OAS member states, as well as other democratic governments around the world, including with our partners in the European Union, to press for greater freedom for the Nicaraguan people. Through yesterday's vote, the members of the OAS made clear that Ortega and Murillo's actions have no place in this hemisphere, given our shared commitments to democracy and human rights.

* * * *

On October 22, 2021, Secretary Blinken applauded the OAS resolution condemning the electoral process and repression in Nicaragua in a press statement available at https://www.state.gov/the-united-states-applauds-the-oas-resolution-condemning-the-undemocratic-electoral-process-and-repression-in-nicaragua/ and excerpted below. The OAS resolution is available at https://scm.oas.org/doc_public/english/hist_21/cp45059e03.docx.

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This week's resounding vote at the Organization of American States (OAS) underscores that member states emphatically condemn President Ortega and Vice President Murillo's undemocratic electoral process and ongoing repression. With 26 countries voting in favor and

zero votes against, this latest OAS action demonstrates that the Ortega-Murillo government stands isolated without supporters in a region committed to democratic principles.

The Nicaraguan government, along with other governments in the Americas, made a democratic commitment to its citizens, as laid out in the Inter-American Democratic Charter. Nicaragua joined the Charter twenty years ago, resolving that its citizens have a right to democracy, and the Nicaraguan government has an obligation to promote and defend that right. President Ortega and Vice President Murillo have failed to honor this commitment by preparing a sham election devoid of credibility, by silencing and arresting opponents, and, ultimately, by attempting to establish an authoritarian dynasty unaccountable to the Nicaraguan people.

This OAS resolution reflects the region's resounding commitment to democracy and respect for human rights and fundamental freedoms in the Americas. The United States continues to work with partners in the region and across the world to promote accountability for those who support Ortega and Murillo's anti-democratic actions, just as we continue to press the Nicaraguan government to restore civil and political rights and immediately and unconditionally release political prisoners.

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2. 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 2021, the United States continued its active participation before the IACHR through written submissions and participation in a number of hearings. Significant U.S. activity in matters, cases, and other proceedings before the IACHR and IACtHR in 2021 is discussed below. The United States also corresponded in other matters and cases not discussed herein.

a. Petition No. P-2340-15: Carla Butcher et al.

On February 2, 2021, the United States submitted its response to the petition filed on behalf of Carla Butcher and others relating to sexual violence in the military. The U.S.

response asserts that the petition is inadmissible for failure to exhaust and failure to state a violation of the American Declaration. Excerpts follow from the U.S. response.

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The United States military has never tolerated or condoned sexual assaults or sexual harassment 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 and sexual harassment. Moreover, since the date of the last incident alleged by the Petition, the U.S. sexual assault prevention and response system has further evolved as a victim-protective criminal investigation and justice system.

As the United States Supreme Court recognized as recently as 2018, the American court-martial system "closely resembles civilian structures of justice."[2] 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 and deployable system is particularly 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 allegations that six service members were sexually assaulted and one sexually harassed between 2002 and 2011. Together, those allegations relate to approximately 0.0005% of today's active duty U.S. military population; they comprise a far smaller percentage of the total number of U.S. service members over the time span from which they are drawn. We condemn sexual assault and sexual harassment 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 and sexual harassment. The mere existence of some level of crime, including sexual assaults and sexual harassment, does not violate the American Declaration of the Rights and Duties of Man. Nor has the U.S. military's response to those individual cases or the phenomena of sexual assault and sexual harassment 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 sexual harassment and a commitment to the careful investigation and adjudication of such allegations to promote appropriate accountability. The United States Government's response has steadily evolved as it considers and implements additional sexual assault and sexual harassment prevention and response measures, as detailed below.

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[2] *Ortiz v. United States*, 138 S. Ct. 2165, 2170 (2018).

III
The Petition is Inadmissible Under Article 31(1) and 34 of the Rules of Procedure of the Inter-American Commission on Human Rights

A. The Petition Is Inadmissible Because Petitioners Have Failed to Pursue and Exhaust a Variety of Domestic Remedies.

The Commission should declare the Petition inadmissible because Petitioners have not satisfied their duty to demonstrate they have "invoked and exhausted" domestic remedies under Article 20(c) of the Commission's Statute and Article 31 of the Rules. A petitioner before this Commission has the duty to pursue all available domestic remedies. As Article 31(1) of the Rules states, "In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law." The requirement for exhaustion of domestic is embedded in the international legal system as a means of respecting State sovereignty. It ensures the State within whose jurisdiction a human rights violation allegedly occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system. A State has the sovereign right to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before the dispute falls within the competence of an international body.

The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance "in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction." Petitioners have the duty to exhaust *all* available domestic remedies. Exhaustion is only realized where such a remedy has been pursued to the highest appellate level, resulting in a final judgment. The arguments raised in the domestic proceedings must be the same as those intended to be raised in international proceedings. In short, "for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success." As the Commission has stated, "[m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies."

This Petition fails to satisfy those exhaustion requirements. Petitioners pursued only one narrow avenue of relief under U.S. law: a federal tort claim action against certain high-level Department of Defense officials. Petitioners inexplicably failed to seek relief from the U.S. Supreme Court, the only U.S. court that was empowered to grant the narrow form of relief it sought. Moreover, even if the Petitioners had exhausted their single chosen remedy, that would be insufficient to satisfy the Commission's exhaustion requirement because they have not pursued (or have not acknowledged pursuing) multiple other avenues for relief under U.S. law.

i. Petitioners failed to exhaust their domestic remedies because they did not seek review by the United States Supreme Court

Petitioners failed to exhaust the one remedy they chose to pursue in the U.S. legal system because they declined to pursue that remedy to the highest appellate level, rendering the Petition inadmissible. Moreover, for the reasons discussed below, only the United States Supreme Court could have granted the narrow form of relief Petitioners sought. Despite having a clear legal right to seek review from the Supreme Court, Petitioners failed to do so. The fact that Petitioners failed to exhaust this remedy by neglecting to seek review before the *only* U.S. court empowered to grant the relief they were seeking compounds this defect.

Petitioners sued several high-level government officials for monetary damages in the United States District Court for the District of Columbia. As required by Supreme Court precedent, including *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987), the District Court dismissed the complaint. Under these precedents, the Supreme Court foreclosed tort actions against the United States by service members for injuries suffered incident to military service. The United States Court of Appeals for the District of Columbia Circuit affirmed, again relying on well-established Supreme Court precedents.

In the United States, Supreme Court precedent is "binding on lower courts in our hierarchical system of absolute vertical *stare decisis*." Thus, neither the United States Court of Appeals for the District of Columbia Circuit nor the United States District Court for the District of Columbia could grant the narrow form of relief Petitioners requested due to Supreme Court precedent. Petitioners acknowledge as much in their Petition: "their claims were dismissed before the District Court and Court of Appeal because of case law from the United States Supreme Court." Yet Petitioners decided not [to] exercise their statutory right to seek Supreme Court review of their case, despite apparently recognizing that the only U.S. court that could provide their requested relief was the Supreme Court.

The Supreme Court can, and sometimes does, overrule its own precedent. ….

Petitioners' failure to seek Supreme Court review must result in a determination of inadmissibility before this Commission. Under U.S. law, Supreme Court review is not an "extraordinary" remedy. Rather, U.S. law provides that seeking Supreme Court review is part of "[d]irect review." It is an ordinary remedy. To the extent any previous decision by the Commission suggests otherwise, the Commission should revisit the question. It would be inconsistent with respect for an Organization of American States (OAS) Member State's sovereignty for an international body to consider a petition filed without ever having given the Member State's highest court an opportunity to consider the issue where domestic law imposed no bar to seeking such review. As this Commission has observed, "the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it, before it has the opportunity to remedy them by internal means."[102] In this case, by failing to seek relief from the United States Supreme Court, Petitioners never gave the only U.S. court with the authority to grant the narrow remedy sought an opportunity to do so. The Petition is, therefore, inadmissible.

Moreover, in marked contrast to the "Juvenile Offenders Sentenced to Life Imprisonment Without Parole" Report, the Petition contains no indication that the United States Supreme Court has *ever* been given the opportunity to rule on the issue now being brought before the Commission. In "Juvenile Offenders," the Supreme Court received a certiorari petition "which presented substantially similar questions to those advanced in the petition received by the Commission, including the allegation that life imprisonment without parole represents cruel or unusual punishment, and the allegation of the necessity of differential treatment for adults and persons below the age of 18." Here, on the other hand, Petitioners fail to demonstrate—or even allege—the Supreme Court has *ever* been given an opportunity to rule on the availability of tort remedies against senior government officials in the military sexual assault or sexual harassment context. Moreover, in "Juvenile Offenders," as the Commission emphasized, one of the petitioners *did* seek review by the United States Supreme Court, giving that court an opportunity to address the matter. Here, on the other hand, none of the Petitioners sought Supreme Court review and there is no demonstration that Court has had any opportunity to rule

on the particular issue presented by the Petition in any other case.

ii. The United States Court of Appeals for the District of Columbia Circuit expressly noted Petitioners' failure to pursue an alternative form of relief

In the course of affirming the District Court's dismissal of Petitioners' suit, the United States Court of Appeals for the District of Columbia Circuit expressly observed: "Plaintiffs have not sued their attackers or those who retaliated against them for reporting their abuse." That is an alternative remedy that Petitioners could have, but did not, pursue. This remedy is particularly relevant in light of the abuses alleged in the complaint, which were private in character and therefore not attributable to the United States as a matter of international law. Moreover, Petitioners' pursuit of remedies against organs of the United States government, while failing to pursue remedies against those individuals allegedly responsible for the private abuses alleged, underscores Petitioners' failure to exhaust domestic remedies. On this point, as the Commission has noted, pursuit of claims that cannot provide a petitioner the relief he or she seeks does not satisfy the exhaustion requirement. For example, in *Josué Luís Zaar v. Brazil*, the Commission found that pursuit of administrative remedies incapable of providing relief was insufficient to satisfy the Commission's exhaustion requirement:

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

Similarly, in its report in *Leonardo López Amancio v. Peru*, the Commission "reiterate[d] that the domestic remedies that must be taken into account for the purpose of exhaustion of domestic remedies are those capable of resolving the legal situation infringed." Because the remedies pursued in that case, even if resolved in petitioner's favor, "would not have remedied the situation brought before the IACHR," they were insufficient to satisfy the Commission's exhaustion requirement. The same reasoning is applicable to the instant Petition. Because Petitioners' complaints against organs of the United States government concerned private conduct, Petitioners in effect pursued remedies against the wrong parties and, as a result, such claims could not be sufficient to satisfy the Commission's exhaustion requirement.

Each Petitioner could have sued the individual or individuals she alleges sexually assaulted or sexually harassed her. In each individual case, a court would have determined whether the totality of the circumstances warranted allowing the case to go forward. However, none of the Petitioners brought such a suit. Accordingly, each Petitioner failed to pursue, much less exhaust, an available remedy. That failure to exhaust available remedies renders the Petition inadmissible before the Commission pursuant to Article 31 of the Commission's Rules.

iii. Petitioners failed to demonstrate exhaustion of relief from the U.S. veterans benefits program

While Petitioners' failure to seek Supreme Court review and failure to seek the alternative remedy identified by the District of Columbia Circuit are each fatal to the petition under Article 31 of the Rules, there are still more remedies available to Petitioners that they do not state they pursued, much less exhausted. One such avenue of relief is the U.S. Veterans Benefits Program. U.S. courts have expressly held that service members who suffer injuries

during military service have "a general alternative" to the kind of tort relief Petitioners sought. Petitioners have failed to demonstrate they pursued and exhausted that alternative form of relief. As the United States Supreme Court has observed, "[T]he Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government." The effects described by the Petition on several of the Petitioners likely would, if proven, warrant veterans' benefits under U.S. law. Additionally, the Department of Veterans Affairs operates a counseling and treatment program specifically for veterans who suffer from sexual trauma. The Petition does not indicate that the Petitioners availed themselves of these programs. Because the veterans' benefits program and 38 U.S.C. § 1720D provide unexhausted means of redress to Petitioners, Petitioners' claims are inadmissible pursuant to Article 31 of the Rules.

iv. Petitioners Failed to Demonstrate They Sought Non-Tort Relief from U.S. Courts

Petitioners failed to pursue still more alternative remedies available under U.S. domestic law, such as injunctive or declaratory relief, which are comparable to some of the remedies Petitioners now seek from the Commission. The United States Court of Appeals for the District of Columbia Circuit, whose case law governs the jurisdiction in which Petitioners sought relief, has held that the Supreme Court case law barring monetary damages claims against the government arising from military service does not bar all forms of equitable relief. The Petitioners could have pursued this avenue of relief in U.S. courts but failed to do so. Accordingly, Article 31 of the Rules bars them from seeking relief before the Commission.

B. The Petition Is Inadmissible Under Article 34(a) of the Rules Because of Its Failure to State Facts that Tend to Establish Violations of Rights Set Forth in the American Declaration and Under Article 34(b) of the Rules Because It Is Manifestly Groundless

In addition to being inadmissible due to failure to exhaust domestic legal remedies, the Petition is inadmissible under Article 34 of the Rules because it fails to make a *prima facie* showing of violations of the American Declaration and because the Petition's claims are manifestly groundless.

The Petition is marred by numerous inaccuracies and omissions, including the following:

1. The Petition twice misrepresents a report by the United Nations Committee against Torture. The Petition falsely states that the United Nations Committee against Torture "recently found that sexual violence in the U.S. military, including but not limited to acts of rape, violated the United States' obligation to prevent torture and cruel, inhuman, and degrading treatment," citing U.N. Committee against Torture, Concluding observations on the third to fifth periodic reports of United States of America, CAT/C/USA/CO/3-5, ¶ 30 (2014). The Committee made no such finding. Rather, it welcomed "recently increased efforts by the Department of Defense to prevent sexual assault in the military," while noting that it "remains concerned about the high prevalence of sexual violence, including rape, and the alleged failure of the Department of Defense to adequately prevent and address military sexual assaults of both men and women serving in the armed forces." The Committee then offered three recommendations. The United States vigorously disputes any suggestion that the Department of Defense has failed to take appropriate steps to prevent and address sexual assault. But regardless of whether there has been any such failure, by no means did the report make a finding that, as the Petition falsely claimed, "sexual violence in the U.S. military, including but not limited to acts of rape, violated

the United States' obligation to prevent torture and cruel, inhuman, and degrading treatment."

2. The Petition reflects a fundamental misunderstanding of the U.S. military justice system by stating, "The United States military has adopted its own military justice system that handles criminal acts committed by and against its members." The United States military did not adopt the military justice system. The United States Constitution gives Congress the authority to "make Rules for the Government and Regulation of the land and naval Forces." Congress, along with various Presidents in the exercise of their role in the lawmaking process, adopted the military justice system. Moreover, as discussed in greater detail below, the military justice system does not displace civilian justice systems. Service members are subject to and protected by both.

3. The Petition offers spurious purported comparisons of military versus civilian sexual assault prevalence and prosecution rates. In reality, the rates of sexual assault in the U.S. military are consistent with those for a similar age cohort in the U.S. population as a whole. The highly regarded National Center for Injury Prevention and Control of the Centers for Disease Control and Prevention (the CDC) has expressly concluded: "Overall, the prevalence of IPV [intimate partner violence], SV [sexual violence], and stalking were similar among women in the U.S. population, active duty women, and wives of active duty men."

A rigorous comparison of U.S. military and civilian prosecution rates for sexual assault offenses found that, to the extent there are differences, the military is *more* likely to prosecute such offenses compared to the civilian community. For example, the authors observed: "it is clear that the military prosecutes more felony-level sexual assaults per capita and based on reporting levels than Texas, New York or 40 large representative counties containing about 60 million people."

4. The Petition repeatedly asserts that military commanders decide whether to investigate sexual assault allegations and control sexual assault investigations. Not true. As was the case at the time the petition was filed, a Department of Defense regulation requires that all investigations of sexual assault allegations, penetrative and non-penetrative alike, be conducted by one of the military criminal investigative organizations—highly professional law enforcement agencies. Commanders are forbidden from conducting or overseeing such investigations. As the Petition itself acknowledges, all six of the alleged sexual assaults at issue were investigated by law enforcement agencies. Five of the six were investigated by the Naval Criminal Investigative Service (NCIS)—a highly professional, well-trained, civilian-led law enforcement agency. The sixth—which concerned an alleged non-penetrative sexual assault in 2010—was investigated by the Marine Corps Criminal Investigation Division. Had that report been made today, it, too, would have been investigated by NCIS.

5. The Petition asserts that "several petitioners were downgraded in rank, denied promotions, or discharged from the military for reporting that other military members had violated their human rights by sexually assaulting them." Not a single Petitioner was ever "downgraded in rank." It does not appear that any Petitioner was ever passed over for a promotion; certainly, no Petitioner was denied a promotion for making a sexual assault allegation. Furthermore, no Petitioner was discharged from the military as a result of making a sexual assault allegation.

6. The Petition asserts that the Petitioners "were unable to take the actions that civilians may take to protect themselves from sexual predators, such as calling the police . . . ." False. Not only may a rape or sexual assault victim in the military call the police, at least two of the Petitioners directly reported their allegations to the police. Petitioner Woods' decision to call

a civilian police department concerning the offense she alleged also disproves the Petition's allegation that the "petitioners in this case had no choice but to use this military justice system." In actuality, every alleged sexual assault committed by a Service member in the United States can be tried not only by the military justice system, but also by the federal civilian criminal justice system, a state criminal justice system, or—depending on the jurisdictional status of the location of the alleged offense—both. Thus, contrary to the Petition's erroneous assertion, U.S. law offers an alternative to the military justice system for sexual assault allegations against service members in the United States.

7. The Petition alleges that Secretary of Defense Robert Gates "failed to ensure that the Department of Defense met its statutorily mandated deadline of January 2010 for implementing a database to centralize all reports of rapes and sexual assaults, as prescribed by the National Defense Authorization Act for Fiscal Year 2009. The database was not created until mid-2012." The Petition fails to note that, in 2011, Congress enacted a law requiring the Department of Defense to submit "a revised implementation plan" for "completing implementation of the database," including "the date by which the database will be operational." Moreover, the fact that creating a massive computer database capable of receiving input from U.S. military commands around the world took longer than originally anticipated is not surprising. It certainly does not reflect indifference to sexual assault and does not constitute a violation of the American Declaration. Additionally, the initial January 2010 deadline was after the date of the alleged sexual assaults or sexual harassment of all of the Petitioners except Petitioner Everage, who alleged that she was the victim of a non-penetrative sexual assault offense in January 2011, and Petitioner McCoy, who alleged she was the victim of a non-penetrative sexual assault offense in April 2010. The Petition fails to allege any facts—and the United States is aware of none—suggesting that had the Defense Sexual Assault Incident Database become operational in January 2010, anything about those incidents would have changed.

8. The Petition asserts that "NCIS, not the chain of command, is the authority that typically issues restraining orders." Not true. NCIS is a law enforcement agency; it has no authority to issue restraining orders. In the military, such orders are issued by commanders.

9. The Petition asserts that "[a]s of 2014, victims of sexual crimes are now protected by the military's 'Rape Shield' law in Article 32 hearings." Actually, Executive Order 12888 of December 23, 1993, amended Rule for Courts-Martial 405(i) to provide, "The Military Rules of Evidence—other than Mil. R. Evid. 301, 302, 303, 305, 412 and Section V—shall not apply to pretrial investigations under this rule." At all times since, Military Rule of Evidence 412—the military justice system's rape shield rule, which is very similar to the portion of Federal Rule of Evidence 412 covering criminal trials—has applied at Article 32 hearings.

10. The Petition asserts that "Congress later criticized the Department of Defense under Secretary Rumsfeld's leadership" for a certain purported delay in establishing a task force. The Petition cites only two statements by a single member of the U.S. House of Representatives in support of that statement. "Congress" does not act through the statements of individual members. The petition's allegation that "Congress" made such a criticism is, thus, unfounded. In addition to those representative errors, as discussed more fully below, the Petition's descriptions of many of the individual cases it recounts contain inaccuracies and/or omit material facts. Again, those examples are illustrative. The United States does not concede the accuracy of any allegation in the Petition concerning individual Petitioners merely because it is not expressly refuted below. Additionally, in some instances this filing provides documentation to demonstrate the inaccuracy of statements in the Petition. Many of these inaccuracies concern

sensitive facts involving multiple people, law enforcement information, or information the disclosure of which is limited by the Privacy Act. Thus, while the United States Government possesses documentation to support all the factual assertions in the section below, the United States Government was necessarily selective in appending that documentation to this filing. In some instances, documents are appended with appropriate redactions.

The Petition was filed on behalf of seven individuals. The Commission may not review claims that are outside the scope of events concerning those seven individuals. As it has explained on numerous occasions, the Commission has competence to review 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*."

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b. Request for Information No. MC-146-21: Apollinaire Nduwimana et al.

On May 11, 2021, the United States provided its response to a precautionary measures request for information filed on behalf of five Canadian asylum seekers who were "directed back" to the United States. As a preliminary matter, the U.S. response explains that U.S. law does not allow discussion of these petitioners' without a privacy waiver. The response further argues that alleged "violations" of commitments under the American Declaration by another OAS Member State cannot serve as the basis for a request for precautionary measures against the United States. Excerpts follow from the U.S. response.

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The Petition alleges that Petitioners, upon entry into Canada with the purpose of seeking asylum in Canada, were directed to return to the United States.[1] Petitioners' sole support for their Petition is the Commission's 2011 Merits Report in the John Doe et al. v. Canada matter, in which "the Commission found that Canada's direct back policy violated Article XXVII—Rights to Seek Asylum and to Non-Refoulement, and Article XXVIII—Right to Due Process." Although Petitioners request precautionary measures "for the same Declaration violations previously identified by the Commission," such findings were rendered with respect to commitments of Canada under the American Declaration. Alleged "violations" of commitments under the American Declaration by another OAS Member State cannot serve as the basis for a request for precautionary measures against the United States.

The controlling threshold issue in the instant matter is that commitments under the American Declaration are territorial in scope, meaning that commitments of the United States under the American Declaration do not extend to the territory and jurisdiction of another State. As a result, the Commission lacks competence *ratione loci* to consider the Petition vis-à-vis the United States because the alleged violations of the American Declaration occurred beyond the jurisdiction of the United States. The applicability of the American Declaration is limited by the

jurisdiction of the State. The scope of the commitments undertaken by OAS Member States through the American Declaration is clear from the preamble of the instrument. The focus of the American Declaration is to strengthen the internal regimes of States through the incorporation of regional standards set forth in the Declaration. The United States undertook a political commitment to do precisely that, and nothing in the text of the American Declaration suggests that OAS member States intended for their commitments under the instrument to apply beyond their respective jurisdictions.

The Commission considers it appropriate to interpret provisions of the American Declaration in light of relevant provisions of the American Convention on Human Rights. 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.

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 Canada during the relevant period, the United States could not have violated its commitments under the American Declaration with respect to Petitioners.To the extent that Petitioners allege that Canada has violated its commitments under the American Declaration, the United States is not the appropriate subject of a request for precautionary measures for such alleged violations.

U.S. Immigration and Customs Enforcement (ICE) Case Review System

The United States is committed to rebuilding a safe, orderly, and humane immigration system. We are committed to reforming immigration policies that do not align with our nation's values while continuing to fairly enforce our immigration laws and border security measures. Pursuant to Executive Order 13993, Revision of Civil Immigration Enforcement Policies and Priorities (January 20, 2021), the then-Acting Secretary of the Department of Homeland Security (DHS) issued a memorandum entitled, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*, requiring DHS components to develop recommendations to address aspects of immigration enforcement, including policies governing the exercise of prosecutorial discretion.

As part of this process, on March 5, 2021, U.S. Immigration and Customs Enforcement (ICE), a component of DHS, established the ICE Case Review (ICR) process for noncitizens who believe their case does not align with ICE's enforcement, detention, and removal policies. The ICR process offers another channel through which noncitizens and their representatives can request that ICE exercise its prosecutorial discretion on a particular noncitizen's behalf, and resolve questions and concerns, consistent with law, policy and the interests of justice. Since all cases are unique, ICE consults with all appropriate parties, including ICE attorneys, to determine what, if any, additional coordination with the courts is necessary for a particular case. Individuals requesting case review should contact their local ICE Enforcement and Removal (ERO) field office for initial consideration. Upon request, cases will be further reviewed by a Senior Reviewing Official, who, where appropriate, will communicate the ultimate resolution to the requestor. The cases of individuals detained in ICE custody or pending imminent removal will be prioritized.

We welcome noncitizens and their representatives to request further review of the individual facts and circumstances of their cases through this new process. Information on the ICE Case Review Process as well as specific procedures for submitting an ICR request are available at www.ice.gov/ICEcasereview.

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The United States reaffirms its longstanding position that the Commission lacks the authority to require that States adopt precautionary measures. We respectfully refer the Commission to past submissions, which state the reasons for the U.S. position on precautionary measures in detail. Because the United States is a not a Party to the American Convention, the Commission has only the authority "to make recommendations … to bring about more effective observance of fundamental human rights."[10] As such, should the Commission adopt a precautionary measures resolution in this matter, the United States would take it under advisement and construe it as recommendatory.

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c. Request for information No. MC-505-18: Antonio Bol Paau et al.

The United States responded on November 2, 2021 to the precautionary measures request for information on behalf of Antonio Bol Paau and others. Excerpts from the U.S. response discuss the work of the Reunification Task Force, also the subject of an IACHR working meeting in October 2021.

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DHS Family Reunification Task Force

The Biden-Harris Administration is committed to the relentless pursuit of reunification for families who were separated under "Zero-Tolerance" policy and related initiatives of the past Administration between January 20, 2017 and January 20, 2021. This Administration is also committed to ensuring that families are not separated at the U.S. border, except in the most extreme circumstances where a separation is clearly necessary for the safety and well-being of the child or is required by law. This Administration is further committed to ensuring that the processing of family units at the border is consistent with U.S. immigration laws and U.S. values. The information you have provided and the concerns you raise are important. We acknowledge that there are myriad challenges to reunifying those families who were previously separated.

On February 2, 2021, President Joseph R. Biden signed Executive Order (E.O.) 14011, *Establishment of Interagency Task Force on the Reunification of Families*. The E.O. established the Interagency Task Force on the Reunification of Families (Task Force) to reunite children separated from their parents at the United States-Mexico border between January 20, 2017 and January 20, 2021, in connection with the prior Administration's "Zero-Tolerance" Policy. The E.O directs the Task Force to identify children who were separated, to facilitate and enable the reunification of the families, and to provide recommendations regarding the provision of additional services and support for the reunified families, including behavioral health services, with a focus on trauma-informed care.

We can assure you that DHS and the Task Force are working determinedly to achieve the Task Force's mission through identifying separated children, and to the greatest extent possible, facilitating and enabling the reunification of each of the identified children with their families. Most recently, the Task Force launched a website at www.together.gov or www.juntos.gov where separated families can go to learn more about the reunification process and available support. Information about the reunification process is translated into English, Spanish, and Portuguese, and audio recordings of the websites are available in English, Spanish, Portuguese, M'am, Ki'che, Q'eqchi', and Q'anjob'al. Once on the site, families are encouraged to register to start the reunification process. Eligible families receive Task Force assistance in obtaining travel documents, submitting parole requests, and making travel arrangements. Families who are granted parole through the Task Force process receive permission to remain in the United States and receive work authorization for three years. The Task Force is also working to provide additional services and support to the families, including behavioral health services, with a focus on trauma-informed care, which the Task Force recognizes must be linguistically and culturally appropriate. Previously separated families who fall under the Task Force mandate and are in the United States can receive services through Seneca Family of Agencies. Additionally, the Task Force will make recommendations to help ensure that the Federal Government will not repeat the policies and practices that led to the separation of families at the border during the prior Administration.

The Task Force is working tirelessly to identify separated families by reviewing relevant U.S. government records and by collaborating with non-governmental organizations (NGOs) and government officials in the countries of origin. The Task Force submits regular reports to President Biden—also available on our webpage. In close coordination with NGOs, the Task Force has identified almost 4,000 children who were separated from their families at the U.S.-Mexico border between July 1, 2017, and January 20, 2021, based on the "Zero-Tolerance" policy. Overall, through the support of NGOs, 2,031 children have been reunified with their parents in the United States under past court orders. As of October 8, 2021, the Task Force itself, through coordination with NGOs, has reunified 54 children with their families. Over one hundred additional families have been registered and referred to the International Organization for Migration for support in the reunification process. The Task Force's Initial Progress Report (June 2, 2021) and its interim progress reports are available on the Task Force's website at: https://www.dhs.gov/publication/family-reunification-task-force-progress-reports.

Family Unity at the Southwest Border

The Biden-Harris Administration places a high value on the principle of family unity and it is DHS policy to adhere to this principle to the greatest extent operationally feasible, absent a legal requirement or an articulable safety or security concern that requires separation. DHS has a responsibility to care for all individuals in its custody, including all children under 18 years of age, and is required by the Trafficking Victim Protection Reauthorization Act of 2008 to transfer unaccompanied children traveling with adults who are not their parents or legal guardians into the care and custody of the U.S. Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) within 72 hours of determining the child is an unaccompanied child. DHS may separate adults and children consistent with the guidance implementing the *Ms. L.* preliminary injunction.

Ms. L Litigation

In addition to the efforts of the Task Force noted above, there has been on-going litigation regarding children separated from the parents under the "Zero Tolerance" policy. The

Task Force, Department of Justice, and class counsel for *Ms. L.* are currently in settlement negotiations, which are ongoing and confidential.

* * * *

d. Petition No. P-620-18

On November 22, 2021, the United States responded to a petition filed on behalf of two brothers who irregularly crossed the U.S.-Mexico border, one of whom died in the process. Excerpts from the U.S. response include the discussion of exhaustion of domestic remedies and failure to state a claim.

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B. Petitioners have not demonstrated that they have 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 such judicial proceedings for its national system has the sovereign right to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before resorting to an international body. The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance "in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction." The Commission has repeatedly made clear that petitioners have the duty to pursue *all* available domestic remedies. And, as the Commission has stated, "[m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies." Exhaustion is only realized where such remedy has been pursued to the highest appellate level, resulting in a final judgment.

The arguments raised in the domestic proceedings must be the same as those intended to be raised in international proceedings. Put differently, the requirement that a petitioner 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. … Consequently, pursuit of domestic remedies with respect to one claim, even if exhausted, would not satisfy the exhaustion requirement with respect to other claims not similarly raised, as the Commission recognized in its 2018 Inadmissibility Report in *Feldman v. Costa Rica*. This claim-by-claim approach to exhaustion ensures respect for "the subsidiarity principle . . . [which] demands that all petitions be previously heard, in substance, by domestic courts." In short, "for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success."

Petitioners pursued no judicial remedy with respect to their Petition. Regarding the administrative remedy Petitioners pursued, with respect to their Article I claim only, that claim was not exhausted. On or about March 30, 2016, Petitioners filed administrative claims with CBP under the FTCA alleging wrongful death. On July 7, 2017, CBP denied Petitioners' administrative claims and "advised that if you are dissatisfied with this decision, you have the right to file suit in an appropriate United States District Court no later than six months after the date of mailing this notification." As noted above, Petitioners did not subsequently file suit. Petitioners thereby failed to exhaust domestic remedies with respect to their Article I claim. Therefore, Petitioners' claim under Article I of the Declaration is inadmissible.

Moreover, the Petition does not evidence that Petitioners have pursued or exhausted *any* domestic remedies available to address Petitioners' other claims of violations of rights contained in the American Declaration. For their claims to be admissible, Petitioners must demonstrate that "remedies of the domestic legal system have been pursued and exhausted." Petitioners did not pursue these claims as part of their administrative FTCA claim against CBP. Therefore, Petitioners' claims under other provisions of the American Declaration are inadmissible because Petitioners have not pursued or exhausted any domestic remedies with respect to those claims.

Finally, as a general matter, Petitioners only pursued their Article I claim against Federal officials but did not pursue remedies against state or local authorities, for example under 42 U.S.C. sec. 1983. Thus, Petitioners' potential constitutional and civil rights claims remain unexhausted with respect to state and local authorities.

Taken together, to the extent Petitioners raise claims under Articles I, II, VI, XI, and XXVII of the Declaration, Petitioners have failed to demonstrate that they invoked and exhausted domestic remedies under Article 20(c) of the Commission's Statute and Article 31 of the Rules, rendering the Petition inadmissible.

Article 31(2) of the Rules specifies three exceptions to the exhaustion requirement that may excuse exhaustion where: (a) the domestic legislation of the State concerned does not afford due process; (b) the party alleging violation of his or her rights has been denied access to remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment. In particular, Petitioners appear to argue that there is no reasonable possibility of success of at least one claim based on existing law, invoking Article 31(2)(a) without citing it. Yet, even reading the Petition generously to presume that Petitioners invoke these exceptions, none of the exceptions apply to the Petition. Petitioners have not been denied or otherwise prevented from exhausting domestic remedies, but rather, Petitioners merely speculate that pursuing a certain remedy might fail. The Commission has clearly established that "mere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies."

Taken together, the Petition fails to satisfy the exhaustion requirement under Article

31(1) of the Rules and does not meet any of the exceptions under Article 31(2) of the Rules. Therefore, the Petition is inadmissible under Article 31 of the Rules.

* * * *

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

The Petition is also inadmissible under Article 34 of the Rules because it does not state facts that establish a violation of the American Declaration, and it is manifestly groundless. Petitioners allege that the United States "violated" Petitioners' rights to life under Article I; to equality before law under Article II; to establish a family under Article VI; to preservation of health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources, under Article XI; and to seek and receive asylum in a foreign territory, in accordance with the laws of each country and with international agreements, under Article XXVII of the Declaration.

As an initial matter, the Petition arises from Petitioners' irregular entry into the United States between ports of entry on the U.S.-Mexico border. It was during this course of action that Petitioners became disoriented and one tragically passed away. Petitioners' tragic claims illustrate the hazards of irregular migration across the U.S.-Mexico border. Nevertheless, the American Declaration does not impose an affirmative duty on the part of federal officials to serve as "first responders," as Petitioners suggest, and Petitioners do not state facts that tend to establish a violation of the American Declaration.

i. Article I (Right to Life)

Article I of the Declaration provides that "[e]very human being has the right to life, liberty and the security of his person." As an initial matter, the Petition does not state facts that tend to establish that Petitioner suffered a violation of his right to life due to acts attributable to the United States. In order to articulate a violation of a right within the meaning of the Declaration, Petitioner must identify some State action in violation of that right.

However, Petitioner is unable to do so because there is no action attributable to the United States that violated Petitioner's right to life under Article I of the American Declaration. Therefore, this claim is inadmissible under Article 34(a) of the Rules.

To overcome this defect, Petitioners adapt a theory of domestic tort law to argue that the United States failed to "provide timely and reasonable assistance" to Petitioner. Petitioners claim that, because [one of the petitioners] had contacted local authorities about his brother's condition during the course of their illegal entry into the United States, Federal officials had "assumed the duties of first responder," and that, because Petitioner died, Federal officials were negligent in the performance of such duties. Even if Petitioners were correct that such a duty exists under the domestic law of the United States—which appears to be the basis for this claim—Article I imposes no such commitment upon the United States under the American Declaration.

Moreover, Petitioners' Article I claim is based on assumptions that are not substantiated by the facts contained in the Petition. Petitioner's condition had apparently deteriorated by the time Petitioner contacted Texas authorities. There is no indication from the facts contained in the Petition that earlier intervention (i.e., between the time of [one of the petitioners'] first call to Texas authorities and Petitioner's death) would have resulted in a different outcome. The

Petition's invitation to assume that the inability of CBP to locate Petitioner was the cause of his death is not a conclusion sustained by the Petition. This defect is compounded by the fact that Petitioners apparently continued to travel after [one of the petioners'] call to Texas authorities, evidently making them more difficult to locate. The allegation that Petitioner's death was caused by negligence on the part of Federal authorities is not supported by facts contained in the Petition. Therefore, Petitioners' Article I claim is also inadmissible under Article 34(b) of the Rules.

ii. Article II (Right to Equality Before Law)

Article II of the Declaration provides that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." The named Petitioners have failed to state facts that tend to establish that they have suffered from unequal treatment before the law on the basis of race, sex, language, creed or any other factor within the meaning of Article II of the Declaration. The Petition asserts that Petitioner was "treated differently for purposes of emergency services" on the basis of their undocumented status. Setting aside whether "undocumented status" is a protected factor within the meaning of Article II, the Petition relies solely on the undocumented status of Petitioner as the alleged basis for unequal treatment before the law without stating any facts that tend to establish that such status was the basis of the alleged withholding of emergency services. Again, Petitioners state no fact that tends to establish that any allegedly improper conduct by the United States was animated by a protected factor. The mere fact of Petitioners' undocumented status, without more, is insufficient to substantiate a claim of a violation of Article II of the Declaration. Therefore, this claim is inadmissible under Article 34(a) and 34(b) of the Rules.

iii. Article VI (Right to Establish a Family)

Article VI of the Declaration provides that "[e]very person has the right to establish a family, the basic element of society, and to receive protection therefore." Petitioners argue that the alleged withholding of medical assistance also constitutes violation of the right to protection of the family." The right to family reflected in Article VI was not intended to apply to the Petitioners' situation. Rather, the language of this provision makes clear that it was intended to provide that all persons have the right to procreate and raise a family. The Commission's own jurisprudence bears out this interpretation. In a case regarding the persecution of the Aché people in Paraguay, for instance, the Commission noted that the sale of children constitutes a "very serious" violation of the right to a family and to receive protection therefor. Moreover, in the case of the Gelman family in Uruguay, the Commission found the Gelmans' petition admissible in part on the basis that Article VI might have been violated by the forced disappearance of Maria Claudi Gelman and the suppression of the identity of her daughter. Here, there is no similar direct State action, as required by Article VI. The fact that Petitioners are brothers is not sufficient to state facts that tend to establish that the United States has violated the right to establish a family under Article VI of the Declaration. Therefore, this claim is inadmissible under Article 34(a) and 34(b) of the Rules.

iv. Article XI (Right to Preservation of Health)

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

through specific means: "sanitary and social measures" relating to "food, clothing, housing and medical care." The right to the preservation of health through such measures under Article XI is further qualified "to the extent permitted by public and community resources."

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

Petitioners' allegation that Federal officials were negligent in the performance of their "first responder duties," even if substantiated, would clearly fall beyond Article XI of the American Declaration. Petitioners' attempt to transform this claim into an allegation that Petitioner was denied "emergency medical assistance available to all others within the United States" is baseless and, even under this variant of Petitioners' theory, it remains that the claim is not cognizable *ab initio* under Article XI of the American Declaration because it falls beyond the preservation of health through sanitary and social measures relating to food, clothing, housing and medical care. Petitioners' claim under Article XI of the American Declaration is therefore inadmissible under Article 34(a) and Article 34(b) of the Rules.

v. Article XXVII (Right of Asylum)

Article XXVII of the Declaration provides that "[e]very person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements. The Petition alleges the United States' failure to perform supposed "first responder duties" "violated [Petitioner's] right to seek asylum." Petitioner's death, while tragic, does not state facts that tend to establish that the United States violated any person's right to seek and receive asylum in accordance with the laws of the United States.

The United States continues to provide a right to seek asylum and to evaluate the asylum process for any needed changes. Petitioners' attempt to bootstrap other human rights violations to an alleged violation of the right to life is without basis in international human rights law. Petitioners' theory appears to be that by allegedly violating Petitioner's right to life, the U.S. Government necessarily also violated other of his human rights, including the right to seek asylum. But this does not make sense as an interpretation of international human rights law: the fact that Petitioner could not exercise human rights after his death does not mean that the United States violated those rights that he may have subsequently attempted to exercise had he not died. International human rights law does not sustain such a sweeping theory of responsibility for human rights violations based on an alleged violation of the right to life. Nothing in the American Declaration suggests otherwise.

Petitioners' claim under Article XXVII of the American Declaration is therefore inadmissible under Article 34(a) and Article 34(b) of the Rules.

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e. Case No. 13.735: Oswaldo Marcelo Lucero et al.

On November 30, 2021, the United States filed its response on the merits to the petition brought on behalf of Marcelo Lucero and others, alleging U.S. responsibility for private violence against Latinos. Excerpts follow from the U.S. response.

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B. Petitioners' New Claims in the "Additional Observations" are Out of Order

Petitioners now seeks to introduce new claims based on factual allegations not included in the Petition. In its letter dated February 1, 2019, the Commission requested that the Petitioners submit "additional observations on the merits of the case," but the Commission did not invite Petitioners to introduce entirely new claims. Petitioners cannot be permitted to introduce entirely new claims at the merits phase of this proceeding. Nothing in the Rules permits Petitioners, at this stage, to introduce new claims beyond those in the Petition, and Petitioners' new claims are plainly out of order under Article 34(b) of the Rules and, as such, inadmissible.

Moreover, allowing Petitioners to introduce new claims at this stage would be inequitable as the admissibility phase of this proceeding is closed. Even if the Commission were inclined to entertain new factual claims, it would require a new petition with a separate admissibility phase that cannot be incorporated into the merits phase of the present matter. The United States acknowledges that the Commission has previously allowed the consideration of additional claims or factual allegations on the basis that the State was "on notice" of the new claims, and "had the opportunity to present observations on the admissibility of all the claims raised by petitioner." This explanation is not compatible with the Commission's Statute or its Rules of Procedure. There is no basis in the Rules of Procedure for a Petitioner to add new claims to his or her Petition during the merits phase of a proceeding. Allowing Petitioners to expand the scope of the Petition by introducing new claims at the merits stage further undermines the Commission's procedures and challenges the integrity of the Commission. This is especially so, as here, where the admissibility phase of a matter is closed. Accordingly, the new claims presented in Petitioners' "Additional Observations" must be deemed out of order at this stage under Article 34(b) of the Rules. The United States therefore regards the scope of the Petition to remain limited to those claims raised in the Petition.

C. Certain claims are inadmissible because they are outside the Commission's competence *ratione materiae.*

Petitioners allege that the United States has "violated" certain specific rights recognized in the American Declaration. 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 ("American Convention"), including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration (*i.e.*, the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of 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 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, Article 20 of the Commission's Statute identifies the particular provisions of the American Declaration over which the Commission is empowered "to pay particular attention" vis-à-vis States not party to the American Convention. Article 20(a) enumerates these as "the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration." An interpretation of Article 20(a) that would not so limit the competence of the Commission with respect to the Declaration would render such language nugatory. Petitioners' claims under Articles V and XVII of Declaration thus fall beyond the *ratione materiae* competence of the Commission and must be dismissed pursuant to Article 20 of the Commission's Statute.

D. Admissibility of Petitioners' Observations on the Merits

The new claims in Petitioners' "Additional Observations" suffer from the same defects that render the claims contained in the original Petition inadmissible. Because these defects continue to render the claims in the Petition inadmissible, the United States reiterates that these defects also render Petitioners' new out-of-order claims inadmissible.

i. The Commission lacks competence *ratione personae* to consider the "Additional Observations"

The "Additional Observations" purport to be filed on behalf of "Other Unidentified or Unknown victims of hate crimes targeting Latinos and/or undocumented immigrants," and make myriad allegations of a generalized nature, not tied to any specific individual, except at particular points when used to illustrate the alleged negative effects of a particular alleged policy or practice, or to demonstrate an increased pattern of violence against Latino persons. The Petitioners argue their approach is necessitated by the "troubling rates of anti-Latino hate crimes in the U.S."

The Commission has stated in a number of cases that it only has competence to entertain matters 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...." In other words, the Commission's governing instruments "do not allow for an *actio popularis*." The United States recalls that the Commission has already found that such claims fall beyond its competence in its 2018 Admissibility Report in this matter, and this same reasoning applies with equal force to the new claims contained in the "Additional Observations."

Based on these principles, the Commission should not consider any allegations in the "Additional Observations" that do not relate to "concrete violations of the rights of specific individuals." It must therefore dismiss the new claims in the "Additional Observations" with respect to the "Other Unidentified or Unknown victims," and it cannot consider the many generalized allegations in the "Additional Observations" that are not tied to a specific, listed Petitioner. This includes everything in Sections II and III of the "Additional Observations,"

including the illustrative examples of particular alleged incidents, as none of the individuals identified in the examples is a Petitioner.

Moreover, while Article28(2) of the Rules gives petitioners the option of withholding their identity from the respondent State, with respect to John Doe 1 and 2, who were subsequently identified by the Commission in its Admissibility Report, it is unclear on what basis this information was initially withheld from the United States. Because this information was not initially transmitted to the State, the United States was not in a position address the admissibility of these claims, as noted in the 2015 response by the United States. Revealing the identities of these Petitioners to the State in thecourse of finding their claims to be admissible, and requesting the United States to now address those claims on their merits, rendered the United States unable to address their inadmissibility during the admissibility phase of this matter.

In sum, the new claims in the "Additional Observations," as with those in the Petition, are beyond the *ratione personae* competence of the Commission.

ii. The "Additional Observations" Submission is inadmissible because it does not state facts that tend to establish a violation of the rights in the American Declaration

The Commission should also declare the claims in the "Additional Observations" inadmissible under Article 34(a) of the Rules because the facts stated in the "Additional Observations" do not tend to establish a violation of the rights in the American Declaration. The thrust of Petitioners' argument is that the United States is responsible under the Declaration for acts allegedly committed by private parties against Latinos because it has failed in its obligation to "protect and fulfill human rights obligations in securing the safety of all citizens," a purported commitment which Petitioners claim extends to protection from non-state actors. However, under international law private conduct is not attributable to the State outside of narrow exceptions not relevant here. The American Declaration contains no language indicating its commitments extend generally to private, non-governmental acts, and no such commitment can be inferred. The United States thus may not be found to have failed to honor a commitment under the American Declaration for the conduct of private individuals acting with no complicity or involvement of the government. The alleged incidents complained of contained in the Petition cannot be attributed to the United States under international law and cannot constitute violations by the United States of its commitments under the American Declaration.

Petitioners again attempt to bypass this basic tenet of international human rights law using the same theory as in the Petition, arguing that the United States has incurred responsibility under the Declaration for a failure to comply with a "positive obligation . . . to prevent human rights violations" by private parties—that is, an "obligation of due diligence." But Petitioners do not, and cannot, cite to any provision of the Declaration that imposes on States an affirmative duty to prevent the commission of crimes or civil wrongs by private parties, even where these acts may undermine an individual's enjoyment of the rights in the Declaration. The States that drafted and adopted the Declaration had no intention to create a commitment that would be so open-ended and impossible to effectively implement. Then as now, despite the best efforts of hard-working law enforcement officials, private individuals commit countless crimes every year in this Hemisphere.

The absence of any such language in the American Declaration is all the more notable when contrasted with other international instruments which specifically do impose obligations upon States Parties to prevent, in certain circumstances, particular types of conduct by private parties or non-State actors. For instance, both the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") and the Convention on the Elimination of All

Forms of Discrimination Against Women ("CEDAW") contain provisions that impose obligations upon States Parties, in the specific context of preventing discrimination, respectively, "by any persons, group or organization" and "by any person, organization or enterprise."

* * * *

The crimes and other acts alleged in the "Additional Observations," while appalling, are materially dissimilar from those in in *Velásquez Rodríguez*. Notably, unlike the widespread and systematic abuses carried out or tolerated by government officials or their agents in *Velásquez Rodríguez*, the acts alleged in the Petition and the "Additional Observations" were committed by private persons, acting on their own initiative, and not under "cover of public authority." Furthermore, Petitioners have presented no evidence to indicate that U.S. authorities at any level of government supported or acquiesced in the acts, or that they deliberately failed to investigate them. Quite the contrary, as explained above, in all of the named Petitioners' cases federal or state authorities investigated the crimes and brought the perpetrators swiftly to justice. Federal authorities also sought and secured significant reforms of local law enforcement departments, and implemented significant changes to immigration policies, discussed below. Thus, even if the due diligence standard articulated by the Inter-American Court applied in the circumstances, the United States undoubtedly has discharged its duties consistent with that standard.

* * * *

In sum, neither the Petition nor the "Additional Observations" states facts that tend to establish a violation of the American Declaration because the Declaration does not impose upon the United States a duty to prevent private violence, especially not under the circumstances alleged in the Petition or "Additional Observations." The facts do not tend to establish any violation of rights in the Declaration and the Commission should therefore find the new claims in the "Additional Observations" inadmissible.

* * * *

E. Merits

For the reasons set forth above, the Commission should not reach the merits of the Petition, or new claims in the Additional Observations, because they are inadmissible in their entirety. Should the Commission nevertheless find the new claims in the Additional Observations admissible, the United States urges it to find the claims in the Petition and Additional Observations meritless. Contrary to the Petitioners' assertions, the United States has implemented both systemic and individualized measures to protect and ensure, to the extent feasible, the safety of all its citizens. Further, the actions taken by the United States demonstrate a commitment to addressing racially-motivated violence, harassment, and discrimination. In January 2021, the Biden Administration announced via executive order a whole-of-government agenda to pursue a comprehensive approach to advancing equity for all, including Black, Latino, Asian-Americans and Pacific Islanders, and other persons of color; members of religious minorities; persons with disabilities; LGBTQI+ communities; persons who live in rural areas; and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.

i. Prosecutions of perpetrators in the named Petitioners' cases

Petitioners claim that they were victimized by private parties and then denied justice by U.S. federal, state, and local authorities for crimes committed in 2008; and that they were prejudiced by a lack of access to law enforcement. Petitioners even appear to suggest that U.S. officials have condoned hate crimes against Latinos. These claims have no basis in fact. As noted above, in each of the named Petitioners' cases, federal or state authorities investigated the incident, located the perpetrators, and brought them swiftly to justice. …

* * * *

iii. Increased support for state and federal prosecutions of hate crimes; increased efforts to prevent domestic violent extremism ("DVE")

More broadly, eliminating hate crimes and bias-motivated violence from our communities and our country is one of the Administration's and DOJ's highest priorities. Within days of taking office, President Biden issued the "Presidential Memorandum Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the United States." The Memorandum directed the Attorney General to explore opportunities to support, consistent with the applicable law, the efforts of State and local agencies, to prevent discrimination, bullying, harassment, and hate crimes against Asian Americans and Pacific Islanders individuals, and expand collection of data and public reporting regarding hate incidents against such individuals.

* * * *

iv. Changes to immigration policy, including regarding 287(g) agreements

Petitioners aver that U.S. immigration policies "have served to degrade the rights of all Latino residents, regardless of their immigration status," and "[t]hese efforts have...served to further encourage private actors to commit hate crimes against Latinos." They complain specifically about 287(g) agreements, by which U.S. Immigration and Customs Enforcement("ICE"), a DHS component, enters into partnership with state and local law enforcement agencies that are willing to assist ICE in its immigration enforcement efforts against those individuals determined to be a priority for removal to their countries of nationality. The 287(g)Program isvoluntary and requires a memorandum of agreement with a state or local law enforcement agency. Petitioners complain tha tthe "the delegation of immigration authority to local governments" under 287(g) agreements is "[o]f particular concern" because it "sends a message that those who wouldtarget Latinos and cause them harm are serving the public good."

As a general matter, the United States is committed to ensuring that allpersons in the United States, regardless of immigration status, receive the protections to which they are entitled under the Constitution and laws of the United States, as well as applicable protections pursuant to international obligations and commitments. The United States is also committed to enforcing its immigration laws, as it is entitled to do under international law and under the American Declaration.

In the time that has elapsed since Petitioners filed their claim in 2008, there have been significant changes in U.S. immigration policies and practices, many of which have been the subject of other proceedings before the Commission.

* * * *

f. Case No. 14-036: David Johnson

On December 10, 2021, the United States responded on the merits to the petition brought on behalf of David Johnson, a citizen of Jamaica who was deported although his single-parent father naturalized when he was a child. The petition alleged gender discrimination in U.S. citizenship laws. The U.S. response, excerpted below, further analyzes a relevant 2019 Third Circuit opinion on the discrimination question.

* * * *

Mr. Johnson claims that the Third Circuit Court's decision in *Tineo* provides "significant legal developments that support [his] case." However, there is well-established precedent that former 8 U.S.C. § 1432(a)(3) does not violate equal protection guarantees, and the *Tineo* decision expressly stated that it has no impact on such precedent with respect to the provision relied upon by Mr. Johnson. As explained below, the Court in *Tineo* explicitly stated that its decision is limited in scope as applied to the particular facts of that case. Further, even in its limited scope, *Tineo* noted the "differential treatment" under sections 1101(c)(1), 1432(a)(2) and (a)(3) but nevertheless affirmed the Supreme Court's holding in *Nguyen v. INS*, which was also reaffirmed by the Supreme Court in *Sessions v. Morales-Santana*. In *Nguyen*, the Supreme Court ruled that sex-based classifications that account for physical differences between men and women do not violate equal protection principles, upholding a provision that required a U.S. citizen father, but not a U.S. citizen mother, to legitimate a child born abroad out of wedlock in order to transmit U.S. citizenship to that child. Therefore, as the United States explained in its 2018 Submission, the statutory scheme embodied in former 8 U.S.C. § 1432(a) does not violate equal protection guarantees and is substantially related to the United States' objective of protecting the rights of both parents when one or both parents become naturalized U.S. citizens.

Additionally, contrary to Mr. Johnson's claim, the facts underlying *Tineo* are vastly different from his case and the court in *Tineo* largely addressed former 8 U.S.C. § 1432(a)(2), not the first part of subsection (a)(3), which is the basis of Mr. Johnson's claim. Subsection (a)(2) allows a child born outside of the United States to noncitizen parents to derive citizenship upon naturalization of the child's surviving parent if one of the parents was deceased. In *Tineo*, the mother passed away when Tineo was 15 years old and as a result, he sought to derive citizenship from his father under subsection (a)(2). *Tineo* did not find subsection (a)(3) of former section 1432 *facially* unconstitutional under principles of equal protection. Rather, *Tineo* addressed only an *as-applied* challenge to subsection (a)(2) in light of the unusual facts in that case. Legitimation was impossible in Tineo's case because under then-applicable Dominican Republic and New York law, the only way for a father to legitimate his child was to marry the mother—and Tineo's mother, as noted, was dead. As a result, "Tineo's father was forever precluded from having his son derive citizenship through him, despite being a citizen and having cared for his son until the child was 21 years old." Had the parental situations been reversed—that is, had Tineo's mother been the surviving citizen parent who cared for Tineo, and Tineo's father the one

who died—Tineo would not have been similarly precluded from deriving citizenship from his mother under subsection (a)(2), and he additionally might have had subsection (a)(3) available to him as well. Accordingly, the Third Circuit determined that those provisions of former section 1432(a), with the legitimation requirement in section 1101(c)(1) and the relevant provisions of Dominican Republic and New York law at the time, all conspired to violate principles of equal protection as applied to Tineo's unusual and "particular family circumstances."

In contrast, Mr. Johnson's claim is based on the first part of subsection (a)(3), which allows a child born outside of the United States to noncitizen parents to derive citizenship upon naturalization of the parent having legal custody of the child when there has been a legal separation of the parents. Mr. Johnson never had a derivative citizenship claim under subsection (a)(2) because his mother was alive throughout his period of minority and did not pass away until he was approximately 33 years old. Mr. Johnson's own petition affirmed that his claim is based on the first part of subsection (a)(3), as he argued that it "draws arbitrary and discriminatory distinctions based on illegitimacy and sex" because the second part of subsection (a)(3) "[a]llow[s] a mother who is the sole legal guardian to pass on automatic derivative citizenship…" Moreover, contrary to Mr. Johnson's claim that *Tineo* constitutes "significant legal developments that supports [his] case," the Third Circuit Court in *Tineo* explicitly chose to limit the scope of its decision only as an *as-applied* challenge to the interplay between 8 U.S.C. §§ 1101(c)(1) and 1432(a)(2) in light of the unusual facts of that case. The Court in *Tineo* stated that "[t]he scope of the challenge is as-applied" then took a step further to state that "[t]his entails a concession that the statute at issue may be constitutional in many of its applications." Additionally, the Court acknowledged the differential treatment in sections 1101(c)(1), 1432(a)(2) and second part of subsection (a)(3) but again, chose to address only the interplay between sections 1101(c)(1) and 1432(a)(2) by relying heavily on the idiosyncrasy that triggered the said provisions. The Court explicitly stated that "the present concern is with a father being forever precluded from having his out-of-wedlock child derive through him. This problem *only* arises where the child's mother is deceased, and the only avenue for legitimation under the relevant law is through the marriage of the parents." Therefore, the Court effectively limited the scope of its decision to the interplay of sections 1101(c)(1) and 1432(a)(2) as applied to the unique facts of that case; thus it does not apply to Mr. Johnson's case since the facts of his case are vastly different from Tineo's.

B. Mr. Johnson's observation on racial discrimination fails to set forth facts that tend to establish a violation of Article II of the Declaration, and is meritless

In his Additional Observations on the Merits, Mr. Johnson alleges racial discrimination as a factor for his equal protection claim arising out of former section 8 U.S.C. § 1432(a)(3) involving derivative citizenship. This new argument is baseless. Mr. Johnson fails to state the actual harm and discrimination that he faced based on his race and further fails to state how it relates to his derivative citizenship claim under 8 U.S.C. § 1432(a). Mr. Johnson merely alleges and assumes that he was subject to discrimination and "unjustified treatment" based on his race "because of structural racism in the U.S." Accordingly, Mr. Johnson's vague comments on the U.S. criminal justice and immigration system - as applied to him - are without basis in fact and fail to set forth facts that tend to establish a violation of Article II of the American Declaration.

* * * *

g. Case No. 14.042: Anastasio Hernández Rojas

The December 22, 2021 further observations of the United States on the case of Hernández Rojas reiterate and expand on the argument in the U.S. admissibility response from 2017, that the domestic settlement agreement renders the petition inadmissible. The 2017 submission is discussed in *Digest 2017* at 330-31.

h. Request for advisory opinion on presidential reelection without term limits

As discussed in *Digest 2020* at 321-30, the United States made written and oral submissions in response to Colombia's request for an advisory opinion by the Inter-American Court of Human Rights on the question of indefinite presidential reelection. On June 7, 2021, the Inter-American Court issued Advisory Opinion OC-28/21, on "Presidential Reelection Without Term Limits in the Context of the Inter-American Human Rights System," in response to Colombia's request. The opinion is available at https://www.corteidh.or.cr/docs/opiniones/seriea_28_eng.pdf. The majority held that there is no customary international law upholding a human right held by the person of the president to be reelected and noted that only four OAS States do not have term limits. The majority also held that States may lawfully impose term limits on presidents and further, that States must impose term limits on presidents in order to live up to their obligation to guarantee democracy. The Court's conclusion aligns with the United States submissions, although the reasoning differs.

i. Hearing on Human Rights Situation of Migrants and Detention Centers

On June 28, 2021, the United States participated in a public IACHR thematic hearing on the "Human Rights Situation of Migrants and Detention Centers in the United States." The prepared remarks of Officer for Civil Rights and Civil Liberties Kathy Culliton-González, of the Department of Homeland Security ("DHS"), appear below.

* * * *

Distinguished Commissioner, petitioners, Secretariat staff, and colleagues, on behalf of the United States Department of Homeland Security, or DHS, I welcome the opportunity to participate in today's hearing and to engage with the IACHR and petitioners on matters relating to the promotion and protection of human rights.

My name is Kathy Culliton-González, and I was appointed on January 20, 2021, by President Biden to serve as the U.S. Department of Homeland Security's Officer for Civil Rights and Civil Liberties (CRCL). I am designated by DHS to protect civil rights and civil liberties, and to also ensure that the Department meets our international human rights treaty obligations.

DHS houses most of the government agencies involved in our immigration system, including U.S. Immigration and Customs Enforcement, or ICE, as well as U.S. Customs and Border Protection, or CBP; and U.S. Citizenship and Immigration Services, or USCIS. In carrying out our diverse missions, including enforcing our immigration and customs laws, securing the border, and adjudicating requests for immigration benefits, my office, CRCL, seeks to ensure that civil and human rights remain at the core of what the Department does.

Today I want to provide you with some highlights of recent efforts the Department has taken as well as express our commitments to continue the immigration reform and racial justice work begun at the advent of the new Administration. Equally as important, I am here today to receive your feedback and concerns, and to consider ways to address the issues we hear about today.

Since January 20, 2021, and pursuant to several immigration-related and equity-based executive orders (EOs) issued by President Biden, we have been working to improve our immigration system to make it more orderly and humane. Among other measures, these improvements include seeking to provide greater opportunities for noncitizens to apply for any form of relief or protection for which they may be eligible, including asylum, withholding of removal, and protection from removal under the regulations implementing United States obligations under the Convention Against Torture. DHS has also begun processing into the United States individuals who had been returned to Mexico under the Migrant Protection Protocols to await removal proceedings. The Department is also conducting a comprehensive examination of current rules, regulations, precedential decisions, and internal guidelines governing the adjudication of humanitarian protection claims and determinations of refugee status to help ensure that the United States provides protection for individuals fleeing persecution or torture in a manner consistent with our domestic laws and international obligations. These measures may alleviate some of the pressures on immigration detention.

In addition, in the areas of detention and immigration enforcement, on January 20, 2021, the then-Acting Secretary of Homeland Security issued a memorandum on the Review of and Interim Revision to Civil Enforcement and Removal Policies and Priorities, and called upon DHS to coordinate a Department-wide review of all policies and practices concerning immigration enforcement, including policies governing detention. As a result, DHS is reviewing its detention policies, including procedures around arrests and policies that govern the care and protection of vulnerable populations. The Department also is launching a new Alternatives to Detention (ATD) pilot program that will provide community-based case management services in select geographic locations to individuals. The pilot program will include mental health services, human and sex trafficking screening, legal orientation programs, cultural orientation programs, connections to social services, and, for individuals who will be returning to their home countries, departure planning and reintegration services. This pilot program is being led by CRCL, in collaboration with ICE and the Federal Emergency Management Agency.

DHS is committed to strengthening its oversight of conditions in DHS confinement facilities and to close ICE detention facilities that do not meet the health and safety requirements in ICE's detention standards. On May 20, 2021, DHS Secretary Mayorkas directed ICE to prepare to discontinue the use of Irwin County Detention Center (ICDC) in Ocilla, Georgia, a facility about which you raised particular concerns in your petition, as well as the C. Carlos Carreiro Immigration Detention Center (also referred to as Bristol) in North Dartmouth, Massachusetts. In announcing the closure of these facilities, the Secretary signaled that the Department will not tolerate the mistreatment of individuals in civil immigration detention or

substandard conditions of detention. Secretary Mayorkas further indicated that he will continue to review concerns with other federal immigration detention centers, and has instructed DHS leadership to provide updates on ICE's current and potential operational needs, the quality of treatment of detained individuals, the conditions of detention, and other factors relevant to the continued operation of each facility.

There are three primary offices within DHS that work collaboratively to provide oversight of DHS immigration detention facilities: CRCL, the Office of the Immigration Detention Ombudsman (OIDO) and the Office of Inspector General (OIG), all conduct coordinated reviews and inspections of ICE detention facilities. In addition to these primary offices, DHS component-based Offices of Professional Responsibility also play an important reporting and oversight role.

For CRCL, oversight of DHS immigration detention facilities is a key part of our mission. CRCL reviews and investigates complaints from the public and/or reports by news sources alleging violations of civil rights or civil liberties by DHS personnel, programs, or activities. Complaints include allegations about inadequate conditions of detention and alleged violations of noncitizens' rights while in detention. For example, CRCL works within the Department and with ICE to strengthen safeguards against sexual abuse and assault of people in DHS custody, including by conducting investigations into ICE's handling of sexual abuse allegations. Once CRCL opens a complaint, we refer the complaint to the DHS OIG, which has the right of first refusal to investigate the allegations that were submitted to CRCL. If the OIG retains the complaint for investigation, CRCL generally must wait until the OIG has completed its investigation before we can determine whether to conduct our own investigation, if necessary. If the OIG declines to investigate the complaint, it is returned to CRCL for investigation.

CRCL opened 4,884 complaint investigations from 2014 to 2020, of which 2,607 alleged inadequate medical/mental health care in detention facilities, 447 alleged inappropriate conditions of detention, 267 alleged excessive force, and 136 alleged abuse of authority by DHS employees or contractors. In Fiscal Year (FY) 2020, CRCL conducted eight onsite investigations at facilities where individuals in ICE custody are detained. In FY 21, we have already conducted five investigations, and we are planning to conduct six more. After investigating, CRCL provides senior leadership of the relevant DHS components with its investigative conclusions of all complaints, and any applicable recommendations. CRCL also notifies the complainant of the results of the investigation, except in instances where we are unable to contact the complainant.

CRCL's complaint recommendations have spurred DHS components to implement improvements to policies and practices and create and update training materials. CRCL has issued numerous expert recommendation memoranda resulting from onsite investigations into conditions of detention for individuals in ICE and CBP custody. CRCL recommendations have led to improvements to detention facility conditions in the areas of medical and mental health care and improvements in training and oversight. Our expert recommendations have also informed CRCL's ongoing work with components on issues extending beyond investigations, including CRCL's review of ICE's hoteling practices and COVID-19 readiness. CRCL has also recently embraced a multifaceted approach to assess the pandemic's impact on DHS activities, from engaging with USCIS on the collateral impact of COVID-19 on its activities, to participating in regular meetings with civil rights colleagues at other federal agencies to discuss concerns raised in the federal government's pandemic response.

Fifty-three percent of CRCL's complaint investigations involve allegations of inadequate medical care in ICE detention facilities. In these cases, CRCL and ICE Enforcement and

Removal Operations (ERO) maintain a process for referring and addressing complaints received by CRCL concerning the medical, dental, and mental health care provided to individuals in ICE custody. Through its work with ERO, CRCL strives to: 1) bring emergent medical concerns to ICE's attention when detained individuals' health may be at imminent risk of harm; 2) inquire about, and receive sufficient information from ICE to resolve and close alleged concerns that are unfounded, or have been adequately addressed; and 3) determine whether there are any remaining, additional, or systemic medical concerns that call for further inquiry or investigation by CRCL.

The success of medical referrals relies heavily on ICE providing a timely response to our referrals, and over the past several years of collaboration, CRCL has seen an increase in the ICE response rate to the referrals and improved quality of responses. CRCL continues to use this process as an important vehicle to relay findings and recommendations to ICE Health Service Corps (IHSC). CRCL has interfaced with IHSC regarding life-altering conditions such as HIV, cancer, and other serious medical and mental health concerns. We do this work with the aim of assisting IHSC to immediately address the issues for individuals in ICE custody, and to improve the overall quality of medical, dental, and mental health care pursuant to the detention standards that facilities are required to follow.

CRCL has specifically addressed complaints related to medical care and other conditions at ICDC in the past. In July 2016, CRCL conducted an onsite investigation of ICDC, examining concerns related to medical and mental health care, use of force, food service, segregation, recreation, and the grievance system for detained individuals. Pursuant to our investigation, which was informed by subject matter experts in the areas of medical care, conditions of detention, and environmental health and safety, CRCL issued a memorandum to ICE containing 26 recommendations to address deficiencies in areas including disinfection and sanitation practices, communication and procedures on the handling of infectious disease outbreaks, record-keeping and documentation, and language access. ICE concurred with nearly all of CRCL's recommendations and implemented many of them. CRCL has also received a number of allegations about unnecessary gynecological procedures performed on detainees at ICDC without informed consent, concerns which you also raised in your petition. These allegations are being separately investigated by the DHS OIG. Due to pending litigation, DHS is unable to comment further on the allegations.

I want to assure you that our work to address concerns in ICE detention facilities is ongoing. CRCL is committed to fully investigating all alleged abuses referred to the Department to ensure that they are appropriately addressed. If you wish to file a complaint with CRCL, there is a fillable complaint form available for download from the DHS website. You can e-mail, fax, or mail the completed form back to CRCL; if you wish to file a complaint with CRCL without using the optional complaint form, you can also provide a detailed written description of the pertinent events via email, fax, phone, or postal mail. (Please note that e-mailing your correspondence to CRCLCompliance@hq.dhs.gov is the fastest way to reach CRCL, but it is not required.)

In addition to complaint investigations, CRCL will continue to play an important role moving forward as DHS looks closely at detention-related issues, including through our work on developing guidance for evaluating detention facilities conditions and concerns.

CRCL provides proactive advice on how DHS can strengthen and further incorporate principles of civil rights and racial justice into policies and procedures around immigration enforcement and detention. CRCL engages with ICE and CBP to revise and strengthen

enforcement and detention-related policies, procedures, and training to protect vulnerable populations, including unaccompanied children, members of the Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Non-Binary (LGBTQI+) community, as well as individuals with limited English proficiency and persons with disabilities. We also work to ensure policies and operations incorporate strong protections against sexual abuse and assault and suicide, enhance access to adequate and timely medical and mental health care, and limit the use of segregation and use of force, among other key civil rights and civil liberties issues. CRCL also works directly with ICE to encourage the release of vulnerable individuals from ICE detention. One example of the direction CRCL provides in policy-making is our ongoing work with ICE and CBP to implement sexual abuse prevention and response policies, training, and external sexual abuse prevention audits in the Department's holding and detention facilities under DHS's regulation to implement the Prison Rape Elimination Act.

Since Day 1 of this administration, CRCL has worked to identify key civil rights principles in several areas, including to inform the Department's revision of its civil immigration enforcement and removal priorities; its approach to the emergency and temporary housing and caring for migrant children at the border; and in the Department's enforcement and detention posture towards LGBTQI+ individuals. On April 27, 2021, DHS issued new guidance to limit ICE and CBP civil enforcement actions in or near courthouses, recognizing that "[e]xecuting civil immigration enforcement actions in or near a courthouse may chill individuals' access to courthouses and, as a result, impair the fair administration of justice." The Department is also currently reviewing its policies on civil immigration enforcement actions at other sensitive locations as well on the arrest and detention of vulnerable populations. In response to the pressing needs at the border in the spring of this year, where DHS saw an increase in the number of families and unaccompanied children entering the country between the ports of entry, DHS worked quickly alongside other federal partners and the American Red Cross to find appropriate, safe, and sanitary housing for the families and unaccompanied children in order to move them more quickly outside of CBP border patrol stations. Under the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, DHS must transfer the care and custody of unaccompanied children to the HHS Office of Refugee Resettlement (ORR) within 72 after determining that the minor child is unaccompanied. Furthermore, to limit the number of days that families and children spend in a custodial environment, ICE ceased to operate one family residential center and in March 2021, and converted the two remaining family residential centers to under-72-hour staging facilities. CRCL is also leading a Sexual Orientation and Gender Identity Working Group, which is examining LGBTQI+ equity concerns within DHS's workforce as well as public-facing policies and programs, such as the care of LGBTQI+ individuals in DHS custody.

I also want to speak directly to the concerns you raised with regard to the deaths of noncitizens in DHS custody and the increased medical vulnerability of detained noncitizens during the COVID-19 pandemic. DHS has made important updates to detention policies and training that address the concerns raised by petitioners, including establishing clinically appropriate procedures for the physical and mental health care and treatment of detained individuals. DHS conducts training for medical personnel assigned to detention facilities as part of their regular and recurring refresher training in accordance with their licensing requirements. This training covers patient assessments and provides tools for the medical personnel to use in identifying any physical trauma that a patient may have incurred, regardless of the source of the trauma. Additionally, the DHS Blue Campaign, the locus for the Department's anti-trafficking

efforts, provides information to help ensure that medical personnel are informed of key factors to be on the lookout for regarding torture and ill-treatment while detained individuals are in transit or in custody. These factors include emotional and behavioral indicators that may lead a medical provider to look more closely at a patient's physical condition and determine if the patient is suffering from any physical trauma from torture or ill-treatment. DHS medical providers also rely on contacts in their immediate area to refer a patient for emotional and behavioral support, as needed.

CRCL is doing other important work that intersects with detention reform by carrying out DHS's commitment to the racial justice and equity work called for by President Biden and making progress on implementing the Administration's equity executive orders. As the Department undertakes this work, we do so with the awareness that the overwhelming majority of persons impacted by immigration policy changes are people of color. CRCL leads a Department-wide Equity Task Force to help DHS implement the Administration's goals on advancing racial equity, combating discrimination on the bases of gender identity and sexual orientation, and condemning racism and xenophobia. On June 14, 2021 we announced that USCIS is implementing a new process, referred to as Bona Fide Determination, which will give victims of crime in the United States access to employment authorization sooner, providing them with stability and better equipping them to assist law enforcement investigations and prosecutions. CRCL is also beginning to assist DHS in remedying the previous Administration's unjust immigration policies, including the "Zero Tolerance" policy that cruelly separated families at the border, and the "Muslim ban," which was rescinded on Day 1 of this Administration. We continue to dig deeper to root out other systemic inequities and inequalities.

Again, I thank you for this opportunity and appreciate your attention to these critical issues.

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j. Hearing on Human Rights Situation of Migrants and Refugees

On October 28, 2021, the United States participated in another public thematic hearing on the "human rights situation of migrants and refugees in the United States." U.S. officials from CRCL and Customs and Border Patrol ("CBP") at DHS and the Department of State's Bureaus of Western Hemisphere Affairs and Population, Refugees, and Migration delivered remarks. Officer Culliton-González's prepared remarks are excerpted below.

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Since my appointment, I and my staff have been working to ensure greater access to humanitarian protections and humane treatment for individuals seeking entry at the Southwest Border, and to ensure that such protections are consistent with our domestic laws and international obligations. This Administration and I are also committed to advancing racial equity. Throughout all of our work, we have been particularly focused on those who are the most

vulnerable or disproportionately impacted, such as children, families, women, black and brown migrants, LGBTQ+ individuals, and those with medical needs.

Today, I would like to highlight for you some of the efforts my CRCL has taken to address the civil and human rights implications of the Department's implementation of the Centers for Disease Control and Prevention's (CDC's) Title 42 authority:

1) One avenue that we use to approach our work involves listening sessions. On August 19th, my Office held a listening session specifically on Title 42 with over thirty (30) community organizations who expressed concerns about:

a. conditions in Mexico and other countries of expulsion;
b. the lack of COVID-19 testing;
c. access to humanitarian parole; and
d. the impact of Title 42 on specifically people of color, among other concerns.

Listening sessions, like this one, may inform the policy recommendations and advice that CRCL can provide to Department and component leadership.

2) CRCL has provided a number of recommendations to the Department on Title 42 to address issues related to civil and human rights. Between March 2020 and October 15, 2021, CRCL received 83 matters and opened 40 complaint investigations alleging civil rights and civil liberties violations related to implementation of the CDC's public health orders pursuant to Title 42 of the U.S. Code. Following the investigations into these complaints, CRCL made formal recommendations to CBP on August 13, 2021, regarding medical treatment and humanitarian protections for persons subject to expulsion under Title 42. CRCL continues to have open complaint investigations and has continued to receive new allegations and open new complaints relating to the Department's assistance in the implementation of Title 42.

CRCL's Compliance Rapid Response Team conducted observations on September 21-22, 2021, in Del Rio, Texas and opened six complaint investigations related to the treatment of Haitian migrants, including those expelled under Title 42. The investigations are looking into, among other things, the following: allegations relating to CBP's implementation of Title 42, expedited removal, and other processing authorities, such as parole or issuing Notices to Appear, as well as allegations of racial discrimination, and allegations of inappropriate use of U.S. Border Patrol's horse patrol units. As Secretary Mayorkas stated on September 24, 2021, "We know that those images painfully conjured up the worst elements of our nation's ongoing battle against systemic racism."

3) In addition to CRCL's complaint and investigation work, CRCL has also issued proactive policy advice to address concerns related to Title 42 expulsions, including concerns about returning people who have been expelled to places where it is more likely than not they will be tortured CRCL has also issued policy advice related to the implementation of the exceptions under Title 42, particularly with respect to individuals with heightened vulnerability factors or where a family separation may occur as a result of an expulsion. CRCL also works directly with CBP when we learn about an individual who may qualify for an exception from Title 42.

Throughout all of this work, our overarching aim is to ensure that individuals at risk of harm are protected. I thank you for this opportunity and appreciate your attention to these critical issues.

FOLLOW-UP REMARKS

Thank you for opportunity to offer follow-up remarks. First, I would like to speak briefly about what happened in Del Rio, Texas last month and efforts we are taking to ensure the safety of Haitian migrants.

I was gravely concerned by the images I saw in Del Rio, Texas, as was the Secretary of Homeland Security, Alejandro Mayorkas, who traveled to Del Rio as DHS was undertaking urgent humanitarian actions for the migrants in the United States, including ensuring the safety and security of the individuals while they awaited processing. A member of my staff traveled to Del Rio within 48 hours of the images of the incident involving Border Patrol agents on horseback to view the situation first-hand. As a result of what the staff member observed, we reiterated prior recommendations related to Title 42 expulsions and suggested that CBP undertake several actions relating to medical assessments, as well as, medical, language, food, and sanitation services.

We are deeply concerned about the situation of Haitians arriving at the U.S. Southwest Border and for Haitians currently in the U.S. who may be facing removal. Through many of the same processes I mentioned in my prepared remarks (listening sessions, investigations, and proactive advice within the agency), my Office has been active in efforts to ensure that alternatives to removal of Haitians to Haiti or expulsions of Haitians to Mexico are vigorously explored.

Second, I would like to address one of the recommendations that the Petitioners posed in their request for this hearing. The petitioners recommended that DHS let USCIS asylum officers adjudicate cases and provide asylum applicants with legal representation and reliable translation services in order to expedite access and processing of asylum applications.

I am happy to report that under a recently published Notice of Proposed Rulemaking from August 20, 2021, Asylum Officers would be given authority to adjudicate certain asylum, withholding of removal and Convention Against Torture claims after an individual has received a positive credible fear screening, rather than the individual being sent to an immigration judge for a removal hearing. That proposed rule, entitled Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and Convention Against Torture Protection Claims by Asylum Officers, allows Asylum Officers to adjudicate these claims in a streamlined fashion. The rule also allows USCIS to arrange for an interpreter for individuals unable to proceed with their claims in English, which USCIS currently arranges for, as well.

Regarding interpreters, USCIS published a temporary final rule (TFR) on September 20, 2020, which allows certain affirmative asylum applicants to use a USCIS-provided telephonic contract interpreter to keep the USCIS workforce and applicants safe during the COVID-19 public health emergency. This TFR was extended for the second time on September 17, 2021 to expire on March 16, 2022. The asylum applicants who are unable to proceed with their interviews in English and who speak one of 47 common languages must use USCIS's telephonic interpreter services at the asylum interview instead of bringing their own interpreter. If an asylum applicant is not fluent in any of the 47 languages for which USCIS provides an interpreter, the applicant must bring an interpreter who is fluent in English and the applicant's native language or any other language in which the applicant is fluent.

Another action that DHS has undertaken in conjunction with DOJ is a new Dedicated Docket to expeditiously process the immigration cases, including asylum cases, of families who arrive between ports of entry at the Southwest Border. The families who will qualify for this Dedicated Docket are those who arrived on or after May 28, 2021, are placed in removal proceedings, and are enrolled in Alternatives to Detention. The Executive Office for Immigration

Review (EOIR), a subagency of the Department of Justice, has committed to providing information to these families to help them understand the immigration system and referring them to pro bono legal service providers for possible representation. EOIR has stated that under the Dedicated Docket, its judges will work to issue a decision within 300 days of the initial master calendar hearing. While the goal is to decide cases expeditiously, EOIR has stated that fairness will not be compromised.

With regard to legal representation, there has been some changes on this front, too, as it pertains to unaccompanied children. Unaccompanied children are not subject to expedited removal, so I am speaking of a program that is outside of DHS. EOIR announced on September 28, 2021 that it is launching a new Counsel for Children Initiative (CCI) that will provide legal representation for certain unaccompanied children in eight immigration courts in which this Government-funded counsel will have the greatest impact. Those courts are in Atlanta, Houston, Los Angeles, New York, San Diego, San Francisco, Seattle, and Portland. Through this initiative, EOIR will also help to identify children who have been victims of human trafficking and abuse and refer them for appropriate services.

Again, I thank you for this opportunity and appreciate your attention to these critical issues.

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The testimony of Acting Executive Director for Policy Remy Krumpak of CBP at the October hearing is excerpted below.

* * * *

Distinguished Commissioner, petitioners, Secretariat staff, and colleagues, it is an honor to appear before you today on behalf of United States Customs and Border Protection (CBP). My name is Remy Krumpak and I am the Acting Executive Director of CBP's Office of Policy. Additionally, until last Friday I served as Acting Deputy Chief of Staff.

CBP is working to support many elements of the Biden-Harris Administration's plan to ensure a fair, orderly, and humane immigration system. CBP is also working with our U.S. Government interagency partners to systematically address the influx of migrants at the United States' Southwest Border in a manner that respects the rule of law, human life, and the dignity of persons fleeing violence, criminal activity, and destruction caused by natural disasters.

In March 2020, the U.S. Centers for Disease Control and Prevention (CDC) issued a public health order to prevent the spread of COVID-19 in CBP holding facilities and in the United States by temporarily suspending the introduction of certain persons into the United States from countries where a communicable disease exists.

Pursuant to statute, CBP is required to assist the CDC in its implementation of the Order. The Order indicates that, under the Health Service Act and its implementing regulations, the Director of CDC is authorized to "suspend the right to introduce persons into the United States when the Director determines that the existence of a quarantinable communicable disease in a foreign country or place creates a serious danger of the introduction of such disease into the United States and the danger is so increased by the introduction of persons from the foreign

country or place that a temporary suspension of the right of such introduction is necessary to protect public health."

Although the Order prevents the introduction of certain persons into the United States, it also explicitly recognizes that there is a need for case-by-case exceptions in certain circumstances. The Order indicates that it does not apply to "[p]ersons whom customs officers determine, with approval from a supervisor, should be excepted from this Order based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests." CBP takes this exception very seriously. Since the Order went into effect, CBP has excepted thousands of persons from the Order and continues to improve its procedures for making these determinations. Starting in July 2021, the CDC Order has fully excepted unaccompanied children.

In implementing the Order, DHS will refer a noncitizen to U.S. Citizenship and Immigration Services for a Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) screening if the noncitizen claims a fear of return. An asylum officer will then assess whether it is more likely than not that the noncitizen would be tortured in the country to which he or she would be sent. If the noncitizen meets the threshold screening standard, DHS will except him or her from the Order.

The CDC Order issued pursuant to Title 42 will remain in place until either the expiration of the Secretary of Health and Human Services' declaration that COVID-19 constitutes a public health emergency, or the CDC Director determines that the danger of further introduction, transmission, or spread of COVID-19 into the United States has declined such that continuation of the Order is no longer necessary to protect public health, whichever occurs first. The circumstances necessitating the Order are reassessed at least every 60 days.

Thank you for the opportunity to speak with you today and for your commitment to promoting and protecting human rights in the Western Hemisphere.

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The prepared remarks of Deputy Assistant Secretary of State Emily Mendrala for the October 28 hearing are excerpted below.

* * * *

Good afternoon and thank you for the opportunity to share what steps the United States is taking to reduce irregular migration, establish collaborative migration management, and address the root causes of irregular migration.

The United States commits to efforts that will effectively and sustainably reduce irregular migration in, from, and through the Western Hemisphere. This requires a comprehensive approach that addresses both the acute and long-term drivers of irregular migration.

While we understand the complexity of factors that lead individuals to migrate irregularly, we also acknowledge that the decision often stems from a profound lack of hope that life in their home countries will improve. The United States continues coordinating our shared efforts and working with regional partners to respond to urgent humanitarian needs, as well as improve conditions throughout the hemisphere over the long term.

While working tirelessly to address these root causes, we also need to focus on collaborative migration management, and humane enforcement of our respective borders, expanded options for legal pathways for migration, and increased options for international protection and resettlement.

We believe that prioritizing both access to protection and humane border enforcement measures are essential to addressing irregular migration, and we have asked countries in the region to join us in prioritizing these two important aspects of migration management.

Irregular migration affects all people. It benefits migrant smugglers, human traffickers, and transnational criminal organizations and puts the lives and personal finances of vulnerable populations at risk. And it poses a particular risk to transit communities as we all continue to deal with the challenges of COVID-19. Irregular migration can also lead to humanitarian crises as we saw in Del Rio.

We continue working very closely with government and civil society partners in Mexico and Central America to address migration challenges.

We are working together with regional partners to develop a regional strategy to ensure safe, orderly, and humane migration in a coordinated and sustainable way.

We must interrupt the cycle of large-scale transit through countries. This may involve actions like imposing visa requirements and meticulously controlling entry across borders.

But we also must increase protection and opportunities to identify vulnerable migrants, including victims of human trafficking, and refer them to services or resettle them in safe areas.

If we do not reduce the migratory flows throughout the hemisphere, the situation will become unsustainable, possibly resulting in a larger humanitarian crisis.

Managing migration involves people and keeping people as safe as possible while enforcing immigration laws. Although the intensity and scale of irregular migrant movements has presented new challenges, we believe that through cooperation and collaboration, we will continue to work with our regional partners to address these challenges. I look forward to our conversation today and to answering your questions. Thank you.

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The as-prepared remarks of Deputy Assistant Secretary of State Marta Youth for the October 28 hearing appear below.

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Allow me to expand on Deputy Assistant Secretary Mendrala's remarks on the importance of addressing the root causes of irregular migration. The Biden-Harris Administration recognizes that migration is not a new phenomena. People and communities have always migrated. In search of better opportunities. In response to natural disasters. In some cases, people are forced to flee persecution and torture or threats thereof from oppressive governments and criminal organizations.

The Collaborative Migration Management Strategy (CMMS) is the other half of President Biden's comprehensive approach to migration in the region - complementing the Root Causes Strategy that DAS Mendrala discussed. The CMMS is our roadmap to work together with regional governments and other key stakeholders to respond to those migrants already on

the move or at imminent risk of displacement. Origin, transit, and destination countries all have a role to play to humanely manage migration throughout the Western Hemisphere.

Secretary Blinken traveled to Colombia last week to meet with counterparts from 15 countries to strengthen this collaboration.

It will take time for these strategies to gain traction in providing for a bright future at home over the long term and in the nearer term to expand legal pathways for safe, orderly, and humane migration for those seeking to emigrate or in need of international protection.

We work closely with international organizations and NGOs to provide urgently needed humanitarian assistance to vulnerable populations.

The United States is increasing support for reception and reintegration of returned migrants to enable them to successfully resume their lives at home. Our efforts include improving reception centers, building out local government capacities to provide reintegration services, and assisting governments to develop reintegration policies and frameworks.

We are supporting international organizations in working to establish information and orientation centers to assist vulnerable populations in mixed movements to access credible, up to date information about their rights and resources available.

We are also funding programs to assist migrants and potential migrants to inform themselves on the risks of irregular migration, such as migrant smuggling and human trafficking, by using official sources of information and learning to recognize fraud and false information.

The United States is expanding access to legal pathways to the United States, as appropriate and consistent with our laws, including through refugee resettlement, family reunification opportunities, and immigrant visas and non-immigrant temporary work visas.

Our embassies in northern Central America are on track to eradicate the immigrant visa processing backlog by the end of January. Currently there are no backlogs in the H-2 temporary worker visa categories. The new year will bring a robust push to meet the Administration's goal of a nearly 10-fold increase in H2A issuances for Guatemalans, Hondurans, and Salvadorans.

The U.S. Refugee Admissions Program's allocation for Latin America and the Caribbean for Fiscal Year 2022 is 15,000, the largest single year allocation for the region since the passage of the 1980 Refugee Act.

To meet this ambitious goal, we are seeking to enhance the capacity of international organizations and civil society to identify and refer more individuals with urgent international protection needs. In addition, we are working to increase the U.S. Refugee Admissions Program processing capacity in the region and will continue to explore additional ways to enhance refugee processing.

Restarting the Central American Minors program was an important goal for the Biden-Harris Administration. We wholeheartedly understand the risks and vulnerabilities of minors in El Salvador, Guatemala, and Honduras and are committed to increasing options for legal pathways to the United States and reuniting families.

We are supporting regional labor migration programs and employment pathways that facilitate equitable access to temporary dignified work opportunities in neighboring countries and ensure workers' rights. Our efforts are complemented by enhanced programming to ensure the treatment of migrant workers is fair and humane.

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k. Hearing on the Right to Housing

On December 16, 2021, Dr. Richard S. Cho, Senior Advisor for Housing and Services at the U.S. Department of Housing and Urban Development, testified at the IACHR hearing on the right to housing in the United States. His testimony is excerpted below.

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Both President Biden and Secretary Fudge have stated their unequivocal belief that housing should be a right and not a privilege, and that homelessness has no place in their vision for America. Housing is essential to health and to success in one's educational attainment, economic and financial success, and other life goals. The cost of housing should not be crushing and take away families' ability to put food on the table or cover other essential needs. In the greatest nation in the world, not one single person should have to sleep night after night in a homeless shelter, on the streets, in their vehicles, or other places not meant for human habitation.

And yet our national data shows that an estimated 580,466 people were experiencing homelessness in America on a single night in January 2020. Many more people experience homelessness over the course of the year. The most recent published administrative data that HUD collects on the number of people who use homeless shelters or other temporary housing indicates that nearly 1.5 million Americans experienced sheltered homelessness in 2018. These data measures alone do not present the full picture of who experiences housing insecurity in America. Our biennial *Worst Case Housing Needs* report also shows that in 2019, 7.77 million households had worst case housing needs, meaning that they were either paying more than 50% of their incomes towards rent, living in severely inadequate conditions, or both. Homelessness and housing challenges are also experienced disproportionately by certain racial and ethnic groups. While Black Americans represent only 12% of the United States population, they comprise nearly 40% of the homeless population in the U.S. Native Americans are overrepresented in homelessness at a rate more than twice their representation in the general population. Cases of worst case housing needs—already disproportionately experienced by nonwhite Americans—increased for Black, Hispanic, and other households of color from 2017 to 2019.

It is important to note that all of these data reflect the state of homelessness and housing insecurity prior to the arrival of the COVID-19 pandemic, which has likely contributed to our nation's homelessness and housing crises. Recognizing that homeless shelters and other congregate settings are high-risk settings for COVID-19 transmission, many communities reduced homeless shelter capacity. COVID-19 also has affected the ability of communities to provide homeless services and housing assistance. And the pandemic has resulted in millions of households facing economic hardship that affected their ability to pay rent and that placed them at risk of housing loss due to eviction.

The COVID-19 pandemic has brought to light the growing crises of homelessness and insecurity is a public health crisis and the existence of this crisis threatens the health and safety of the entire nation. But while the pandemic may have exacerbated homelessness and housing insecurity, it did not cause them. Homelessness was already on the rise over the last four years, despite having decreased in prior years.

From 2010 to 2016, the single night prevalence of homelessness declined from 637,077

people in 2010 to 549,928 people in 2016—a reduction of nearly 14%. For certain populations such as military veterans and families, these reductions were even steeper. Veteran homelessness declined by 47%. Homelessness among families with children declined by nearly 23%. We at HUD believe that the decreases achieved in these years were in large part due to the federal leadership and national coordination created through the development and implementation of *Opening Doors*, the first-ever federal strategic plan to prevent and end homelessness. Aligned with recognizing the importance of housing to the enjoyment of human rights, much of this plan was focused on promulgating community implementation of the Housing First approach, in which people experiencing homelessness are assisted to obtain permanent housing as quickly as possible using a variety of interventions that provide rental assistance or affordable housing alongside health and supportive services, and without first requiring that people complete addiction treatment, demonstrate sobriety, or enter inpatient psychiatric treatment.

Over the last few years, however, severe resource constraints have limited communities' ability to provide Housing First interventions. HUD data shows that, prior to 2021, communities typically had only one available Housing First intervention for every seven individuals who were experiencing homelessness, and approximately one available Housing First intervention for every three families with children who were experiencing homelessness. As a result, more people have become homeless in the last few years than have been assisted to exit homelessness. HUD's data showed that, from 2017 to 2020, the number of people that newly entered homelessness exceeded the number of people that exited homelessness by an average of approximately 8,000 people per year.

Not surprisingly, homelessness rose by over 5% from 2016 to 2020. Much of the gains in reducing homelessness achieved from 2010 to 2016 have been lost. Single night prevalence of homelessness in America in 2020 is back to what it was in 2013. Homelessness among single individuals rose by 15%, and the number of people experiencing unsheltered homelessness rose by 28%. From 2019 to 2020, both Veteran and family homelessness increased. For the first time ever since the Point-in-Time counts have been conducted, the number of single individuals experiencing unsheltered homelessness in 2020 was higher than the number of single individuals sleeping in shelters.

In many communities, the rise in unsheltered homelessness—and the emergence of homeless encampments as the most visible manifestation of unsheltered homelessness—has led to greater pressure at the local government level to resort to more aggressive tactics involving law enforcement and public works to clear encampments, displace residents, seize and remove property, as well as pass and enforce laws and ordinances prohibiting sleeping, lying down, or performing other basic human functions outside.

HUD and the United States government's position is clear that the civil and human rights of people experiencing homelessness must be protected. Under the Eighth Amendment of the Constitution, all Americans have protections against cruel and unusual punishment and arresting and jailing people for performing basic human functions like sleeping outside when they lack homelessness are protected under the Fourth Amendment to from the unreasonable and warrantless seizure or destruction of personal property and possessions.

The United States federal government is working to combat the criminalization of homelessness:

Through our annual Continuum of Care Program competition, which provides $2.7 billion in grants annually to support communities' responses to homelessness, HUD has included an incentive in the annual CoC Competition for communities that take steps to

reduce the criminalization of homelessness.

HUD has also provided communities with federal tools and guidance developed the United States Interagency Council on Homelessness, the Department of Justice, and national organizations like the National Homelessness Law Center on how to avoid the criminalization of homelessness, and implement constructive alternatives.

HUD has also shared guidance developed by the United States Interagency Council on Homelessness on how to respond to homeless encampments that emphasizes the use of homeless outreach to connect people to housing and services, and which ensures that communities adopt policies and processes that uphold civil rights.

Ultimately, the Administration believes that the best way to combat the criminalization of homelessness is to end it—specifically, by helping people to stay in their homes and avoid housing loss, and when housing loss cannot be prevented, by helping people re-enter permanent housing with access to services as needed as quickly as possible. The Biden-Harris Administration is committed to achieving an end to homelessness for all Americans and to ensuring access to adequate housing for all Americans. And while the realization of this is necessarily progressive, I would contend that more progress has been made in the last year to realize this than in many years.

In the last year, the federal government sprang into action to help millions of Americans avoid evictions and other housing loss. In response to a national eviction crisis that was exacerbated by the COVID-19 pandemic, President Biden's American Rescue Plan expanded federal funding for the Emergency Rental Assistance program to total more than $46 billion, as well as made some needed improvements to this program. Through a whole-of-government approach, the federal government has provided guidance and technical assistance to assist states and communities to quickly deliver emergency rental assistance to Americans, as well as encourage them to develop new eviction protections including court-based eviction diversion programs, direct aid to tenants, and improving access to legal representation in housing courts.

The Administration has also taken action to prevent evictions among HUD-assisted renters. Following the Supreme Court's decision to end a nationwide eviction moratorium in August 2021, HUD also adopted a rule that prohibits the eviction of tenants facing eviction for nonpayment of rent, during a national emergency, from HUD-subsidized public housing and certain properties with project-based rental assistance without providing a 30-day notice period that includes information about available federal emergency rental assistance. In late November, HUD awarded $20 million for eviction protection and diversion programs in ten (10) cities across the country. The program supports experienced legal service providers in providing legal assistance at no cost to low-income tenants at risk or subject to evictions. The Eviction Protection Grant Program is part of HUD's continued work, as part of a whole of government approach, to support families recovering from the public health and economic impacts of the COVID-19 pandemic.

The Administration has also taken several actions to assist homeowners facing financial hardship from losing their homes due to foreclosures. On June 24, the Administration extended the foreclosure moratorium for a final, additional month until July 31, 2021 and the forbearance enrollment window through September 30, 2021, and provided up to three months of additional forbearance for certain borrowers. Homeowners with government-backed mortgages receive enhanced assistance to reduce their monthly payments by roughly 25%. Through the American Rescue Plan, the Homeowner Assistance Fund (HAF) is providing $9.961 billion to states, D.C., territories, and Tribes for relief to homeowners impacted by the COVID-19 economic crisis.

These funds can be used for assistance with mortgage payments, homeowner's insurance, utility payments, and other specified purposes – and homeowners can access these funds through designated state agencies, in addition to the payment reduction options discussed above. And they will be integrated into the payment reduction options outlined above – providing additional payment reduction to borrowers who need it and to borrowers whose mortgages are not backed by federal agencies.

With regard to re-housing people who are experiencing homelessness, the Biden Administration is firmly centering the federal response to homelessness on the Housing First approach—which entails providing tailored levels of housing assistance and supportive services to help people experiencing homelessness re-enter and remain in permanent housing without requiring them to first complete treatment or achieve sobriety. The evidence is clear and compelling that Housing First works. Housing First interventions like permanent supportive housing and rapid re-housing and rental vouchers help people exit homelessness more quickly, remain stably housed, achieve better health, and reduce their use of costly crisis services like

Through the American Rescue Plan, the Biden Administration and HUD is providing communities with historic resources to quickly increase the availability of Housing First interventions to re-house people experiencing homelessness. HUD has provided communities with 70,000 Emergency Housing Vouchers to re-house people experiencing or at-risk of homelessness, including those fleeing or attempting to flee domestic violence, sexual assault, or human trafficking. Through the American Rescue Plan, HUD has also awarded $5 billion in HOME Investment Partnerships grants to help communities build additional affordable and permanent supportive housing units, as well as provide temporary rental assistance and fund supportive services to address homelessness.

To support communities to deploy these new resources with urgency to help re-house people experiencing homelessness, HUD Secretary Fudge and other Administration officials launched a new national initiative known as *House America: an all hands-on deck effort to address the nation's homelessness crisis*. Through House America, the federal government is calling upon mayors, county leaders, governors, and tribal nation leaders to set specific numeric goals for the number of people experiencing homelessness that will be re-housed in permanent housing and the number of new permanent housing units that will be placed into the development process by the end of 2022. Over 35 state and local leaders have joined to date—from California to Maine, from Seattle to Miami, from Chattanooga to Cherokee Nation—and more leaders continue to sign on every week. Through the American Rescue Plan resources provided and the engagement of state and local leaders through House America, the Administration hopes that at least 100,000 households experiencing homelessness will obtain permanent housing and add at least 20,000 new units of housing to address homelessness will be placed into development by the end of 2022.

Ensuring access to adequate housing in America also entails addressing discrimination and ensuring equal access. On January 20, 2021, President Biden issued an Executive Order on Advancing Racial Equity and Support for Underserved Communities through the Federal Government, instructing the federal government to pursue and prioritize a comprehensive approach to affirmatively advance equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.

Racially discriminatory housing practices and policies have kept communities of color from accessing safe, high-quality housing and the chance to build wealth that comes through

homeownership. On January 26, 2021, President Biden issued a memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, recognizing the specific role that the federal government played in creating legacies of residential segregation and discrimination, which remain present today. Accordingly, the Federal Government is working with communities to end housing discrimination, to provide redress to those who have experienced housing discrimination, to eliminate racial bias and other forms of discrimination in all stages of home-buying and renting, to lift barriers that restrict housing and neighborhood choice, to promote diverse and inclusive communities, to ensure sufficient physically accessible housing, and to secure equal access to housing opportunity for all.

The Administration has taken a number of steps to strengthen fair housing protections over the last year. In February, HUD announced that it will administer and enforce the Fair Housing Act to prohibit discrimination on the basis of sexual orientation and gender identity. This means that when a housing provider refuses to sell, rent or otherwise makes housing unavailable based in part on a person's sexual orientation or gender identity, the housing provider potentially violates the Fair Housing Act.

In April, HUD withdrew the previous administration's proposed action that would have weakened the Equal Access Rule. The Equal Access Rule ensures that all individuals -- regardless of sexual orientation or gender identity – have equal access to important HUD programs. Equal access to HUD programs that serve people who are homeless or at risk of homelessness is essential in addressing the challenges faced by transgender and gender nonconforming persons. Transgender and gender non-conforming persons face enormous safety risks in shelters.

The Administration has made it a priority to fund fair housing enforcement, both within government and in supporting civil society organizations that bolster fair housing efforts. The Administration's current budget request contains a 17% increase in staffing for fair housing enforcement over the previous year, while HUD has awarded over $71 million in grants over the past year to civil society organizations participating in the Fair Housing Initiatives Program.

The Administration has taken steps to ensure that addressing the need for access to adequate housing is responsive to climate change and the effects of the climate crisis. Climate change creates new risks and exacerbates existing vulnerabilities in communities across the U.S., presenting growing challenges to human health and safety, quality of life, and economic prosperity. Though these challenges are universal, our nation's low-income families and communities of color are disproportionately impacted by climate change due to historic disinvestment and a longstanding pattern of residential segregation. For low-income households and communities of color, climate change exacerbates existing vulnerabilities in their communities, such as aging infrastructure and the siting of toxic waste facilities. The Administration is taking a whole-of-government effort to ensure that at least 40 percent of overall Federal investments in climate and clean energy are delivered to disadvantaged communities.

If the Biden Administration's actions in the last year are a significant step forward in the progressive realization of ensuring access to adequate housing in the United States, President Biden's Build Back Better plan would represent a major leap. The President's Build Back Better plan includes historic investments that would provide affordable housing to millions more Americans. If enacted by Congress, Build Back Better would make investments in programs that will increase the supply of rental housing, rental assistance that will increase housing affordability for low-income households and people experiencing homelessness, and increase

housing for older adults and people with disabilities. Build Back Better would make homeownership a reality for more Americans, as well as address the disparities in homeownership by Black Americans.

There is more work ahead to ensure that all Americans have access to housing that is both affordable and adequate, to protect Americans from housing loss due to evictions and foreclosures, to prevent housing discrimination, minimize housing's role in climate change and mitigate the impacts of the climate crisis on the right to housing, and to end homelessness. The steps and actions made in the last year by the United States government demonstrate that while the realization of ensuring access to adequate housing is progressive, it need not always be slow. Significant progress has already been made and the enactment of President's Build Back Better plan would build upon this momentum to accelerate the realization further. We have a once-in-a lifetime opportunity to realize President Biden's vision and belief that housing be a right, not a privilege. Thank you for listening to my testimony.

* * * *

Cross References

Global counterterrorism efforts, **Ch. 3.B.1**
Crimes against humanity, **Ch. 3.C.1**
International tribunals and other accountability mechanisms, **Ch. 3.C**
International Criminal Court, **Ch. 3.C.2**
Inter-American Juridical Committee on Binding and Non-Binding Agreements, **Ch. 4.A.1**
International treaty framework, **Ch. 4.A.3**
World Health Organization, **Ch. 4.B.3**
UN Third Committee, **Ch. 6.A.4**
Human Rights Council, **Ch. 6.A.5**
Labor, **Ch. 6.F**
FG Hemispheres v. DRC*,* **Ch. 10.C.2.b**
Immunities of international organizations, **Ch. 10.D**
Security Council on maritime security, **Ch. 12.A.1.c**
Third Committee resolution on the return of cultural property, **Ch. 14.B**
UNCITRAL, **Ch. 15.A**
Article 51 letters to UN Security Council, **Ch. 18.A.3**

CHAPTER 8

International Claims and State Responsibility

A. IRAN CLAIMS

On January 15, 2021, pursuant to the order of the Iran-United States Claims Tribunal ("Tribunal") dated September 17, 2020, Iran submitted its brief on the Algiers Declarations Claims. On June 25, 2021, the Tribunal issued an Order refusing Iran's request that it take action with regard to the Tribunal's Award No. 604 of March 10, 2020, in Case A/15(II:A). The hearing scheduled in Case B B/1 was postponed to June 2022.

B. SUDAN CLAIMS

As discussed in *Digest 2020* at 336-42, the United States and Sudan signed a claims settlement agreement in 2020. The agreement, available at https://www.state.gov/sudan-21-209, entered into force on February 9, 2021. The Sudan Claims Resolution Act ("Act"), Title XVII, Div. FF, Pub. L. No. 116-260, 134 Stat. 1182 (2020), also signed into law in 2020, provides for the restoration of Sudan's sovereign immunity from terrorism-related claims in U.S. federal and state courts, upon certification by the Secretary of State that the United States has received sufficient funds pursuant to the agreement.

On March 20, 2021, Secretary Blinken provided the certification required under Section 1704(A)(2) of the Act. 86 Fed. Reg. 19,080 (Apr. 12, 2021). Namely, Secretary Blinken certified that:

> (A) The August 12, 1993, designation of Sudan as a state sponsor of terrorism has been formally rescinded;
>
> (B) Sudan has made final payments with respect to the private settlement of the claims of victims of the U.S.S. COLE attack; and
>
> (C) the United States Government has received funds pursuant to the United States-Sudan Claims Settlement Agreement that are sufficient to ensure:
>
> (i) Payment of the agreed private settlement amount for the death of a citizen of the United States who was an employee of the United States Agency for International Development in Sudan on January 1, 2008;

> (ii) meaningful compensation for claims of citizens of the United States (other than individuals described in section 1707(a)(1) of the Act) for wrongful death or physical injury in cases arising out of the August 7, 1998, bombings of the United States embassies located in Nairobi, Kenya, and Dar es Salaam, Tanzania; and
> (iii) funds for compensation through a fair process to address compensation for terrorism-related claims of foreign nationals for wrongful death or physical injury arising out of the events referred to in clause (ii).

Id.

On March 31, 2021, the State Department issued a statement by Secretary Blinken announcing the receipt of funds for resolution of certain claims against Sudan. The statement, available at https://www.state.gov/receipt-of-funds-for-resolution-of-certain-claims-against-sudan/, includes the following:

> We are pleased to announce that the United States received the $335 million provided by Sudan to compensate victims of the 1998 bombings of the U.S. Embassies in Kenya and Tanzania and the USS Cole in 2000 as well as the 2008 killing of USAID employee John Granville.
>
> Achieving compensation for these victims has been a top priority for the Department of State. We hope this aids them in finding some resolution for the terrible tragedies that occurred. Last week, the Department transmitted to Congress the Secretary's certification restoring Sudan's sovereign immunities pursuant to the Sudan Claims Resolution Act enacted last December. We appreciate Sudan's constructive efforts over the past two years to work with us to resolve these long-outstanding claims. With this challenging process behind us, U.S.-Sudan relations can start a new chapter. We look forward to expanding our bilateral relationship and to continuing our support for the efforts of the civilian-led transitional government to deliver freedom, peace, and justice to the Sudanese people.

C. NEGOTIATIONS WITH CANADA PURSUANT TO THE 1977 TRANSIT PIPELINES TREATY

On October 4, 2021, the Canadian government informed the Department of State that Canada would formally invoke Article IX of the U.S.-Canada Agreement Concerning Transit Pipelines, Can.-U.S., Jan. 28, 1977, 28 U.S.T. 7449, 1086 U.N.T.S. 343, signed at Washington on January 28, 1977 ("transit pipelines treaty"), in response to the state of Michigan's revocation on May 12, 2021, of the 1953 easement it issued for the Line 5 pipeline to pass through the Straits of Mackinac. The text of the transit pipelines treaty is available at https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f8f8b&clang=_en. In December 2021, the governments of Canada and the United States held the first negotiation session regarding Line 5 under the transit pipelines treaty.

Article IX of the transit pipelines treaty provides:

> Article IX. 1. Any dispute between the Parties regarding the interpretation, application or operation of the Agreement shall, so far as possible, be settled by negotiation between them.
>
> 2. Any such dispute which is not settled by negotiation shall be submitted to arbitration at the request of either Party. Unless the Parties agree on a different procedure within a period of sixty days from the date of receipt by either Party from the other of a notice through diplomatic channels requesting arbitration of the dispute, the arbitration shall take place in accordance with the following provisions. Each Party shall nominate an arbitrator within a further period of sixty days. The two arbitrators nominated by the Parties shall within a further period of sixty days appoint a third arbitrator. If either Party fails to nominate an arbitrator within the period specified, or if the third arbitrator is not appointed within the period specified, either Party may request the President of the International Court of Justice (or, if the President is a national of either Party, the member of the Court ranking next in order of precedence who is not a national of either Party) to appoint such arbitrator. The third arbitrator shall not be a national of either Party, shall act as Chairman and shall determine where the arbitration shall be held.
>
> 3. The arbitrators appointed under the preceding paragraph shall decide any dispute, including appropriate remedies, by majority. Their decision shall be binding on the Parties.
>
> 4. The costs of any arbitration shall be shared equally between the Parties.

Constructive discussions between the United States and Canada were ongoing at the end of 2021 regarding various issues that would inform a resolution of this matter.

Cross References

Crystallex v. Venezuela, **Ch. 5.A.1**
Promoting Security and Justice for Victims of Terrorism Act, **Ch. 5.A.3**
ICJ, **Ch.7.B**
Foreign Sovereign Immunities Act, **Ch. 10.A**
Investor-State dispute resolution, **Ch. 11.B**
Servotronics, Inc. v. Rolls-Royce *(international arbitration)*, **Ch. 15.C.2**

CHAPTER 9

Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues

A. DIPLOMATIC RELATIONS, SUCCESSION, AND CONTINUITY ISSUES

1. Somalia

The State Department issued several statements on Somalia in 2021, encouraging progress toward elections and on the September 17, 2020 framework. The April 13, 2021 statement is excerpted below and available at https://www.state.gov/somalia-the-united-states-opposes-federal-government-term-extensions/.

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* * * *

The United States is deeply disappointed by the Federal Government of Somalia's decision to approve a legislative bill that extends the mandates of the president and parliament by two years.

We have stressed repeatedly that it is vital for the peace, stability, prosperity, and governance of Somalia that the Federal Government and Federal Member States reach a consensus on a way forward for the electoral process. We have also made clear that the United States does not support mandate extensions without broad support from Somalia's political stakeholders, nor does the United States support parallel or partial electoral processes. Such actions would be deeply divisive, undermine the federalism process and political reforms that have been at the heart of the country's progress and partnership with the international community, and divert attention away from countering al-Shabaab. They will also further delay holding the promised elections awaited by the Somali people.

Implementation of this bill will pose serious obstacles to dialogue and further undermine peace and security in Somalia. It will compel the United States to reevaluate our bilateral relations with the Federal Government of Somalia, to include diplomatic engagement and assistance, and to consider all available tools, including sanctions and visa restrictions, to respond to efforts to undermine peace and stability.

We call on Somalia's Federal Government and Federal Member State leaders to return to talks urgently and agree to a way forward to resolve the electoral crisis. We urge all parties to exercise maximum restraint, continue dialogue, and avoid further unilateral actions that will inflame tensions and undermine Somalia's democratic processes and institutions.

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The State Department's April 28, 2021 statement on the return to election negotiations is excerpted below and available at https://www.state.gov/return-to-election-negotiations/.

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The United States notes President Farmaajo's April 28 commitment to return to the September 17 election agreement and resume talks immediately with Federal Member State leaders. We call on the President and Parliament to act swiftly to annul the April 12 mandate extension bill.

We commend Prime Minister Roble and the Federal Member State leaders for rejecting a mandate extension. We urge Somalia's national and Federal Member State leaders to meet immediately to finalize a consensus-based electoral model and hold parliamentary and presidential elections as soon as possible on the basis of the September 17 agreement. All leaders must set aside their political aspirations and differences for the good of the Somali people and negotiate in good faith without preconditions and with a willingness to compromise.

We also call on Somalia's security forces and all armed groups to stand down and allow political dialogue to resume in an atmosphere free from violence and intimidation. Continuing conflict will only serve to worsen conditions for the people of Somalia.

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On May 27, 2021, after Somalia's national and state leaders agreed to proceed with parliamentary and presidential elections on the basis of the September 17 framework, the State Department issued a further statement, available at https://www.state.gov/somalias-electoral-agreement/, which states:

> We commend Prime Minister Roble's efforts and call on Somalia's leaders to maintain the spirit of cooperation and compromise demonstrated during this week's negotiations. We encourage them to move swiftly to implement the agreement, as concluding a peaceful, inclusive, and transparent electoral process as soon as possible is vital for Somalia to continue on its path to peace and prosperity. We look forward to continuing our support for that process.

On September 20, 2021, the State Department issued a call for Somalia's president and prime minister to resolve their dispute and complete the electoral process. That statement follows and is available at https://www.state.gov/call-for-somalias-president-and-prime-minister-to-resolve-dispute-and-complete-elections/.

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Cooperation among Somalia's leaders – particularly President Farmaajo and Prime Minister Roble – is essential to ensure that the country quickly completes its ongoing electoral

process. The dispute between President Farmaajo and Prime Minister Roble risks complicating this process and needs to be resolved immediately and peacefully.

The United States welcomes both sides' stated commitment to the electoral process but remains concerned that these elections are already months behind schedule. Any further delay increases the potential for violence and plays into the hands of al-Shabaab and other extremist groups seeking to destabilize the country.

Based on our shared interest to ensure the electoral process moves forward, we call on the President and the Prime Minister to avoid further provocative statements or actions and to resolve their disagreement over personnel appointments and their respective authorities peacefully. Rapidly completing the electoral process will help advance the country's counter-terrorism agenda and give the next government the opportunity to meet the needs of Somalia's people. Somalia's citizens deserve nothing less.

* * * *

2. Sudan

On September 21, 2021, the State Department issued a statement supporting Sudan's civilian-led transition and condemning an attempted seizure of power by "rogue military and civilian actors." The statement is excerpted below and available at https://www.state.gov/u-s-supports-sudans-civilian-led-transition-condemns-attempted-seizure-of-power/.

> The United States condemns the failed attempt … to seize power from Sudan's Civilian Led Transitional Government (CLTG). The United States continues to support the CLTG in its pursuit of a democratic transition for Sudan. We urge the CLTG to hold all those involved accountable through a fair legal process. Anti-democratic actions such as those of September 21 in Khartoum undermine the call of the Sudanese people for freedom and justice and place international support for Sudan, including the bilateral relationship with the United States, at risk. We condemn any external interference that seeks to sow disinformation and undermine the will of Sudan's people. Along with a wide range of other international actors, the United States is mobilizing substantial assistance to help Sudan achieve the country's economic and security goals. We will advance this support as Sudan makes continued progress in its ongoing transition, including the establishment of a legislative assembly, reform of the security sector under civilian leadership, and justice and accountability for past human rights abuses.

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On October 25, 2021, the Troika (Norway, the United Kingdom, and the United States) issued a statement regarding the military takeover in Sudan. The statement

follows and is available, as a State Department media note, at https://www.state.gov/troika-statement-on-military-takeover-in-sudan/.

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The Troika is deeply concerned about the situation in Sudan and condemns the suspension of the institutions of state, the declaration of state of emergency, and the military forces detaining Prime Minister Hamdok as well as other members of the civilian leadership. We call on the security forces to immediately release those they have unlawfully detained. The actions of the military represent a betrayal of the revolution, the transition, and the legitimate requests of the Sudanese people for peace, justice and economic development.

The rights of freedom of expression and peaceful assembly must be respected; violence and bloodshed must be avoided; and communication networks must be restored.

The Troika will continue to support those working for a democratic Sudan with a fully legitimate civilian government. This remains the best guarantee for the long-term stability of the country and the broader region. We reject this attempt to derail the transition toward democratic elections and call for the immediate restoration of the civilian-led government on the basis of the Constitutional Declaration and other foundational documents of the transition.

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On October 25, 2021, the State Department released a statement by Secretary of State Antony J. Blinken condemning the actions of Sudanese military forces against the civilian-led transitional government. The statement is excerpted below and available at https://www.state.gov/the-united-states-condemns-actions-against-sudans-civilian-led-transitional-government/.

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The United States strongly condemns the actions of the Sudanese military forces. We firmly reject the dissolution of the civilian-led transitional government and its associated institutions and call for their immediate restoration. The arrest of Prime Minister Hamdok and other civilian leaders is unacceptable. The military forces must ensure their safety and release them immediately. These actions have the potential to derail the country's transition to democracy and are a betrayal of Sudan's peaceful revolution.

The United States strongly supports the right of the Sudanese people to assemble peacefully in support of democracy. We are gravely concerned by reports that Sudanese security forces have used live ammunition against peaceful protesters. Security officials should immediately cease the use of violence against peaceful protesters. We also urge the restoration of Internet services.

These actions contravene Sudan's Constitutional Declaration and undermine the democratic aspirations of the Sudanese people who have repeatedly called for peace, justice, and liberty in their country. An immediate return to the principles of Sudan's peaceful revolution and the transitional framework laid out in the 2019 Constitutional Declaration and the 2020 Juba

Peace Agreement is essential. Concerns about the uneven pace of the democratic transition do not justify abandoning this path.

As we have warned repeatedly, any changes by force to the transitional government put at risk U.S. assistance. In light of these developments, the United States is immediately pausing the delivery of $700 million in emergency Economic Support Funds to Sudan, which were intended to support the country's democratic transition, while we evaluate next steps.

The United States firmly supports the Sudanese people's demand for a civilian-led transition to democracy. We are working closely and on an urgent basis with our partners to chart a common diplomatic approach to address these actions and to prevent them from leading to further instability in Sudan and the region.

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On October 26, 2021, Secretary Blinken spoke with Sudanese Prime Minister Abdalla Hamdok. The readout of the call is available at https://www.state.gov/secretary-blinkens-call-with-sudanese-prime-minister-hamdok/ and includes the following:

> The Secretary welcomed the Prime Minister's release from custody and reiterated his call on Sudanese military forces to release all civilian leaders in detention and to ensure their safety. He also expressed his deep concern about the ongoing military takeover and repeated the imperative for military forces to use restraint and avoid violence in responding to demonstrators. The Secretary emphasized U.S. support for the civilian-led transition to democracy and for a return to the principles of Sudan's transitional framework, as laid out in the 2019 Constitutional Declaration and the 2020 Juba Peace Agreement. He noted the growing chorus of international voices condemning the military takeover and supporting the calls by the Sudanese people for civilian leadership, democracy, and peace.

On November 3, 2021, the Quad for Sudan (the Kingdom of Saudi Arabia, the United Arab Emirates, the United States of America, and the United Kingdom) issued a joint statement on the developments in Sudan. The joint statement appears as a State Department media note at https://www.state.gov/joint-statement-by-the-quad-for-sudan-the-kingdom-of-saudi-arabia-the-united-arab-emirates-the-united-states-of-america-and-the-united-kingdom-on-the-developments-in-sudan/

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The Kingdom of Saudi Arabia, United Arab Emirates, the United States of America, and the United Kingdom affirm their countries' stance with the people of Sudan and emphasize the importance of supporting their aspirations for a democratic and peaceful nation. The protests of

October 30 demonstrated the depth of the Sudanese people's commitment to advancing their country's transition, and we remain committed to helping them achieve these aspirations.

We endorse the international community's serious concern with the situation in Sudan. We call for the full and immediate restoration of its civilian-led transitional government and institutions. We call upon all parties to strive for cooperation and unity in reaching this critical objective. In that vein we encourage the release of all those detained in connection with recent events and the lifting of the state of emergency. Violence has no place in the new Sudan, on this point we encourage an effective dialogue between all parties, and we urge all to ensure that the peace and security for the people of Sudan is a top priority.

The Kingdom of Saudi Arabia, United Arab Emirates, United States of America, and the United Kingdom also stress the importance of the commitment to the Constitutional Document and the Juba Peace Agreement as the foundation for further dialogue about how to restore and uphold a genuine civil-military partnership for the remainder of the transitional period, pending elections. This will help ensure Sudan reaches political stability and economic recovery so that it is able to continue the transitional period with the support of Sudan's friends and international partners.

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Following the announcement of a political agreement having been reached, Secretary Blinken spoke with Prime Minister Hamdok again on November 22, 2021 and also spoke separately on the same day with General Abdel Fattah al-Burhan, chair of Sudan's Sovereign Council. The readout of the calls is available at https://www.state.gov/secretary-blinkens-call-with-sudanese-prime-minister-hamdok-and-sovereign-council-chair-general-burhan/ and includes the following:

> The Secretary encouraged both leaders to work rapidly to put Sudan's democratic transition back on track. He recognized the important first step that had been taken with the release and reinstatement to office of Prime Minister Hamdok but noted the outstanding transitional tasks. To restore public confidence in the transition he urged the immediate release of all political detainees and pressed for the immediate lifting of the state of emergency. He underscored the imperative for all parties to renew their focus on completing Sudan's transition to democracy by implementing the transitional tasks outlined in the Constitutional Declaration and the Juba Peace Agreement. He reiterated U.S. calls for respect for peaceful protests and called on the security forces to desist from the use of violence against demonstrators.
>
> The Secretary urged Prime Minister Hamdok and General Burhan to take timely action to implement the elements of the agreement reached November 21 in fulfillment of the aspirations of the Sudanese people, including creating a transitional legislative council, judicial structures, electoral institutions, and a constitutional convention. Both voiced their support for an effective and mutually beneficial U.S.-Sudan relationship.

On December 16, 2021, the Quad issued another joint statement. The joint statement appears below and as a State Department media note at https://www.state.gov/joint-statement-by-the-kingdom-of-saudi-arabia-the-united-arab-emirates-the-united-states-of-america-and-the-united-kingdom-on-the-november-21-political-agreement-in-sudan/.

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The Kingdom of Saudi Arabia, the United Arab Emirates, the United States of America and the United Kingdom are encouraged by the political agreement in Sudan, signed on 21 November 2021, and the reinstatement of Dr. Abdalla Hamdok as Prime Minister. This is a first step to resolving Sudan's political challenges and returning the country to its transition to democracy based on the 2019 Constitutional Document.

We urge signatories to live up to the commitments made in the political agreement. In this respect we note with appreciation the recent releases of political detainees, and the establishment of a committee of investigation to ensure that those responsible for violence against protestors are held accountable. We acknowledge the commitment to lifting the state of emergency in the near future and urge that it be fulfilled expeditiously. We encourage the early progress towards the formation of a civilian government comprised of independent experts. We also urge early progress towards the political declaration and partnership framework promised in the 21 November agreement, and stress the importance of inviting all components of the 2019 civilian-military partnership to participate in this dialogue process. We also stress the importance of the early publication of a credible roadmap towards elections in late 2023 or early 2024.

We affirm our collective and individual support for the people of Sudan and their aspirations for a democratic, stable and peaceful nation. The ongoing protests demonstrate the depth of the Sudanese people's commitment to transition. Protecting them from violence should remain a priority.

The Kingdom of Saudi Arabia, United Arab Emirates, the United States of America, and the United Kingdom reaffirm our readiness to support all those working for the democratic transition in Sudan. A genuine partnership between all stakeholders for the remainder of the transitional period, leading to free and fair elections, will help Sudan reach political stability and economic recovery. We will continue to show solidarity with all those working towards achieving this transition. We also fully support the United Nations Integrated Transition Assistance Mission in Sudan (UNITAMS) in implementation of its mandate.

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3. Haiti

On July 20, 2021, the State Department released a statement by Secretary Blinken welcoming efforts by Haiti's political leadership to form a unity government after the

assassination of the Haitian president. The statement follows and is available at https://www.state.gov/announcement-of-a-unity-government-in-haiti/.

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The United States welcomes efforts by Haiti's political leadership to come together in choosing an interim Prime Minister and a unity cabinet to chart a path forward in the wake of the heinous assassination of Jovenel Moïse. The formation of this interim government is a positive and necessary step to respond to the Haitian people's needs and begin restoring Haiti's democratic institutions.

The United States, together with the international community, urges Haiti's political and civil society leaders to continue to work together to advance a broad and inclusive dialogue that responds to the needs of the Haitian people and lays the groundwork for long-term stability and prosperity.

We remain committed to supporting the Haitian government's investigation into the assassination of Jovenel Moïse, expanding COVID-19 vaccination efforts, working with the Haitian National Police to promote security and the rule of law, and coordinating with the international community to establish the conditions necessary for Haitians to vote as soon as feasible.

We call on all Haitians to work together to maintain peace and will continue to support the Haitian people as they strive to build a stable, prosperous, and democratic country.

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4. Libya

On January 21, 2021, the governments of France, Germany, Italy, the United Kingdom, and the United States issued a joint statement on the situation in Libya. The joint statement appears below, and as a State Department media note at https://www.state.gov/joint-statement-on-the-situation-in-libya/.

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The Governments of France, Germany, Italy, the United Kingdom, and the United States welcome the Libyan Political Dialogue Forum's (LPDF) vote in favor of the selection mechanism for a new interim executive authority, which will guide Libya toward national elections on December 24, 2021. This is an important step towards Libyan unity. The LPDF's decision affirms the clear demands of the Libyan people that it is time for a change of the status quo. We encourage all Libyan parties to act urgently and in good faith to finalize the adoption through the LPDF of a unified and inclusive government. As participants in the Berlin Conference process and international partners of Libya, we will lend our full support to the LPDF's efforts.

We also welcome the UN Secretary-General's appointment of Ján Kubiš as Special Envoy of the Secretary-General for Libya, and the appointments of Raisedon Zenenga as the

UNSMIL Coordinator and Georgette Gagnon as Resident Coordinator and Humanitarian Coordinator, and we will fully support them in their important roles. We express our ongoing gratitude to the Acting UN Special Representative, Stephanie Williams, for her continuing steadfast leadership of UN mediation until Mr. Kubiš takes up his position.

One year after the Berlin Conference, we underscore the critical role of the international community in support of a political solution in Libya as well as our continued partnership with the Berlin Process members. We remind the Berlin Process members of the solemn commitments we all made at the Summit one year ago, reinforced by UNSCR 2510. In particular, we must continue to support a ceasefire, restore full respect for the UN arms embargo, and end the toxic foreign interference that undermines the aspirations of all Libyans to reestablish their sovereignty and choose their future peacefully through national elections. It is crucial that all Libyan and international actors support steps toward full implementation of the Libyan ceasefire agreement signed on October 23 of last year, including the immediate opening of the coastal road and removal of all foreign fighters and mercenaries.

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On March 10, 2021, the State Department issued a statement by Secretary Blinken welcoming the vote of confidence by the Libyan House of Representatives on an interim Government of National Unity. The statement is excerpted below and available at https://www.state.gov/house-of-representatives-vote-on-a-libyan-interim-government-of-national-unity/.

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We welcome today's vote of confidence by the House of Representatives in support of the slate of choices put forward by Interim Prime Minister-designate Abdulhamid Dabaiba for an interim Government of National Unity. This is a milestone toward the fulfillment of the Libyan Political Dialogue Forum's Roadmap for an effective and unified interim Government of National Unity. We encourage this new leadership, upon assuming power, to take the necessary steps to ensure free and fair national elections on December 24 as a key step toward finalizing a political solution to end a decade of conflict. A smooth and orderly transfer of authority to leaders elected by the Libyan people in these elections is critical to furthering Libya's democratic process.

In addition to ensuring timely national elections, the new interim Government of National Unity will have the responsibility to implement the October 23 ceasefire agreement, provide essential public services, initiate a national program for reconciliation, and address the economic crisis.

In welcoming the vote in support of the interim Government of National Unity, we also acknowledge departing Prime Minister Fayez Sarraj's key transitional role in bringing Libya to this next stage. The United States calls on all sides to maintain this positive momentum and to support the full implementation of the Libyan ceasefire agreement, restore full respect for the UN arms embargo, and end foreign interference. All Libyan and international actors should support these steps, including the immediate removal of all foreign forces and mercenaries. The

United States stands with the Libyan people as they work to establish lasting peace and security throughout their country.

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A similar joint statement on March 11, 2021 welcomed the vote of confidence in the new cabinet in Libya. The governments of France, Germany, Italy, the United Kingdom, and the United States joined in the statement, which is excerpted below and available as a State Department media note at https://www.state.gov/joint-statement-by-france-germany-italy-the-united-kingdom-and-the-united-states-on-an-interim-government-of-national-unity-in-libya/

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France, Germany, Italy, the United Kingdom, and the United States of America welcome the vote of confidence by the overwhelming majority of the members of the House of Representatives meeting in Sirte 8-10 March to endorse the cabinet chosen by Prime Minister-designate Abdulhamid Dabaiba for an interim Government of National Unity.

We applaud the Libyan people for their determination to restore unity to their country. We commend all Libyan actors for constructively participating in and facilitating this vote by a body representing the voices of the Libyan people.

This outcome is a fundamental step on the path towards the unification of Libyan institutions and a comprehensive political solution to a crisis that has tested Libya and its people. Through the Berlin Process, we will continue to support the Libyan people and the UN efforts jointly with our partners.

We appreciate the statement issued by Prime Minister Sarraj welcoming the vote of the House of Representatives and expressing readiness to hand over power, and now call upon all current Libyan authorities and actors to show the same responsibility and ensure a smooth and constructive handover of all competences and duties to the interim Government of National Unity. The new interim executive authority will have the primary tasks of organizing free and fair Presidential and Parliamentary elections on 24 December 2021, followed by a transfer of authority to Libya's democratically chosen leaders; fully implementing the 23 October 2020 ceasefire agreement; commencing a process of national reconciliation; and addressing the basic needs of the Libyan population.

France, Germany, Italy, the United Kingdom and the United States of America welcome the withdrawal of foreign forces and mercenaries from the area around Ghardabya airport, in order to allow members of the House of Representatives to safely participate in the parliamentary session in Sirte, and praise the work of the Joint Military Commission 5+5 to make this possible. It is important that such a development represent an irreversible step towards the full implementation of the 23 October 2020 ceasefire agreement, including the withdrawal of all foreign fighters and mercenaries from all of Libya.

We express gratitude to the UN Support Mission in Libya (UNSMIL) and the Special Envoy of the UN Secretary General for Libya, Jan Kubiš, for their tireless efforts to stabilize Libya and ensure stability and prosperity to its people.

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On April 16, 2021, the United States submitted an explanation of vote for the record following the adoption of UN Security Council resolutions on the political process in Libya and the renewal of the mandate of the panel of experts, resolutions 2570 and 2571. The U.S. statement appears below and is available at https://usun.usmission.gov/explanation-of-vote-following-adoption-of-the-resolution-in-support-of-un-facilitated-political-process-in-libya-panel-of-experts-mandate-renewal/.

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The United States commends the UK delegation as penholder on the two resolutions adopted today, particularly for the cooperative spirit in which they led the process. We also welcome the genuine commitment of members of this Council to crafting a strong resolution in support of the UN-facilitated political process in Libya and the extension of the UN Panel of Experts' mandate as well as authorizations and sanctions measures related to illicit petroleum exports. Importantly, the Security Council has lent its voice to welcoming the new interim government, underscoring the importance of preparing for national elections on December 24 of this year, and clearly calling for foreign forces and mercenaries to depart the country without delay.

Over the last six months, we have observed and contributed to the positive momentum in Libya. This Council has backed Libya's inclusive political progress through Security Council Press and Presidential Statements. The resolutions adopted today underscore and bolster our firm commitment to underpin continued progress and to hold accountable those who would attempt to derail the efforts Libyans are courageously making to prepare for elections, end the conflict, and establish peace and security in their country.

We must now ensure that forward progress does not falter. Libya's interim Government of National Unity must focus on unifying institutions, delivering basic services, passing a national budget and transparently distributing resources, and, most critically, preparing for and organizing free and fair national elections on December 24, 2021. It is vitally important that Libyans establish the constitutional and legal basis for national elections without delay. By passing these resolutions, we have shown that the UN Security Council supports these efforts and expects the interim Government of National Unity and other Libyan institutions to meet their responsibilities, including adhering to the electoral timeline.

We also reiterate that all external actors involved in this conflict must cease their military intervention and withdraw from Libya immediately. The ceasefire agreement cannot be successfully implemented as long as foreign forces and mercenaries remain in Libya. In addition, all external military support inconsistent with the UN arms embargo must end – including the training and financing of mercenaries and proxy forces.

The United States remains firmly committed to Libya's future, as evidenced by our favorable votes on these resolutions today. We believe that with the international community's continued support, Libyans can bring a final end to years of conflict and carve out a new future for themselves. It is incumbent upon all of us to support the Libyan people as they continue down this peaceful path toward national elections on December 24.

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The State Department issued a fact sheet on June 23, 2021 regarding Secretary Blinken's participation in the Second Berlin Conference on Libya on that day in Berlin. The fact sheet is available at https://www.state.gov/the-united-states-and-libya/ and excerpted below.

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[Secretary Blinken will participate,] underscoring U.S. support for progress in Libya and reaffirming the importance of Libya's national elections scheduled for December 24, 2021. Secretary Blinken will also emphasize support for the implementation of UN Security Council resolutions 2570 (2021) and 2571 (2021) along with the October 23 Libyan nationwide ceasefire agreement, including the withdrawal of foreign military forces, foreign fighters, and mercenaries.

U.S.-Libya Relations

The United States strongly supports the progress the Libyan people have made towards an inclusive, negotiated political solution.

The United States is committed to increasing its diplomatic focus on supporting progress in Libya, including through the work of Ambassador Richard Norland as the U.S. Special Envoy for Libya.

Support for Elections in December 2021

The United States strongly supports the work of the Libyan interim Government of National Unity to ensure elections are held in December 2021.

The goal of the United States is a sovereign, stable, unified, and secure Libya with no foreign interference, and a democratically elected government that supports human rights and development, and that is capable of combating terrorism within its borders.

The United States looks forward to working with the international community and Libyan partners to ensure robust support as national elections are organized for December 2021 and the political transition continues.

Withdrawal of Foreign Forces

The United States opposes all military escalation and foreign military interventions, including through foreign fighters and proxy forces, which deepen and prolong the conflict in Libya.

To that end, the United States. strongly supports the implementation of the October 23 Libyan nationwide ceasefire agreement, including the withdrawal of foreign military forces, foreign fighters, and mercenaries.

The United States, at the highest levels, engages stakeholders on all sides of the conflict – both Libyan and international – to encourage restraint and advance a Libyan-led, UN-facilitated political solution in the service of Libyan sovereignty and protection of the shared interests of the international community.

Assistance

Since 2011, the United States has invested over $850 million in Libya's overall development, including $605 million in U.S. development and security assistance, as well as nearly $269

million in humanitarian assistance, including nearly $11 million in COVID-related humanitarian assistance.

The United States implements programming across Libya to promote a peaceful political transition and to strengthen the foundations of a more unified Libyan state.

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On December 24, 2021, the text of the following joint statement on the Libyan electoral process was released by the governments of the United States of America, France, Germany, Italy, and the United Kingdom. The joint statement is available as a media note on the State Department's website at https://www.state.gov/joint-statement-on-libyan-election-process/.

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France, Germany, Italy, the UK, and the United States welcome the statement of the Secretary-General's Special Adviser (SASG) on Libya, Stephanie Williams on 23 December and commend the work of the SASG to engage in broad consultations across Libya over the past ten days. We express our strong support for the ongoing efforts of the United Nations Support mission in Libya (UNSMIL) to further a Libyan-led and Libyan-owned process towards the holding of free, fair and inclusive elections.

We take note of the High National Electoral Commission's (HNEC) statement of 22 December on the postponement of the ballot scheduled on 24 December and its proposal for a new, early date on which to hold those elections. We call on the relevant Libyan authorities to respect the aspirations of the Libyan people for prompt elections by swiftly determining a final date for the polling and issuing the final list of presidential candidates without delay.

We commend the technical and logistical preparation already undertaken by HNEC for the holding of elections as stipulated in the Libyan Political Dialogue Forum roadmap and endorsed in UNSC resolution 2570 (2021), as well as the conclusions of the second Berlin conference of 23 June 2021 and during the Paris International Conference for Libya of 12 November 2021. We recall that free, fair and credible elections will allow the Libyan people to elect a representative and unified government, and reinforce the independence, sovereignty, territorial integrity and national unity of Libya. It is important that momentum towards these goals is maintained.

In line with the Paris declaration, France, Germany, Italy, the UK and the United States recall their understanding that the transfer of power from the current interim executive authority to the new executive authority shall take place following the announcement of the results of such early and prompt parliamentary and presidential elections. To avoid conflicts of interests and to promote a level playing field, candidates holding roles in public institutions should also continue vacating them until the announcement of the electoral results.

We reiterate UNSMIL's call for disagreements on emerging political or military matters to be resolved without resorting to violence. We stand ready to hold to account those who threaten the stability or undermine the political and electoral process in Libya, through violence, or the incitement of violence. We affirm that individuals or entities, inside or outside Libya, who

obstruct, undermine, manipulate or falsify the electoral process and the political transition will be held accountable and may be designated by the United Nations sanctions committee in accordance with UNSC resolution 2571. We commit to respecting the UN-facilitated, Libyan-led and owned political process and urge all other international actors to do the same.

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5. Mali

The State Department issued a press statement on the situation in Mali on May 26, 2021, which is excerpted below and available at https://www.state.gov/on-the-situation-in-mali/.

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The United States strongly condemns the detention of civilian leaders of Mali's transition government. We support the May 24 **joint statement** of ECOWAS and the African Union, and we are working closely with the local transition monitoring committee and other international actors to seek the immediate and unconditional release of those detained and resumption of the civilian-led transition.

A democratic, civilian-led government presents the best opportunity to achieve security and prosperity in Mali and the wider Sahel region. The Malian transition government's commitment to a civilian-led transition and democratic elections in 2022 set the stage for Mali's continued engagement with international partners to advance democracy, human rights, peace, and security efforts. The events of May 24 put that progress at risk.

Following the August 2020 coup d'etat in Mali, the United States restricted assistance to the Government of Mali in accordance with provisions of the annual appropriations acts. We are now suspending security assistance that benefits the Malian Security and Defense Forces that we had continued previously pursuant to available authorities. The United States will also consider targeted measures against political and military leaders who impede Mali's civilian-led transition to democratic governance.

We stand with the people of Mali in their aspirations to achieve democracy, peace, development, and respect for human rights.

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6. Guinea

On September 5, 2021, the State Department issued a press statement on the military seizure of power in Guinea. The statement follows and is available at https://www.state.gov/on-the-military-seizure-of-power-in-guinea/.

The United States condemns today's events in Conakry.

Violence and any extra-constitutional measures will only erode Guinea's prospects for peace, stability, and prosperity. These actions could limit the ability of the United States and Guinea's other international partners to support the country as it navigates a path toward national unity and a brighter future for the Guinean people.

We urge all parties to forego violence and any efforts not supported by the Constitution and stand by the rule of law. We reiterate our encouragement of a process of national dialogue to address concerns sustainably and transparently to enable a peaceful and democratic way forward for Guinea to realize its full potential.

7. Burma

On February 2, 2021, the State Department announced that the recurring military coup restriction on assistance outlined in the annual appropriation act was applicable to Burma. Specifically, the Department press briefing, transcribed at https://www.state.gov/briefings/department-press-briefing-february-2-2021/ includes the following:

> [A]ccording to the annual Department of State Foreign Operations and Related Programs Appropriation Act, it contains a recurring provision that restricting certain assistance to the government of a military – and these are the three criteria we looked at – whose (1) duly elected head of government is (2) deposed by a military coup d'etat or decree, or a coup d'etat or decree in which (3) the military plays a decisive role. So those are the three criteria that individuals here in this building in our [East Asian and Pacific Affairs or] EAP Bureau and the Legal Adviser's Office have been taking a very close look at ever since Sunday night. You were right that we moved expeditiously with this. I can tell you it was an absolute priority for us to determine exactly what happened and to be decisive in calling it what it was.

Also on February 2, 2021, senior State Department officials held a briefing on the assessment of recent events in Burma. The transcript of the briefing is available at https://www.state.gov/briefing-with-senior-state-department-officials-on-the-state-departments-assessment-of-recent-events-in-burma/ and excerpts follow.

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MODERATOR: …As President Biden and Secretary Blinken have said, the United States is deeply concerned by the Burmese military's detention of civilian government leaders, including

State Counsellor Aung San Suu Kyi, and civil society leaders. After a review of all the facts, we have assessed that the Burmese military's actions on February 1st, having deposed the duly elected head of government, constituted a military coup d'etat. The United States will continue to work closely with our partners throughout the region and the world to support respect for democracy and the rule of law in Burma, as well as to promote accountability for those responsible for overturning Burma's democratic transition.

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SENIOR STATE DEPARTMENT OFFICIAL ONE: … we have expressed grave concern regarding the Burmese military's detention of civilian government leaders, including State Counsellor Aung San Suu Kyi, President Win Myint, and civil society leaders.

After a careful review of the facts and circumstances, we have assessed that Aung San Suu Kyi, the leader of Burma's ruling party, and Win Myint, the duly elected head of government, were deposed in a military coup on February 1st. We continue to call on the Burmese military leadership to release them and all other detained civil society and political leaders immediately and unconditionally.

We have denounced in the strongest possible terms Burma's military leaders for seeking to reject the will of the people of Burma as expressed in democratic elections on November 8th, and for taking control of the Government of Burma. We continue to stand with the people of Burma, as we have done for decades, in their efforts to achieve democracy, freedom, peace, and development.

This assessment triggers certain restrictions in foreign assistance to the Government of Burma, as it should, and in addition, we will undertake a broader review of our assistance programs to ensure they align with recent events. At the same time, we will continue programs that benefit the people of Burma directly, including humanitarian assistance and democracy support programs that benefit civil society.

A democratic, civilian-led government has always been Burma's best opportunity to address the problems the country faces – weak democratic institutions, intercommunal conflict and strife, an underdeveloped and closed-off economy, and a long history of human rights abuses committed by the military.

The return to civilian rule in 2015 enabled Burma to re-engage with countries and businesses across the globe and move beyond relying on others in the region that do not respect human rights and democratic institutions.

The military's actions over the last week, and frankly prior to that, have put that progress at grave risk. A very small circle of Burma's military leaders have chosen their own interests over the will and well-being of the people.

We reject any attempt by the military to alter the outcome of the November 2020 election in Burma. And, as President Biden has said, we will take action against those responsible, including through a careful review of our current sanctions posture as it relates to Burma's military leaders and companies associated with them. Most importantly, we will continue to stand with the people of Burma. …

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SENIOR STATE DEPARTMENT OFFICIAL ONE: This is [Senior State Department Official One]. So the coup restrictions apply to U.S. foreign assistance for the Government of Burma, and we'll continue programs for the – for the people of Burma that

benefit them directly, including humanitarian assistance to Rohingya and other populations in need. But we will be conducting review of all our assistance programs for Burma. I don't have a timeline for you on that, but we're going to be guided by our longstanding commitment to the people of Burma and their aspirations for democracy, peace, justice, and development.

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SENIOR STATE DEPARTMENT OFFICIAL ONE: …the Government of Burma – including the Burmese military – is already subject to a number of foreign assistance restrictions, including statutory restrictions on military assistance, due to its human rights record. I mean, those who led the military seizure of the power in Burma are many of the same individuals responsible for previous abuses, including atrocities against the Rohingya. And we sanctioned the four senior military leaders with Global Magnitsky sanctions already due to their actions with the Rohingya.

We don't have foreign assistance programs that directly benefit the Burmese military as an institution. As part of our review, we'll look at any programs that indirectly benefit the military or individual low-level officers.

In terms of humanitarian assistance to the Rohingya, absolutely not. That assistance will not be affected. Humanitarian assistance is generally exempted from such coup restrictions or any kinds of sanctions. And our assistance review will aim to combine the support to the most vulnerable population and people. That's our priority going forward. …

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SENIOR STATE DEPARTMENT OFFICIAL ONE: … the vast majority of our assistance goes through civil society institutions. It doesn't go directly to the Government of Burma.

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In terms of the various sanctions, since the Rohingya crisis and frankly since the earlier human rights abuses, our cooperation with the Burmese military has been extremely limited to virtually non-existent. So … the existing sanctions regimes that we have in place, including the Global Magnitsky sanctions I mentioned plus other sanctions on human rights abuses, have meant that we have very little to no direct contact or work with Burmese military. ….

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On February 23, 2021, the foreign ministers of the G7 (Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States) and the high representative of the European Union issued a joint statement on Burma. The statement is available as a Department of State media note at https://www.state.gov/g7-foreign-ministers-statement-on-burma/ and excerpted below.

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We … firmly condemn violence committed by Myanmar's security forces against peaceful protests. We offer condolences for the loss of life. The military and the police must exercise utmost restraint and respect human rights and international law. Use of live ammunition against

unarmed people is unacceptable. Anyone responding to peaceful protests with violence must be held to account.

We condemn the intimidation and oppression of those opposing the coup. We raise our concern at the crackdown on freedom of expression, including through the internet blackout and draconian changes to the law that repress free speech. The systematic targeting of protesters, doctors, civil society and journalists must stop, and the state of emergency must be revoked. We continue to call for full humanitarian access to support the most vulnerable.

We remain united in condemning the coup in Myanmar. We call again for the immediate and unconditional release of those detained arbitrarily, including State Counsellor Aung San Suu Kyi and President Win Myint, and continue to stand with the people of Myanmar in their quest for democracy and freedom.

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8. Afghanistan

On August 30, 2021, Secretary Blinken announced that the United States would be suspending operations at Embassy Kabul and that a team in Doha, Qatar would work on diplomatic issues related to Afghanistan. See remarks available at https://www.state.gov/secretary-of-antony-j-blinken-remarks-on-afghanistan/. See Chapter 2 for discussion of the arrangement with Qatar on the protection of U.S. interests in Afghanistan ("protecting power arrangement" or "PPA").

B. STATUS ISSUES

1. Ukraine

On February 11, 2021, Rodney Hunter of the U.S. Mission to the United Nations delivered remarks at a UN Security Council briefing on the Ukraine conflict and implementation of the Minsk agreements. His remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-ukraine-conflict-and-implementation-of-the-minsk-agreements-via-vtc/.

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Madam President, in 2014, Russia occupied Crimea and instigated a conflict in the Donbas region. Russia has blocked meaningful progress in diplomatic negotiations while arming, training, funding, and leading its proxy forces and supporting the self-proclaimed "authorities" on the ground.

Since 2014, Russia's actions in eastern Ukraine have led to the deaths of more than 13,000 people. Its actions have displaced 1.5 million Ukrainians and left an additional 3.4 million in need of humanitarian assistance.

Russia has stepped up its efforts to destabilize Ukraine and undermine Ukraine's sovereignty over the past year. Russia continues to deny that it controls the conflict in eastern Ukraine and falsely presents itself as a mediator to this conflict, even though it is, in fact, the instigator.

We have witnessed Russia act disingenuously toward negotiations as well. President Putin agreed at the 2019 Normandy Summit to take steps to improve humanitarian and security situations on the ground. However, Russia subsequently sought to hinder the implementation of those very same steps at the Trilateral Contact Group, both directly and through its proxies. Russia stalled the opening of new civilian crossing points along the Line of Contact and blocked additional exchanges of detainees. President Putin has even refused to endorse the agreement on ceasefire-strengthening measures Ukraine secured through the Trilateral Contact Group last July.

Meanwhile, Russia escalated its oppression of any dissent to its brutal occupation of Crimea. The United States continues to condemn the human rights abuses taking place under Russia's repressive occupation. We urge Russia to release the more than 100 Ukrainian political prisoners it is holding, and to end its campaign of intimidation against Crimean Tatars and opponents of their occupation.

Madam President, the United States reaffirms its unwavering commitment to Ukraine's sovereignty and territorial integrity. We will never recognize Russia's attempted annexation of Crimea. As a result, U.S. sanctions on Russia in response to its aggression in eastern Ukraine and occupation of Crimea will remain in place unless – and until – Russia reverses course.

We continue to support the Minsk agreements as the way forward in eastern Ukraine. The resolution to this conflict must be a diplomatic one, and one which respects Ukraine's sovereignty and territorial integrity.

We are also greatly concerned by the restrictions on access that Russia and its proxies continue to impose on humanitarian workers and OSCE Special Monitoring Mission personnel. This is especially troubling as it comes at a time when vulnerable conflict-affected populations face even greater threats to their lives and livelihoods due to COVID-19. Russia and its proxies have used the guise of "COVID-19 mitigation measures" to further limit the life-saving operations of humanitarian actors, contrary to humanitarian principles and the OSCE's mandate in Ukraine.

Russia must immediately cease its aggression in eastern Ukraine and end its occupation of Crimea. We call on Russia to withdraw its forces from Ukraine, cease its support for its proxies and other armed groups, and implement all of the commitments it made under the Minsk agreements. We further call on Russia to grant and facilitate safe, timely, and unhindered access to all humanitarian personnel and OSCE and UN monitors throughout the Ukrainian territory that Russia controls, including parts of Donetsk, Luhansk, and occupied Crimea.

Madam President, the United States looks forward to continuing to support our Ukrainian partners in their efforts to uphold Ukraine's sovereignty and restore its territorial integrity. To this end, we welcome Ukraine's Crimean Platform initiative, and hope like-minded partners will consider joining this diplomatic effort to push back on Russia's aggression and make clear that the international community will not tolerate Russia's brutal occupation.

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On March 26, 2021, the U.S. Mission to the UN issued the joint statement by multiple UN permanent missions on the occasion of the seventh anniversary of the

adoption of UN General Assembly Resolution 68/262, "Territorial Integrity of Ukraine." The joint statement is available at https://usun.usmission.gov/joint-statement-on-the-occasion-of-the-seventh-anniversary-of-the-adoption-of-un-general-assembly-resolution-68-262-territorial-integrity-of-ukraine/. The following is a joint statement by the Permanent Missions of the Republic of Albania, Australia, Austria, Belgium, the Republic of Bulgaria, Canada, Costa Rica, the Republic of Croatia, the Czech Republic, Denmark, the Republic of Estonia, the Federated States of Micronesia, Finland, France, Georgia, Germany, Greece, Iceland, Ireland, Italy, Japan, the Republic of Latvia, the Principality of Liechtenstein, the Republic of Lithuania, Luxembourg, the Republic of Malta, the Republic of Marshall Islands, the Republic of Moldova, the Principality of Monaco, Montenegro, Kingdom of the Netherlands, New Zealand, the Republic of North Macedonia, Norway, the Republic of Poland, Portugal, Romania, Slovakia, the Republic of Slovenia, Spain, Sweden, the Republic of Turkey, Ukraine, the United Kingdom, and the United States of America.

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Seven years ago, on 27 March 2014, the United Nations General Assembly by an overwhelming majority of UN member-states adopted resolution 68/262 "Territorial Integrity of Ukraine". By this resolution, the international community affirmed, loud and clear, its full commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders.

Despite the clear demands of the General Assembly, the Russian Federation has not stopped its temporary occupation of Crimea. On the contrary, it continues flagrant human rights violations and abuses, and military build-up on the peninsula.

These actions of the Russian Federation that undermine Ukraine's sovereignty and territorial integrity, and its violations and abuses of the human rights of persons belonging to ethnic and religious minorities on the peninsula and all others who oppose Russia's occupation, prompted the General Assembly to adopt resolutions 71/205, 72/190, 73/263, 74/168, 75/192 "Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine" and 73/194, 74/17, 75/29, "Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov". In these resolutions, the General Assembly condemned the temporary occupation of Crimea and urged the Russian Federation, as the occupying power, to uphold all its obligations under applicable international law.

Russia's actions have been of global concern, inconsistent with international law, including the UN Charter, and are also contrary to the Helsinki Final Act, as well as international humanitarian and human rights law. Russia's attempts to legitimize the attempted annexation of Crimea are not, and will not be recognized.

We also firmly condemn Russia's continued destabilization of Ukraine, especially Russia's actions in certain areas of the Donetsk and Luhansk regions, disregarding the commitments it made under the Minsk agreements. We reiterate our support for the efforts of the Normandy format and our firm commitment to a peaceful resolution of the conflict in eastern Ukraine, in line with the Minsk agreements and with full respect of Ukraine's sovereignty and territorial integrity. Russia is a party to the conflict in eastern Ukraine, not a mediator.

Yet again, we urge the Russian Federation to immediately end its occupation of the Autonomous Republic of Crimea and the city of Sevastopol, and fully implement the relevant UN General Assembly resolutions on the situation in Crimea. We welcome in principle Ukraine's initiative to establish an International Crimean Platform to consolidate the international community's efforts on Crimea.

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On April 12, 2021, the State Department published as a media note the joint statement of the G7 foreign ministers (Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States) on the situation along Ukraine's borders. The media note is available at https://www.state.gov/g7-foreign-ministers-statement-on-the-situation-along-ukraines-borders/. The April 12, 2021 G7 joint statement follows.

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We, the G7 foreign ministers of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States of America and the High Representative of the European Union are deeply concerned by the large ongoing build-up of Russian military forces on Ukraine's borders and in … Crimea.

These large-scale troop movements, without prior notification, represent threatening and destabilising activities. We call on Russia to cease its provocations and to immediately de-escalate tensions in line with its international obligations. In particular, we call on Russia to uphold the OSCE principles and commitments that it has signed up to on transparency of military movements and to respond to the procedure established under Chapter III of the Vienna Document.

Recalling our last statement of 18 March, we reaffirm our unwavering support for the independence, sovereignty and territorial integrity of Ukraine within its internationally recognised borders. We support Ukraine's posture of restraint.

We underline our strong appreciation and continued support for France's and Germany's efforts through the Normandy Process to secure the full implementation of the Minsk agreements, which is the only way forward for a lasting political solution to the conflict. We call on all sides to engage constructively in the Trilateral Contact Group on the OSCE's proposals to confirm and consolidate the ceasefire.

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On April 13, 2021, Secretary Blinken met with Ukrainian Foreign Minister Dmytro Kuleba in Brussels. The State Department spokesperson's readout of the meeting is available athttps://www.state.gov/secretary-blinkens-meeting-with-ukrainian-foreign-minister-kuleba/ and includes the following:

Secretary Blinken affirmed the United States' unwavering support for Ukraine's sovereignty and territorial integrity in the face of Russia's ongoing aggression.

The Secretary expressed concern about Russia's deliberate actions to escalate tensions with Ukraine, including through its aggressive rhetoric and disinformation, increasing ceasefire violations, and movement of troops in occupied Crimea and near Ukraine's borders. Secretary Blinken and Foreign Minister Kuleba discussed the importance of advancing rule of law and economic reforms to strengthen Ukraine's institutions, support anti-corruption efforts, and further its Euro-Atlantic integration aspirations.

On November 10, 2021, Secretary Blinken and Minister Kuleba signed a new U.S.-Ukraine Charter on Strategic Partnership. This Charter replaces the U.S.-Ukraine Charter on Strategic Partnership, signed at Washington on December 19, 2008. The United States and Ukraine intend to revise this Charter every ten years or earlier if both sides believe that changes are needed. The U.S.-Ukraine Charter on Strategic Partnership follows and is available at https://www.state.gov/u-s-ukraine-charter-on-strategic-partnership/.

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Preamble

The United States and Ukraine:

1. Reaffirm the importance of our relationship as friends and strategic partners, based both on our shared values and common interests, including a commitment to a Europe that is whole, free, democratic, and at peace. Reiterate that the strategic partnership existing between our two nations is critical for the security of Ukraine and Europe as a whole.
2. Underscore that our partnership is founded on common democratic values, respect for human rights and the rule of law, and a commitment to Ukraine's implementation of the deep and comprehensive reforms necessary for full integration into European and Euro-Atlantic institutions in order to ensure economic prosperity for its people.
3. Commend Ukraine's significant progress towards improving its democracy as well as its commitment to continuing democratic reform, which are crucial for advancing democracy throughout Eastern Europe.
4. Emphasize unwavering commitment to Ukraine's sovereignty, independence, and territorial integrity within its internationally recognized borders, including Crimea and extending to its territorial waters in the face of ongoing Russian aggression, which threatens regional peace and stability and undermines the global rules-based order.
5. Declare our determination to deepen our strategic partnership by expanding bilateral cooperation in political, security, defense, development, economic, energy, scientific, educational, cultural, and humanitarian spheres.
6. Affirm the commitments made to strengthen the Ukraine-U.S. strategic partnership by Presidents Zelenskyy and Biden on September 1, 2021.
7. Intend to use the Strategic Partnership Commission (SPC), its Working Groups and other bilateral mechanisms to maximize the potential of our cooperation and address the challenges outlined in this Charter.

Section I: Principles of Cooperation

This Charter is based on core principles and beliefs shared by both sides:

1. Support for each other's sovereignty, independence, territorial integrity, and inviolability of borders constitutes the foundation of our bilateral relations.
2. Our friendship and strategic relationship stem from our fundamental mutual understanding and appreciation for the shared belief that democracy and rule of law are the chief guarantors of security, prosperity, and freedom.
3. Cooperation between democracies on defense and security is essential to respond effectively to threats to peace and stability.
4. A strong, independent, and democratic Ukraine, capable of defending its sovereignty and territorial integrity and promoting regional stability, contributes to the security and prosperity not only of the people of Ukraine, but of a Europe whole, free, democratic, and at peace.

Section II: Security and Countering Russian Aggression

The United States and Ukraine share a vital national interest in a strong, independent, and democratic Ukraine. Bolstering Ukraine's ability to defend itself against threats to its territorial integrity and deepening Ukraine's integration into Euro-Atlantic institutions are concurrent priorities.

The United States recognizes Ukraine's unique contribution to nuclear nonproliferation and disarmament and reaffirms its commitments under the "Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons" (the Budapest Memorandum) of December 5, 1994.

Guided by the April 3, 2008 Bucharest Summit Declaration of the NATO North Atlantic Council and as reaffirmed in the June 14, 2021 Brussels Summit Communique of the NATO North Atlantic Council, the United States supports Ukraine's right to decide its own future foreign policy course free from outside interference, including with respect to Ukraine's aspirations to join NATO.

1. The United States and Ukraine intend to continue a range of substantive measures to prevent external direct and hybrid aggression against Ukraine and hold Russia accountable for such aggression and violations of international law, including the seizure and attempted annexation of Crimea and the Russia-led armed conflict in parts of the Donetsk and Luhansk regions of Ukraine, as well as its continuing malign behavior. The United States intends to support Ukraine's efforts to counter armed aggression, economic and energy disruptions, and malicious cyber activity by Russia, including by maintaining sanctions against or related to Russia and applying other relevant measures until restoration of the territorial integrity of Ukraine within its internationally recognized borders.
2. The United States does not and will never recognize Russia's attempted annexation of Crimea and reaffirms its full support for international efforts, including in the Normandy Format, aimed at negotiating a diplomatic resolution to the Russia-led armed conflict in the Donetsk and Luhansk regions of Ukraine on the basis of respect for international law, including the UN Charter. The United States supports Ukraine's efforts to use the Crimea Platform to coordinate international efforts to address the humanitarian and security costs of Russia's occupation of Crimea, consistent with the Platform's Joint Declaration.
3. The United States and Ukraine endorse the 2021 Strategic Defense Framework as the foundation of enhanced Ukraine-U.S. defense and security cooperation and intend to work to advance shared priorities, including implementing defense and defense industry reforms, deepening cooperation in areas such as Black Sea security, cyber defense, and intelligence sharing, and countering Russia's aggression.

4. The United States and Ukraine are key partners in the broader Black Sea region and will seek to deepen cooperation with Black Sea Allies and partners to ensure freedom of navigation and effectively counter external threats and challenges in all domains.
5. The United States remains committed to assisting Ukraine with ongoing defense and security reforms and to continuing its robust training and exercises. The United States supports Ukraine's efforts to maximize its status as a NATO Enhanced Opportunities Partner to promote interoperability.
6. Ukraine intends to continue to enhance democratic civilian control of the military, reform its security service, and modernize its defense acquisition processes to advance its Euro-Atlantic aspirations.
7. The United States and Ukraine underline the importance of close cooperation within international institutions, including the United Nations, the OSCE and the Council of Europe, and intend to multiply efforts in finding new approaches and developing joint actions in preventing individual states from trying to destroy the rule-based international order and forcefully to revise internationally recognized state borders.
8. The United States and Ukraine intend to support accountability for those responsible for abuses of human rights in the territories of Ukraine temporarily occupied by Russia, and to support the release of political prisoners and hostages held in these territories. The United States intends to continue to support impartial criminal investigations conducted by war crimes units under the Office of the General Prosecutor.
9. The United States intends to continue assisting Ukraine in providing humanitarian support to people affected or displaced by the Russia-led armed conflict in the Donetsk and Luhansk regions as the government of Ukraine increases its provision of life-saving assistance in the form of food, shelter, safe drinking water, and protection for the most vulnerable, including the elderly.
10. The United States remains committed to enhancing Ukraine's ability to secure and police its borders, and to pursuing greater information sharing and law enforcement cooperation to counter international criminal and terrorist activity, including the trafficking of people, weapons, and narcotics.
11. The United States and Ukraine pledge to combat the proliferation of weapons of mass destruction and secure advanced technologies by adhering to international nonproliferation standards, strengthening, and effectively implementing export control regimes, and partnering to manage emerging technology risks.
12. The United States and Ukraine are committed to further developing their partnership in cyber security, countering hybrid threats, combating the spread of disinformation while upholding freedom of expression, and strengthening Ukraine's cyber security infrastructure.

Section III: Democracy and Rule of Law

The United States and Ukraine are bound by the universal values that unite the free people of the world: respect for democracy, human rights, and the rule of law. Strengthening the rule of law, promoting reform of the legal system and of law enforcement structures, and combating corruption are crucial to the prosperity of Ukraine and its people.

1. The United States acknowledges the progress made by Ukraine in strengthening its democratic institutions and welcomes the important steps taken by Ukraine to develop an effective national justice and anti-corruption system. The United States and Ukraine recognize the need for Ukraine to further pursue a comprehensive reform agenda to keep transforming the country and ensure a bright future for all people in Ukraine.

2. The United States intends to continue to support Ukraine's commitment to strengthen efforts to combat corruption, including through independent media and journalism, and empower institutions that prevent, investigate, prosecute, and adjudicate corruption cases to bolster faith in rule of law, build a competitive economy, and to integrate Ukraine fully into European and Euro-Atlantic structures.
3. The United States recognizes Ukraine's progress on reforms, including steps forward on defense and defense industry reforms, the establishment of independent anti-corruption institutions, land reform, local governance and decentralization, and digitalization. The United States intends to continue supporting further law enforcement and justice sector reforms in line with international best practices to strengthen public trust in the institutions responsible for upholding the rule of law in Ukraine.
4. The United States and Ukraine intend to continue to cooperate closely to promote remembrance, including increased public awareness of the Holodomor of 1932-1933 in Ukraine, and other brutalities committed within and against Ukraine in the past.
5. The United States and Ukraine confirm the importance of advancing respect for human rights, and fundamental freedoms in accordance with international commitments and obligations, as well as fighting racism, xenophobia, anti-Semitism, and discrimination, including against Roma and members of the LGBTQI+ communities.
6. The United States and Ukraine share a desire to strengthen our people-to-people ties and enhance our cultural, educational, and professional exchanges that promote innovation, scientific research, entrepreneurship and increase mutual understanding between our people.

Section IV: Economic Transformation

The United States and Ukraine intend to expand cooperation to support economic reform, enhance job creation, foster economic growth, support efforts under United States-Ukraine Trade and Investment Council to expand market access for goods and services and to improve the investment environment, including through enhanced protection and enforcement of intellectual property. Ukraine's continued adoption and implementation of reforms are critical to ensuring that its economy delivers for all of its people. The United States supports the ambitious transformation plan for Ukraine's economy aimed at reforming and modernizing key sectors and promoting investments. The United States and Ukraine recognize the need to advance Ukraine's energy security and to take urgent action to tackle climate change through sustainable, effective, and durable policy solutions underpinned by ongoing corporate governance reform.
1. The United States and Ukraine intend to strengthen economic and commercial ties, promote liberalization of trade conditions and facilitate access to markets for goods and services. The United States intends to support Ukraine's efforts to create a robust investment environment built on the principles of rule of law, a fair judiciary, transparency, respect for workers' rights, innovations and digitalization, and strong protections for intellectual property.
2. Ukraine pledges to prioritize efforts to reform corporate governance in its state-owned enterprises and banks, which are intended to promote robust and inclusive economic growth in the Ukrainian economy and the bilateral U.S.-Ukrainian economic relationship. The United States intends to continue working with Ukraine in these efforts. The United States intends to also expand its support to privatization initiatives, work with Ukraine to create an environment that attracts U.S. investment in these initiatives, support private sector development, and strengthen financial sector supervision.
3. The United States is committed to the energy security of Ukraine and intends to support Ukraine's efforts to become energy independent, decarbonize its economy, deregulate its energy

sector, diversify energy supplies, integrate with Europe's energy grid, modernize its nuclear sector, manage a just transition from coal, and prevent the Kremlin's use of energy as a geopolitical weapon. The Strategic Energy and Climate Dialogue is designed to accelerate these efforts.

4. The United States and Ukraine intend to work together to promote commercial partnership between Ukrainian and U.S. companies to significantly increase their participation in both economies, particularly, projects in energy, agriculture, infrastructure, transportation, safety and security, healthcare, and with a special focus on digitalization.

5. The United States and Ukraine intend to continue cooperation in the exploration and use of outer space for peaceful purposes, and in implementing other mutually beneficial initiatives within bilateral science and technology cooperation.

6. The United States and Ukraine reaffirm the need to strengthen Ukraine's healthcare infrastructure and its capacity to react to and manage pandemics, such as the COVID-19 pandemic. The United States intends to continue to explore pathways for providing Ukraine with assistance to advance these objectives.

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On September 5, 2021, the State Department issued a press statement condemning the detention of Crimean Tatar leaders by Russian occupation authorities. The statement is available at https://www.state.gov/united-states-condemns-the-unjust-detention-of-crimean-tatar-leaders/ and includes the following:

> The United States strongly condemns the September 4 detention of the Deputy Chairman of the Crimean Tatar Mejlis, Nariman Dhezlal, and at least 45 other Crimean Tatars by Russian occupation authorities in Crimea. We call on the Russian occupation authorities to release them immediately. This is the latest in a long line of politically-motivated raids, detentions, and punitive measures against the Mejlis and its leadership, which has been targeted for repression for its opposition to Russia's attempted annexation of Crimea. As the United States reaffirmed during the August 23 Crimea Platform Summit, Crimea is Ukraine, and the United States is unwavering in its support for Ukraine's sovereignty and territorial integrity.

On September 17, 2021, the State Department issued a further statement, this one expressing regret at the Russian Federation blocking consensus on extension of the OSCE Border Observer Mission at Russian checkpoints in eastern Ukraine. The statement is available at https://www.state.gov/planned-closure-of-the-osce-border-observer-mission/ and excerpted below.

> The United States deeply regrets the decision by the Russian Federation to block consensus to extend the OSCE Border Observer Mission at the Russian Checkpoints Gukovo and Donetsk, which was announced by the OSCE Chair in Office, in Vienna yesterday. The OSCE Border Observer Mission plays a valuable role in providing transparency on movements of people and material between

the Russian Federation and areas in eastern Ukraine, controlled by Russia-led forces. This small mission has been in operation since July 2014, and its work is fundamentally connected to the commitment Russia made when it signed the Minsk Protocol in September 2014, which "ensure[s] permanent monitoring on the Ukrainian Russian state border and verification by the OSCE." Russia's objection to continuing the Border Observer Mission's mandate raises deep concerns about its intentions to fulfill its international commitments and engage constructively with Ukraine. We continue to call on Russia to allow the Border Observer Mission mandate to be extended, cease its ongoing aggression against Ukraine, and contribute to a peaceful resolution to the conflict.

On December 1, 2021, Secretary Blinken delivered remarks at the NATO ministerial held in Riga, Latvia. His remarks are available at https://www.state.gov/secretary-antony-j-blinken-at-a-press-availability-at-the-nato-ministerial/ and excerpted below.

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First, on Russia and Ukraine. We're deeply concerned by evidence that Russia has made plans for significant aggressive moves against Ukraine. The plans include efforts to destabilize Ukraine from within, as well as large scale military operations.

Now, we've seen this playbook before, in 2014 when Russia last invaded Ukraine. Then, as now, they significantly increased combat forces near the border. Then, as now, they intensified disinformation to paint Ukraine as the aggressor to justify pre-planned military action. We've seen that tactic again in just the past 24 hours.

And in recent weeks, we've also observed a massive spike – more than tenfold – in social media activity pushing anti-Ukrainian propaganda, approaching levels last seen in the leadup to Russia's invasion of Ukraine in 2014.

Now, we don't know whether President Putin has made the decision to invade. We do know that he is putting in place the capacity to do so on short order should he so decide. So despite uncertainty about intentions and timing, we must prepare for all contingencies while working to see to it that Russia reverses course.

The United States has been engaging intensively with allies and partners on this issue, and directly with President Putin. President Biden convened the leaders of the United Kingdom, France, and Germany on the situation in Ukraine at the G20 meeting in Rome a few weeks ago. Then, at the President's direction, CIA Director Burns traveled to Moscow to convey our concerns, our commitment to a diplomatic process, and the severe consequences should Russia follow the path of confrontation and military action. We've made it clear to the Kremlin that we will respond resolutely, including with a range of high-impact economic measures that we've refrained from using in the past.

Following my own meetings with President Zelenskyy and Foreign Minister Kuleba last month, other senior State Department officials have been enegaging with Ukrainian partners, with NATO Allies, and with the Russians. And I came here to Riga to consult and coordinate with our Allies, and it is evident they are as resolute as we are. I heard that loud and clear in our

discussions yesterday and today from virtually all NATO members, and in direct consultations with France, Germany, and the United Kingdom.

We are prepared to impose severe costs for further Russian aggression in Ukraine. NATO is prepared to reinforce its defenses on the eastern flank.

My consultations will continue tomorrow at the OSCE foreign ministers meeting, where I'll also meet with Ukrainian Foreign Minister Kuleba and Russian Foreign Minister Lavrov. The United States remains unwavering in our support for Ukraine's sovereignty and territorial integrity, and committed to our security partnership with Ukraine. And just as we've been clear with Moscow, we're also urging Ukraine to continue to exercise restraint. Because again, the Russian playbook is to claim provocation for something that they were planning to do all along.

Diplomacy is the only responsible way to resolve this potential crisis. The most promising avenue for diplomacy is for Russia and Ukraine to return to dialogue in the context of the Minsk agreements, which aims to end the armed conflict in eastern Ukraine. President Putin said recently, and I quote, "There is no alternative to the full implementation of the Minsk agreements." President Zelenskyy has also reiterated Ukraine's continued commitment to Minsk.

The United States reaffirms our support for diplomacy and for implementing the Minsk agreements. We call on all sides to restore the ceasefire to July 2020 levels. And we urge Russia to de-escalate, to reverse the recent troop buildup, to return forces to normal peace-time positions, to pull back heavy weapons and forces from the line of contact in eastern Ukraine, to refrain from further intimidation and attempts to destabilize Ukraine internally, and to leave plans for further military action behind.

That's how we can turn back from a crisis that would have far-reaching and long-lasting consequences for our bilateral relations with Moscow, for Russia's relations with Europe, for international peace and security.

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On December 12, 2021, the G7 issued a further statement on Russia and Ukraine. The joint statement is available as a State Department media note at https://www.state.gov/g7-foreign-ministers-statement-on-russia-and-ukraine/ and excerpted below.

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We, the G7 Foreign Ministers of Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States of America, and the High Representative of the European Union, are united in our condemnation of Russia's military build-up and aggressive rhetoric towards Ukraine.

We call on Russia to de-escalate, pursue diplomatic channels, and abide by its international commitments on transparency of military activities as President Biden did in his call with President Putin on 7 December. We reconfirm our support for the efforts of France and

Germany in the Normandy Format to achieve full implementation of the Minsk Agreements in order to resolve the conflict in eastern Ukraine.

Any use of force to change borders is strictly prohibited under international law. Russia should be in no doubt that further military aggression against Ukraine would have massive consequences and severe cost in response.

We reaffirm our unwavering commitment to Ukraine's sovereignty and territorial integrity, as well as the right of any sovereign state to determine its own future. We commend Ukraine's posture of restraint.

We will intensify our cooperation on our common and comprehensive response.

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On December 17, 2021, a senior administration official held a special briefing on U.S. diplomatic engagement regarding Ukraine and the U.S. commitment to Ukraine's sovereignty, territorial integrity, and independence. The transcript of the briefing is available at https://www.state.gov/senior-administration-official-on-u-s-diplomatic-engagement-regarding-our-ongoing-commitment-to-ukraines-sovereignty-territorial-integrity-and-independence/

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As you know, we remain gravely concerned with the large and unprovoked Russian buildup on Ukraine's borders. We are working intensively with our allies and partners on this issue. We are also concerned about Russia's increasingly harsh rhetoric and pushing a false narrative that Ukraine is somehow seeking to provoke a conflict with Russia. I'd like to be clear: This situation is the responsibility of the Russian Federation. There is no aggressive action on the part of the Ukrainians.

We have been clear with Russia and with our allies and partners that we support diplomacy as a way to de-escalate, ease tensions, and end this aggression against Ukraine. That said, if diplomacy fails, as the G7 said on December 12, as the North Atlantic Council said yesterday in its statement, there will be – if there is any further aggression against Ukraine, that will have massive consequences and will carry a high price.

With regard to the diplomacy, in addition to the stops in Kyiv and Moscow that Assistant Secretary of State for European Affairs Karen Donfried made earlier in this week, she was also in Brussels yesterday talking to both the EU and our NATO Allies, and that resulted in the statement that you saw yesterday.

National Security Advisor Sullivan spoke with Russian Presidential Foreign Policy Advisor Ushakov yesterday as well and has spoken to Ukrainian National Security Advisor Yermak.

We are focused on, as I said, seeing how the United States might be able to support implementation of the Minsk agreements and support Normandy allies France and Germany in their efforts there. Just to underscore, the Normandy Format remains the essential format for the Minsk negotiations, but the U.S. is prepared to use our bilateral channels to Moscow and to Kyiv to support if we can.

We are particularly interested as the Normandy powers are in seeing a Christmas ceasefire and a prisoner exchange. That's something that's under discussion. And we are also – as you know, we received some concrete proposals from the Russians when Assistant Secretary Donfried was in Moscow. We have shared those with our allies.

As we have said, we are prepared to discuss them. That said, there are some things in those documents that the Russians know will be unacceptable, and they know that. But there are other things that we are prepared to work with and that merit some discussion. That said, we will do this with our allies and partners. Nothing about European security without Europeans in the room.

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2. Georgia

On June 16, 2021, Secretary Blinken made determinations that the Government of Nicaragua, the Government of Nauru, and the Government of the Syrian Arab Republic have all recognized the independence of, or have established diplomatic relations with, the Russian Federation occupied Georgian territories of Abkhazia and Tskhinvali Region/South Ossetia pursuant to section 7047(c)(1) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2021 (Div. K, Pub. L. 116–260) ("SFOAA") and similar provisions in prior years' SFOAAs. 86 Fed. Reg. 40,226-27 (July 27, 2021). Absent a waiver, foreign assistance for the central government of a country subject to such a determination is restricted.

On April 18, 2021, the State Department issued as a media note the joint statement of the Department spokesperson and the EU external affairs spokesperson on the political impasse in Georgia. The statement follows, and is available at https://www.state.gov/statement-on-georgias-political-impasse/.

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After nearly six months of negotiations, the citizens of Georgia have made clear that they want the political crisis to end, and for all elected Members to work together in Parliament and address the serious challenges facing the country, including the regional challenges, COVID, and the economic crisis.

With this in mind, the European Union and the United States call on all Members of Georgia's Parliament to sign the agreement that European Council President Michel will propose today. This is an agreement all Members can sign in good faith rather than a unilateral action that undermines the goal of a broad-based agreement.

The institutional reforms in the agreement represent important progress for Georgia's democratic development and are of significant benefit for its citizens, helping to create a more independent judiciary, stronger electoral processes, and a Parliament that can better reflect the voices of all people of Georgia.

Accepting this compromise demonstrates courage and a commitment by all parties to put the needs of the citizens of Georgia first, ahead of the interests of any one political party.

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On July 15, 2021, the State Department issued a press statement on recent judicial appointments in Georgia. The statement follows and is available at https://www.state.gov/recent-judicial-appointments-in-georgia/.

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The United States is deeply troubled by the Georgian Parliament's July 12 approval of six Supreme Court nominees, in contravention of the April 19 agreement between ruling and opposition party representatives.

Mediated by the EU and the United States under the auspices of European Council President Charles Michel, the April 19 agreement committed the signatories to pause "all ongoing appointments" to the Supreme Court until passage of "ambitious judicial reform" in a broad, inclusive, and multiparty reform process.

We urge Georgia's authorities to implement the April 19 agreement, including by suspending Supreme Court appointments pending comprehensive, transparent, and inclusive judicial reform. This is what Georgia's political leaders, including the ruling party, agreed to do. Failure to do so would further undermine the Georgian public's and international community's confidence in Georgia's judiciary and risk undermining Georgia's democratic development. Incomplete implementation of the April 19 agreement could also weaken investor confidence and diminish the resilience of Georgia's political and social institutions.

The United States calls on Georgian authorities to restore their commitment to democratic principles and the rule of law, while reinvigorating their partnership with the United States and international community.

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3. Armenia and Azerbaijan

On June 12, 2021, Secretary Blinken welcomed the release by Azerbaijan of 15 Armenian detainees and Armenia's decision to provide information to facilitate humanitarian demining. The statement, available at https://www.state.gov/united-states-welcomes-actions-by-armenia-and-azerbaijan/, goes on to say:

> We are grateful to Prime Minister Irakli Garibashvili and the Government of Georgia for the essential role Georgia played in facilitating these steps, which bring the people of the region closer to the peaceful and prosperous future they deserve.
>
> The United States is pleased to support these steps and hopes they will lay the groundwork for additional cooperation. We continue to call for the return of all detainees and stand ready to assist the countries of the region in their efforts to continue cooperation and resolve outstanding issues between them.

> We also continue to urge Armenia and Azerbaijan to reengage in substantive negotiations under the auspices of the OSCE Minsk Group Co-Chairs to negotiate a comprehensive political settlement to the conflict.

On July 28, 2021, the State Department issued a press statement on the escalation of violence along the international border between Armenia and Azerbaijan. The statement, available at https://www.state.gov/escalation-of-violence-along-international-border-between-armenia-and-azerbaijan/, follows:

> The United States condemns the recent escalation of violence along the international border between Armenia and Azerbaijan. We call on Armenia and Azerbaijan to uphold their ceasefire commitments by taking immediate steps to de-escalate the situation.
>
> Continued tensions along the Armenia-Azerbaijan border underscore the fact that only a comprehensive resolution that addresses all outstanding issues can normalize relations between the two countries and allow the people of the region to live together peacefully. The United States urges Armenia and Azerbaijan to return as soon as possible to substantive discussions under the auspices of the OSCE Minsk Group Co-Chairs to achieve a long-term political settlement to the conflict.

On September 27, 2021, Principal Deputy Assistant Secretary of European and Eurasian Affairs Dereck Hogan and National Security Council Senior Director for Europe Amanda Sloat, met with OSCE Minsk Group Co-Chairs Stephane Visconti of France, Andrew Schofer of the United States, and Igor Khovaev of the Russian Federation, as well as Personal Representative of the OSCE Chairperson in Office Andrzej Kasprzyk. The State Department media note of that same date, available at https://www.state.gov/principal-deputy-assistant-secretary-hogan-meets-osce-minsk-group-co-chairs/, provides the following readout of their meeting:

> The co-chairs discussed their successful facilitation of the first joint meeting of the Armenian and Azerbaijani Foreign Ministers since November 2020, held last week on the sidelines of the UN General Assembly. They also noted that September 27 is the one-year anniversary of the initiation of renewed intensified hostilities in the Nagorno-Karabakh conflict, and expressed condolences for the loss of life on both sides. They underscored only a comprehensive resolution that addresses all outstanding issues can normalize relations between the two countries and allow the people of the region to live together peacefully.
>
> Principal Deputy Assistant Secretary Hogan and Senior Director Sloat welcomed the co-chairs' efforts and the resolve of Armenia and Azerbaijan to reengage in the peace process through direct dialogue aimed at contributing to security, stability, and prosperity in the region. They conveyed the commitment of the United States to continue working with its fellow co-chair countries to help Armenia and Azerbaijan resolve all outstanding issues related to or resulting

from the Nagorno-Karabakh conflict, including with regard to detainees, missing persons, and humanitarian demining efforts.

4. Bosnia and Herzegovina

On October 20, 2021, the following statement was released by the government of the United States of America and the European Union. This joint statement on the Western Balkans is also available at a State Department media note at https://www.state.gov/joint-statement-on-the-western-balkans/.

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Following the recent meeting between Secretary Blinken and High Representative Borrell, the United States and the EU agreed to further strengthen their joint engagement in the Western Balkans in support of the region's progress on its European path. We underscore our full support for the EU's enlargement process. EU accession, a stated priority for the whole Western Balkans, helps consolidate democratic institutions, protect fundamental rights, and advance the rule of law. This region belongs in the European Union. Closer integration will enhance stability and contribute to prosperity for the people of the region. In this context, we stress that accession negotiations with Albania and North Macedonia should start without delay.

The United States and the European Union are united in their firm support for the territorial integrity of Bosnia and Herzegovina, as well as in their joint work to promote electoral and constitutional reform and maintain the functionality of its state institutions. We have serious concerns about increasingly divisive rhetoric in Bosnia and Herzegovina. We call on all parties to respect and protect state institutions, resume constructive dialogue, and take steps to advance progress on the EU integration path – including on relevant reforms. The EU and the United States stand ready to facilitate these steps.

We stress the importance of the EU-facilitated Dialogue, which is the key mechanism to address the comprehensive normalization of relations between Serbia and Kosovo. After the recent weeks of tension in the north of Kosovo, we encourage both parties to engage in continued and sustained de-escalation and avoid actions that threaten stability. We welcome and support Kosovo's engagement to fight corruption and organized crime, and we reiterate that violence against civilians, journalists, police, or other authorities is unacceptable.

We call on all political forces in Montenegro to work together to maintain a strategic orientation that reflects the desire of the people of Montenegro to achieve the reforms necessary to make their hopes for a future in the EU a reality.

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On November 4, 2021, the State Department issued a press statement affirming U.S. support for the UN Security Council-mandated Operation ALTHEA in Bosnia and Herzegovina. The statement is excerpted below and available at

https://www.state.gov/affirming-our-enduring-support-for-operation-althea-and-the-role-of-the-high-representative-in-bosnia-and-herzegovina/.

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The United States welcomes the action of the United Nations Security Council to unanimously renew the mandate for EUFOR's Operation ALTHEA. Rooted in the Dayton Peace Accords, EUFOR's Operation ALTHEA remains critical to maintaining the stability, sovereignty, and territorial integrity of Bosnia and Herzegovina (BiH).

The Office of the High Representative is the civilian mission that corresponds to EUFOR ALTHEA. It also plays a crucial role in ensuring stability in BiH, supporting the rule of law, and assisting in reform of democratic institutions to advance Bosnia and Herzegovina's progress on its chosen Euro-Atlantic path. The United States fully supports High Representative Christian Schmidt . . . until the 5+2 Agenda is complete and BiH is a peaceful, sovereign state, with territorial integrity and irreversibly on course for European integration. The High Representative and his Office merit the full support of the international community in this task. We regret that the Security Council was not able to hear from High Representative Schmidt during the debate on his report at the session that adopted Resolution 2604.

The United States stands strong in our support for the government of BiH as it strives to consolidate multi-ethnic democracy and strengthen democratic institutions, counter corruption, and provide economic opportunity for all the people.

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5. Hong Kong

The governments of the United States of America, Australia, Canada, and the United Kingdom issued a joint statement on Hong Kong on January 9, 2021. The joint statement appears below and as a State Department media note at https://2017-2021.state.gov/joint-statement-on-hong-kong-3/index.html.

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We, the Foreign Ministers of Australia, Canada, and the United Kingdom, and the United States Secretary of State, underscore our serious concern at the mass arrests of 55 politicians and activists in Hong Kong for subversion under the National Security Law.

The National Security Law is a clear breach of the Sino-British Joint Declaration and undermines the 'One Country, Two Systems' framework. It has curtailed the rights and freedoms of the people of Hong Kong. It is clear that the National Security Law is being used to eliminate dissent and opposing political views.

We call on the Hong Kong and Chinese central authorities to respect the legally guaranteed rights and freedoms of the people of Hong Kong without fear of arrest and

detention. It is crucial that the postponed Legislative Council elections in September proceed in a fair way that includes candidates representing a range of political opinions.

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Secretary Blinken's March 11, 2021 press statement also condemns the assault by the People's Republic of China ("PRC") on democratic institutions in Hong Kong. The statement, available at https://www.state.gov/assault-on-democracy-in-hong-kong/, is excerpted below.

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The National People's Congress decision today to unilaterally change Hong Kong's electoral system is a direct attack on autonomy promised to people in Hong Kong under the Sino-British Joint Declaration. These actions deny Hong Kongers a voice in their own governance by limiting political participation, reducing democratic representation, and stifling political debate. Beijing's actions also run counter to the Basic Law's clear acknowledgment that Hong Kong elections should progress towards universal suffrage.

We call on the PRC to uphold its international obligations and commitments and to act consistently with Hong Kong's Basic Law. The PRC's attempt to label its crackdown on Hong Kong as an "internal matter" ignores the commitments Beijing made in the Sino-British Joint Declaration to uphold Hong Kong's autonomy and enumerated rights and freedoms until at least 2047.

We call on the PRC and Hong Kong authorities to allow the September 2021 Legislative Council elections to proceed and ensure that all candidates are included in a transparent and credible manner. We also call on these authorities to release and drop charges against all individuals charged under the National Security Law and other laws merely for standing for elections or for their expressions of dissenting views.

A stable, prosperous Hong Kong that respects human rights, freedoms, and pluralism serves the interests of Hong Kong, mainland China, and the broader international community. The United States stands united with our allies and partners in speaking out for the rights and freedoms of people in Hong Kong.

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The G7 also released a statement on Hong Kong's electoral changes on March 12, 2021. The statement appears below, and is available as a State Department media note at https://www.state.gov/g7-statement-on-hong-kong-electoral-changes/.

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We, the G7 Foreign Ministers of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States of America and the High Representative of the European Union, are united

in expressing our grave concerns at the Chinese authorities' decision fundamentally to erode democratic elements of the electoral system in Hong Kong. Such a decision strongly indicates that the authorities in mainland China are determined to eliminate dissenting voices and opinions in Hong Kong.

The package of changes approved by the National People's Congress, combined with mass arrests of pro-democracy activists and politicians, undermines Hong Kong's high degree of autonomy under the "One Country, Two Systems" principle. The package will also stifle political pluralism, contrary to the aim of moving towards universal suffrage as set out in the Basic Law. Furthermore, the changes will reduce freedom of speech, which is a right guaranteed in the Sino-British Joint Declaration.

The people of Hong Kong should be trusted to cast their votes in the best interests of Hong Kong. Discussion of differing views, not silencing of them, is the way to secure the stability and prosperity of Hong Kong.

We call on China to act in accordance with the Sino-British Joint Declaration and its other legal obligations and respect fundamental rights and freedoms in Hong Kong, as provided for in the Basic Law. We also call on China and the Hong Kong authorities to restore confidence in Hong Kong's political institutions and end the unwarranted oppression of those who promote democratic values and the defense of rights and freedoms.

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On March 31, 2021, the State Department announced, in a State Department press statement from Secretary Blinken, that the Department had submitted to Congress the annual Hong Kong Policy Act Report. Secretary Blinken certified to Congress that Hong Kong does not warrant differential treatment under U.S. law in the same manner as U.S. laws were applied to Hong Kong before July 1, 1997. The press statement follows, and is available at https://www.state.gov/hong-kong-policy-act-report/.

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Over the past year, the People's Republic of China (PRC) has continued to dismantle Hong Kong's high degree of autonomy, in violation of its obligations under the Sino-British Joint Declaration and Hong Kong's Basic Law. In particular, the PRC government's adoption and the Hong Kong government's implementation of the National Security Law (NSL) have severely undermined the rights and freedoms of people in Hong Kong.

Each year, the Department of State submits to Congress the **Hong Kong Policy Act Report** and accompanying certification. In conjunction with this year's report, I have certified to Congress that Hong Kong does not warrant differential treatment under U.S. law in the same manner as U.S. laws were applied to Hong Kong before July 1, 1997.

This report documents many of the actions the PRC and Hong Kong governments have taken against Hong Kong's promised high degree of autonomy, freedoms, and democratic institutions. These include the arbitrary arrests and politically-motivated prosecutions of opposition politicians, activists, and peaceful protesters under the NSL and other legislation; the

postponement of Legislative Council elections; pressure on judicial independence and academic and press freedoms; and a de facto ban on public demonstrations.

I am committed to continuing to work with Congress and our allies and partners around the world to stand with people in Hong Kong against the PRC's egregious policies and actions. As demonstrated by the March 16 Hong Kong Autonomy Act update, which listed 24 PRC and Hong Kong officials whose actions reduced Hong Kong's autonomy, we will impose consequences for these actions. We will continue to call on the PRC to abide by its international obligations and commitments; to cease its dismantlement of Hong Kong's democratic institutions, autonomy, and rule of law; to release immediately and drop all charges against individuals unjustly detained in Hong Kong; and to respect the human rights of all individuals in Hong Kong.

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On April 16, 2021, the State Department issued a press statement from Secretary Blinken condemning as politically-motivated the sentencing of Hong Kong pro-democracy leaders for unlawful assembly. The statement, available at https://www.state.gov/sentencing-of-hong-kong-pro-democracy-activists-for-unlawful-assembly/, includes the following:

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The United States condemns the sentencing of seven pro-democracy leaders on politically-motivated charges. Beijing and Hong Kong authorities are targeting Hong Kongers for doing nothing more than exercising protected rights and fundamental freedoms, including freedom of peaceful assembly and freedom of speech.

Today's sentences are yet another example of how the PRC and Hong Kong authorities undermine protected rights and fundamental freedoms guaranteed by the Basic Law and the Sino-British Joint Declaration in an effort to eliminate all forms of dissent. The seven pro-democracy leaders – Martin Lee, Jimmy Lai, Albert Ho, Margaret Ng, Cyd Ho, Lee Cheuk-yan, and Leung Kwok-hung – participated in a peaceful assembly attended by 1.7 million Hong Kongers. The sentences handed down are incompatible with the non-violent nature of their actions.

The Sino-British Joint Declaration, a binding international agreement, guarantees Hong Kong a high degree of autonomy, and people in Hong Kong are entitled to the rights and freedoms guaranteed in the Joint Declaration and Basic Law. We will continue to stand with Hong Kongers as they respond to Beijing's assault on these freedoms and autonomy, and we will not stop calling for the release of those detained or imprisoned for exercising their fundamental freedoms.

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Secretary Blinken's May 27, 2021 press statement, available at https://www.state.gov/denial-of-democracy-in-hong-kong/, elaborates on further denials of democracy in Hong Kong. It states:

> The Chinese government continues to undermine the democratic institutions of Hong Kong, denying Hong Kong residents the rights that the People's Republic of China (PRC) itself has guaranteed. The Hong Kong Legislative Council (LegCo) passage on May 27 of new measures that alter the composition of the LegCo and Election Commission severely constrains people in Hong Kong from meaningfully participating in their own governance and having their voices heard.
>
> Decreasing Hong Kong residents' electoral representation will not foster long-term political and social stability for Hong Kong. This legislation defies the Basic Law's clear acknowledgment that the ultimate objective is the election of all members of the LegCo by universal suffrage. We once again call on the PRC and the Hong Kong authorities to allow the voices of all Hong Kongers to be heard. We also call on these authorities to release and drop charges against all individuals charged under the National Security Law and other laws merely for standing for election or for expressing dissenting views. The United States stands united with our allies and partners in speaking out for the human rights and fundamental freedoms guaranteed to the people in Hong Kong by the Sino-British Joint Declaration and the Basic Law.

On July 1, 2021, Deputy Assistant Secretary of State for China, Mongolia, and Taiwan Affairs in the Bureau of East Asian and Pacific Affairs Jonathan Fritz delivered remarks assessing the National Security Law in Hong Kong. Deputy Assistant Secretary Fritz's remarks, delivered at a UN Human Rights Council side event, are excerpted below and available at https://www.state.gov/assessing-the-national-security-law-in-hong-kong/

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24 years ago today, the PRC resumed sovereignty over Hong Kong. Under the terms of that resumption, as laid out in the Sino-British Joint Declaration, the PRC promised to protect certain enumerated rights and freedoms of Hong Kongers and to maintain Hong Kong's high degree of autonomy for 50 years. On June 30, 2020, in a breach of those international obligations, the National People's Congress imposed the National Security Law on Hong Kong. Over the past year, PRC and Hong Kong authorities have wielded this legislation to silence dissent, arrest individuals for expressing pro-democratic views or participating in democratic processes, crack down on media freedom, and shrink the autonomy of Hong Kong's judiciary and legislature. These efforts to stifle Hong Kongers' human rights and fundamental freedoms have robbed Hong Kong of its vibrance and hurt Hong Kong's credibility and future as an international business hub.

The United States and the international community are following the developments in Hong Kong with great concern. The UN special rapporteurs present have all expressed their concerns with the National Security Law, relevant to their mandates on freedom of peaceful assembly and association, freedom of opinion and expression, and human rights defenders. In spite of the ongoing, systematic crackdown, we are inspired to see the resilience of Hong Kongers in their pursuit of what the PRC promised them: a Hong Kong with a high degree of autonomy, universal suffrage and genuine protection of fundamental freedoms.

We hope Beijing will realize the truth: Hong Kongers aren't the problem; they are its greatest strength. To dissent is to show your patriotism, and Hong Kongers are showing that they want their government to be better. If the PRC can have the confidence to tolerate dissent and welcome diverse points of view, Hong Kong will flourish.

Otherwise, people in Hong Kong will be forced to do what people do when their freedoms are oppressed: vote with their feet. Sadly, we are seeing this already, as demonstrated by several of the panelists with us here today, none of whom would be able to safely join this event from Hong Kong.

This event is intended to provide an objective assessment of the human rights implications of the NSL on Hong Kong. I look forward to hearing the perspectives of our excellent panelists.

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On July 16, 2021, the State Department issued a press statement by Secretary Blinken, marking the one-year anniversary since the imposition of national security legislation in Hong Kong (see *Digest 2020* at 365-68). The press statement is excerpted below and available at https://www.state.gov/marking-one-year-of-hong-kongs-national-security-law/.

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Over the past year, People's Republic of China (PRC) and Hong Kong officials have systematically undermined Hong Kong's democratic institutions, delayed elections, disqualified elected lawmakers from office, and forced officials to take loyalty oaths to keep their jobs. Since protests began in 2019, local authorities have arrested thousands for speaking out against government policies with which they disagreed, including for their social media posts and for attending vigils. Journalists have been arrested simply for doing their jobs in reporting on the government's activities and repressive efforts against protesters. Hong Kong authorities have mounted a persistent and politically motivated campaign against the free press, imprisoned *Apple Daily* founder Jimmy Lai, and forced the closure of that publication – a bastion of independent reporting. Beijing has chipped away at Hong Kong's reputation of accountable, transparent governance and respect for individual freedoms, and has broken its promise to leave Hong Kong's high degree of autonomy unchanged for 50 years.

We will continue to stand up for the rights and freedoms guaranteed to people in Hong Kong by the Sino-British Joint Declaration and the Basic Law. In the face of

Beijing's decisions over the past year that have stifled the democratic aspirations of people in Hong Kong, we are taking action. Today we send a clear message that the United States resolutely stands with Hong Kongers.

Promoting Accountability: The Department of State has designated Chen Dong, Yang Jianping, Qiu Hong, Lu Xinning, Tan Tieniu, He Jing, and Yin Zonghua, who are Deputy Directors of the Liaison Office of the Central People's Government of the Hong Kong Special Administrative Region (LOCPG). The LOCPG is the PRC's main platform for projecting its influence in Hong Kong and has repeatedly undermined the high degree of autonomy promised for Hong Kong in the Sino – British Joint declaration. The seven officials are being designated under Executive Order 13936.

Transparency: Hong Kong's business environment has deteriorated in the past year. The many legal, financial, operational, and reputational risks long present in mainland China are now increasingly prevalent in Hong Kong. A healthy business and investment climate requires a transparent regulatory framework and adherence to the rule of law. Today, the Department of State, together with the Department of Commerce, the Department of Homeland Security, and the Department of the Treasury, released a **Business Advisory** warning of increased risks for businesses in Hong Kong. These risks include those introduced by the National Security Law and other new legislation, potential electronic surveillance and lack of data privacy, reduced access to information, and potential retaliation against companies for their compliance with U.S. sanctions. The business advisory outlines these emerging risks to inform U.S. individuals and businesses and recommends increased awareness and due diligence.

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On October 21, 2021, the State Department issued a press statement on the continued erosion of freedoms in Hong Kong. The statement follows, and is available at https://www.state.gov/on-the-continued-erosion-of-freedoms-in-hong-kong/.

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The United States remains seriously concerned at the continued erosion of human rights and fundamental freedoms, including political participation, in Hong Kong. We note in particular the increase in politically-motivated prosecutions, including through the National Security Law, targeting Hong Kong's teachers, labor unions, lawyers, journalists, health care workers, student unions, and individual citizens. We again call on the Beijing and Hong Kong authorities to release those unjustly detained and cease their crackdown on peaceful civil society organizations. We once more urge Beijing to abide by its treaty obligations in the Sino-British Joint Declaration.

Hong Kong authorities continue to disqualify scores of pro-democracy district councilors, who received their public mandate from free and fair elections in 2019. These retroactive and targeted disqualifications, based on the Hong Kong authorities' arbitrary determination that these district councilors' loyalty oaths are invalid, prevent people in Hong Kong from participating meaningfully in their own governance.

People in Hong Kong and its vibrant civil society have been the city's greatest resource and the cornerstone of Hong Kong's success as an international hub of business and exchange. We will continue to support people in Hong Kong and their rights and freedoms.

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A further G7 joint statement on Hong Kong was released as a State Department media note on December 20, 2021. The statement is available at https://www.state.gov/g7-foreign-ministers-statement-on-hong-kong-legislative-council-elections/ and appears below.

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We, the G7 Foreign Ministers of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States of America and the High Representative of the European Union, noting the outcome of the Legislative Council elections in Hong Kong which took place on 19 December 2021, express our grave concern over the erosion of democratic elements of the Special Administrative Region's electoral system.

The package of changes to the electoral system introduced earlier this year in Hong Kong, including reduction of the number of directly elected seats and establishment of a new vetting process to severely restrict the choice of candidates on the ballot paper, undermined Hong Kong's high degree of autonomy under the "One Country, Two Systems" principle.

We strongly reiterate our call on China to act in accordance with the Sino-British Joint Declaration and its other legal obligations and respect fundamental rights and freedoms in Hong Kong, as provided for in the Basic Law. We also call on the China and the Hong Kong authorities to restore confidence in Hong Kong's political institutions and end the unwarranted oppression of those who promote democratic values and the defense of rights and freedoms.

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On December 20, 2021, the State Department announced in a press statement, available at https://www.state.gov/hong-kong-autonomy-act-report-to-congress/, the release of the Hong Kong Autonomy Act Report to Congress. The press statement follows.

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The Hong Kong Autonomy Act Report to Congress, released today, underscores the United States' deep concerns about Beijing's clear efforts to deprive Hong Kongers of a meaningful voice in the December 19 Legislative Council (LegCo) elections. The United States is concerned by the People's Republic of China's (PRC) continued efforts to undermine the democratic institutions in Hong Kong and erode Hong Kong's autonomy in its judiciary, civil service, press, and academic institutions, among other areas that are key to a stable and

prosperous Hong Kong. Foreign financial institutions that knowingly conduct significant transactions with the individuals listed in today's report are subject to sanctions. The report is available at **https://www.state.gov/december-2021-update-to-report-on-identification-of-foreign-persons-involved-in-the-erosion-of-the-obligations-of-china-under-the-joint-declaration-or-the-basic-law/**.

Under the Hong Kong Autonomy Act, the Secretary of State is required to update Congress regularly on foreign persons who are materially contributing to, have materially contributed to, or attempt to contribute materially to the failure of the PRC to meet its obligations under the Sino-British Joint Declaration or Hong Kong's Basic Law, as defined by the Act. Today's report to Congress identifies five PRC officials whose actions have reduced Hong Kong's autonomy. The five officials are Deputy Directors of the Liaison Office of the Central People's Government in Hong Kong, which is the PRC's main entity for projecting its influence in Hong Kong.

The United States will continue to speak out for the rights and freedoms of people in Hong Kong, and we will continue to hold the PRC accountable when it fails to meet its obligations.

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6. Israel

Effective June 8, 2021, the Department of Commerce amended the Export Administration Regulations ("EAR") to reflect the formal termination by the United Arab Emirates ("UAE") of its participation in the Arab League Boycott of Israel. 86 Fed. Reg. 30,535 (June 9, 2021).

> Specifically, in recognition of the UAE's August 16, 2020 issuance of Federal Decree-Law No. 4 of 2020, certain requests for information, action or agreement from the UAE, which were presumed to be boycott-related if made prior to August 16, 2020, would not be presumed to be boycott-related if made following that date, and thus would not be prohibited or reportable under the EAR. Accordingly, BIS [Bureau of Industry and Security] adds an interpretation to the Restrictive Trade Practices or Boycotts regulations of the EAR, which sets forth BIS's view that the prohibitions and reporting requirements contained in the EAR's antiboycott provisions do not apply to such requests from the UAE made after August 16, 2020.

On June 29, 2021, the State Department issued a press statement from Secretary Blinken welcoming the opening of the Israeli Embassy in Abu Dhabi, United Arab Emirates. The press statement is excerpted below and available at https://www.state.gov/the-opening-of-the-israeli-embassy-in-the-united-arab-emirates/.

> The United States welcomes the historic opening of the Israeli Embassy in Abu Dhabi and the visit of Alternate Prime Minister and Foreign Minister, Yair Lapid, for the ceremony hosted by UAE Minister of Foreign Affairs and International Cooperation Sheikh Abdullah bin Zayed Al Nahyan. Foreign Minister Lapid's trip, the first to the UAE by an Israeli Foreign Minister, and the opening of the first Israeli Embassy in a Gulf state are significant for Israel, the UAE, and the broader region. The United States will continue to work with Israel and the UAE as we strengthen all aspects of our partnerships and work to create a more peaceful, secure, and prosperous future for all the peoples of the Middle East.

On September 17, 2021, Secretary Blinken delivered remarks on the one-year anniversary of the Abraham Accords and normalization agreements between Israel and Bahrain, the UAE, and Morocco. The remarks are excerpted below and available at https://www.state.gov/at-the-one-year-anniversary-of-the-abraham-accords-normalization-agreements-in-action/.

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September 15th, 2020, leaders from Bahrain, Israel, the United Arab Emirates signed the Abraham Accords. A few months later, on December 10th, Israel and Morocco also signed a normalization agreement.

Today, a year after the Accords and normalization agreements were signed, the benefits continue to grow.

We're seeing deepening diplomatic relationships. It's been a year of firsts: the first Israeli embassy in Abu Dhabi, the first embassy of the United Arab Emirates in Tel Aviv.

This month, Israel named its first ambassador to Bahrain. And earlier this week, Bahrain's first ambassador to Israel presented his credentials.

Minister Lapid, your visit to Morocco last month to meet with Minister Bourita and others was the first by an Israeli minister to the Kingdom since 2003.

And both countries recently opened liaison offices that are expected to be upgraded to embassies by the end of the year.

We're seeing growing people-to-people ties, even with the serious challenges posed by the COVID-19 pandemic. Diplomatic relations have made it possible to fly between Israel and Bahrain, Israel and Morocco, and Israel and the United Arab Emirates. Some of these flights have never been allowed before.

Your governments are making it easier for your citizens to take advantage of those flights.

For example, Israel and Bahrain were the first countries to mutually recognize one another's digital COVID-19 vaccine passports, which means that people from your countries can go to restaurants and concerts when visiting each other's countries without quarantining.

And the people of your countries are seizing the opportunity. Again, despite COVID-19, more than 130,000 Israelis visited the United Arab Emirates just in the first four and a half months after the Accords were signed. There is a hunger to learn about each other's cultures, to

see new sights, to try new foods, forge new friendships – all experiences that have been impossible for so long and for so many, and now they're making up for lost time.

We're seeing new economic opportunities, innovations, collaborations. The United Arab Emirates has pursued significant investments in strategic sectors in Israel, including energy, medicine, technology, healthcare. Private firms across your countries are working together on everything from desalinization to stem cell therapies. These opportunities would be exciting at any time – but they are particularly important today, as we work to build back better from the devastating economic impact of the pandemic.

The deepening diplomatic relationships also provide a foundation to tackle challenges that demand cooperation among nations, like reducing regional tensions, combating terrorism, mitigating the impact of the climate crisis.

And we all must build on these relationships and growing normalization to make tangible improvements in the lives of Palestinians, and to make progress toward the longstanding goal of advancing a negotiated peace between Israelis and Palestinians. Palestinians and Israelis deserve equal measures of freedom, security, opportunity, and dignity.

This administration will continue to build on the successful efforts of the last administration to keep normalization marching forward. We'll do that in three main ways.

First, we'll help foster Israel's growing ties with Bahrain, with Morocco, with the United Arab Emirates – as well as with Sudan, which has also signed the Abraham Accords, and Kosovo, which established ties with Israel at the beginning of the year.

Second, we'll work to deepen Israel's longstanding relationships with Egypt and Jordan – partners critical to the United States, Israel, and Palestinians alike.

It was 43 years ago today that Egypt and Israel signed the Camp David Accords, and next month will mark 27 years since Israel and Jordan signed the Wadi Araba Treaty.

The visit to Cairo this week by Prime Minister Bennett to meet with President Sisi – the first trip at this level in over a decade – and the negotiations between Israel and Jordan around new agreements on water and trade show how these relationships continue to build on the trailblazing agreements signed decades ago.

And third, we will encourage more countries to follow the lead of the Emirates, Bahrain, and Morocco. We want to widen the circle of peaceful diplomacy, because it's in the interests of countries across the region and around the world for Israel to be treated like any other country. Normalization leads to greater stability, more cooperation, mutual progress – all things the region and the world need very badly right now.

Let me close by bringing us back to the primary beneficiaries of normalization: people across borders whose lives will be improved by these new possibilities.

Abdulla Baqer is an investor who co-leads the newly created UAE-Israel Business Council. He wants to spend a month in Israel to learn more about its people and culture, so that he can better connect entrepreneurs in the two countries. He says, and I quote, "Everything is possible if we sit together and have a dialogue and understand each other."

Ebrahim Nonoo is the head of the Jewish community in Bahrain. Just last month, he led Shabbat services in a synagogue for the first time in 74 years – making Jewish life visible in Bahrain for the first time in generations.

And so many people are eager to rekindle longstanding connections that had been cut off – until now. More than a million Israelis have Moroccan heritage, including five ministers in Israel's current government. How meaningful it will be for more Israelis of Moroccan descent to travel back and forth between the two countries, rediscover cultural ties, and pass them on.

The 2020 World Expo was delayed by COVID-19, but it will soon open in Dubai. The Abraham Accords had not yet been signed when Israel's pavilion was first conceived. It consists of seven consecutive free-standing gates – no walls, completely open. Across the final gate is a giant sign that reads, "For Tomorrow," in a script that combines Arabic and Hebrew letters.

What an apt metaphor for the new horizons that open when countries are no longer closed to each other.

Thanks to the countries here today, others who have joined, and the people forging ties between these nations, that vision is becoming a reality. May it be a model for others to follow.

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On October 13, 2021, Secretary Blinken, Israeli Minister Yair Lapid and UAE Minister Al Nahyan held a joint press availability at which Secretary Blinken delivered the following remarks. The transcript of the press availability is available at https://www.state.gov/secretary-antony-j-blinken-and-israeli-alternate-prime-minister-and-foreign-minister-yair-lapid-and-united-arab-emirates-foreign-minister-sheikh-abdullah-bin-zayed-al-nahyan-at-a-joint-press-availab/.

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Well, good morning or, almost, good afternoon, everyone. Just over a year ago, the leaders of Israel and the United Arab Emirates signed the Abraham Accords. Today, I am honored to host Foreign Minister Lapid, Foreign Minister Sheikh Abdullah, to review the progress that's been made in the past year in the normalization of relations, and what more we can do together to shape a more peaceful and prosperous region. The UAE-Israel relationship has, I think it's fair to say, flourished this past year. This May, Israel opened an embassy in the UAE, the first it has ever had to a Gulf nation. And a few days ago, Israel's new ambassador to the UAE presented his credentials. In July, the UAE opened an embassy in Israel, the first Gulf state to take that action.

In addition to these diplomatic strides, the people-to-people ties between the two countries are also thriving, even with COVID. Direct flights are now connecting Israel and the UAE. Tourists are seizing the opportunity. Around 200,000 Israelis have visited the Emirates this past year alone. We strongly support these historic steps, and we're committed to continue building on the efforts of the last administration to expand the circle of countries with normalized relations with Israel in the years ahead.

We believe that normalization can and should be a force for progress, not only between Israel and Arab countries and other countries in the region and beyond, but also between Israelis and Palestinians. As President Biden has said, Israelis and Palestinians equally deserve to live safely and securely and to enjoy equal measures of freedom, prosperity, democracy. The President has also been clear that a two-state solution is the best way to ensure Israel's future as a Jewish and democratic state, living in peace alongside a viable, sovereign, and democratic Palestinian state.

Today, our three countries discussed two new working groups that we are launching together. The first is on religious coexistence. This is a moment of rising anti-Semitism, rising Islamophobia, and we want Israel, the United Arab Emirates, and the United States to work

together to build tolerance and ensure that all religious groups can worship in their traditional ways without violence, without intimidation, without discrimination.

The second working group is on water and energy, critical issues for our countries in the face of the climate crisis, and places where the United States, Israel, and the UAE can be in a sense greater than the sum of our parts to the benefit of our people, the region, and even the world. We're very pleased that Israel has joined the Agriculture Innovation Mission for Climate, a joint U.S. and UAE initiative to catalyze new investment in climate-smart agriculture. Israeli and Emirati firms are already planning to collaborate on a number of renewable projects.

And I want to commend the UAE for its plan to achieve net zero emissions by 2050, the first country in the GCC to do so, and Israel for its new plan to reduce emissions by 85 percent by 2050.

Finally, the trilateral partnership also makes it possible for our countries to discuss other urgent regional issues more effectively, to do it together. For example, today we talked about a range of regional security issues, including Iran, Syria, Ethiopia. That's what normalization has made possible; transformative partnerships on the urgent challenges facing our countries and facing the world. And that's why it's so important, and it's why I am deeply grateful to both of you for being here today and for the work that we're doing together. …

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Cross References

Afghan Special Immigrant Visa program, **Ch.1.B.5.e**
Afghanistan refugee program, **Ch. 1.C.5**
Relocation and evacuation operations in Afghanistan, **Ch. 2.A.2**
Protecting power arrangement regarding Afghanistan, **Ch. 2.A.2**
ICC and Libya, **Ch. 3.C.2.e**
ICC and Sudan, **Ch. 3.C.2.f**
Tseng v. Biden *case (regarding Taiwan),* **Ch. 5.C.1**
Renegotiating Compacts of Free Association, **Ch. 5.D**
HRC on Afghanistan, **Ch. 6.A.6.b**
Joint statement on the situation of women and girls in Afghanistan, **Ch. 6.B.2.c**
Media freedom in Hong Kong, **Ch. 6.K.1**
Taiwan at the UN, **Ch. 7.A.2**
Resolution of Sudan claims, **Ch. 8.B**
Russia's intention to restrict navigation in parts of the Black Sea, **Ch. 12.A.2.b**
Request for import restrictions on cultural property of Afghanistan, **Ch. 14.A.7**
Hong Kong sanctions, **Ch. 16.A.2.b**
Burma sanctions, **Ch. 16.A.6**
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Afghanistan, **Ch. 17.B.1**
Armenia and Azerbaijan (Nagorno-Karabakh), **Ch. 17.B.3**
Atrocities in Burma, **Ch. 17.C.3**
Afghanistan, **Ch. 18.A.2**

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 2021 in which the United States filed a statement of interest or participated as amicus curiae.

1. Scope of Application: Instrumentality of a Foreign State

Section 1603(a) and (b) of the FSIA define "foreign state" as follows:

> (a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
> (b) An "agency or instrumentality of a foreign state" means any entity—
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

As discussed in *Digest 2020* at 392-98, the United States filed a brief on appeal in the Ninth Circuit in *United States v. Pangang Group Co. Ltd.*, a criminal prosecution of a group of Chinese companies for corporate espionage. The court of appeals did not reach the issue of whether the immunity conferred by the FSIA applies in criminal cases, concluding that, in moving to dismiss the indictment, the Pangang Group failed to carry its burden to make a prima facie showing that they are instrumentalities of a foreign

state within the meaning of the FSIA. The court's opinion is excerpted below. 6 F.4th 946 (9th Cir. 2021).

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We … turn to the merits of the Pangang Companies' appeal. The companies claim that they are immune from prosecution in this case by virtue of the terms of § 1604 of the FSIA, which provides:

> Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604. The parties vigorously dispute whether this provision confers immunity from all jurisdiction, civil or criminal, or whether it instead applies only to jurisdiction over civil cases. If § 1604's immunity does apply to criminal cases, the parties further dispute whether, and to what extent, the *exceptions* to immunity listed elsewhere in the FSIA also apply in such cases. But we cannot properly reach such issues unless and until the threshold predicate for application of the FSIA is first satisfied—namely, that the party seeking to invoke the FSIA's immunity is a "foreign state" within the meaning of the FSIA. Accordingly, we begin by considering that issue. And because we find it dispositive, we do not reach or decide whether, or to what extent, the FSIA applies in criminal cases.

A

Because we have never addressed whether the FSIA applies in criminal cases, we have never considered how the issue of foreign sovereign immunity would properly be raised or analyzed in a criminal case. We need not definitively resolve those questions here. Assuming *arguendo* that the FSIA does apply in criminal cases, we see no reason not to further assume that the same basic procedural framework that we have applied in the civil context would also apply, *mutatis mutandis*, in the criminal context.

Under that framework, when (as here) it is "not obvious or uncontested" that the defendant is a "foreign state," *Peterson v. Islamic Republic Of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010), the defendant seeking to assert FSIA immunity "bears the initial burden to 'make a prima facie case that it is a foreign state,' " *Packsys, S.A. de C.V. v. Exportadora de Sal, S.A. de C.V.*, 899 F.3d 1081, 1087 (9th Cir. 2018) (quoting *Peterson*, 627 F.3d at 1124). Once this prima facie case has been established, the burden shifts to the plaintiff to make a sufficient showing that an exception to the FSIA applies. …

In seeking to invoke this burden-shifting framework, and in asserting immunity from jurisdiction, a defendant "may make either a facial or factual challenge to the district court's subject matter jurisdiction." *Terenkian*, 694 F.3d at 1131. If the defendant makes a factual challenge, "the defendant may introduce testimony, affidavits, or other evidence to dispute the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* (simplified). …

In moving to dismiss the operative indictment here, the Pangang Companies raised only a facial challenge. They did not present any evidence in support of their motion, but instead relied entirely on the allegations of the indictment, which they took as true, to carry their threshold burden to establish that each of them was a "foreign state" within the meaning of the FSIA. In opposing the Pangang Companies' motion to dismiss the indictment, the Government likewise did not present any evidence, but instead relied solely on the allegations of the indictment in arguing that the immunity conferred by the FSIA was inapplicable. As framed here, the question therefore is whether the Pangang Defendants' reliance on the allegations of the indictment, taken as true, is sufficient to carry their "initial burden to 'make a prima facie case' " that they are " 'foreign state[s].' " …

B

Taking the allegations in the indictment as true, we conclude that the Pangang Companies failed to establish a prima facie case that they qualify as "foreign states" under the FSIA.

1

The immunity afforded by the FSIA applies only to a "foreign state," a phrase that § 1603 defines to "include[ ] a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a). There is no contention that the Pangang Companies are "political subdivision[s]" of the "foreign state" of the PRC, and so the only question is whether they qualify as "agenc[ies] or instrumentalit[ies] of a foreign state as defined in subsection (b)." That subsection, in turn, defines that phrase to mean:

> [A]ny entity—
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). Because there is no dispute that the Pangang Companies are separate corporate persons and that they were organized under the laws of the PRC, the requirements of § 1603(b)(1) and (b)(3) are not at issue here. Moreover, the Pangang Companies have not contended that they are "organ[s] of a foreign state or political subdivision thereof." The only question, therefore, is whether "a majority of [each of the Pangang Companies'] shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id*. § 1603(b)(2).

The literal language of this phrase presents a threshold question whether its use of the phrase "foreign state" is recursive, such that it might be applied in a chain-like fashion to reach successive layers of related entities. Thus, for example, if a "foreign state" owns a majority of the shares of a separate corporation organized under its laws, that corporation qualifies as an "agency or instrumentality of a foreign state" under subsection (b), which means, in turn, that it is included within the definition of a "foreign state" under subsection (a). Because that corporation is thus generally treated as a "foreign state" for purposes of the FSIA, … can it then be treated as a "foreign state" *in subsection (b)(2)* when determining whether *another* entity meets subsection (b)'s definition of "agency or instrumentality"? If so, that would mean that a corporation that is majority owned by *another* corporation that is majority owned by a foreign state would count as a "foreign state" that is entitled to immunity.

The problem with this reading of § 1603 is that it ignores a critical difference in language between subsection (a) and subsection (b)(2). The general definition of "foreign state" in subsection (a) provides that, as used in the FSIA, that phrase includes not only what one would ordinarily think of as the "foreign state"—*i.e.*, the foreign nation itself—but also *both* "a political subdivision of a foreign state" *and* "an agency or instrumentality of a foreign state." … But when defining which state-owned entities are foreign "agenc[ies] or instrumentalit[ies]," subsection (b)(2) requires ownership "by a foreign state or *political subdivision* thereof," thereby conspicuously omitting the phrase "agency or instrumentality of a foreign state." … The difference in language must be given significance, and it precludes the above-described recursive reading. *See Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("Where 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." (simplified)).

Moreover, a recursive reading would render subsection (b)(2)'s explicit reference to a "political subdivision" surplusage inasmuch as a "political subdivision" would *already* be included within the reinserted definition of "foreign state." That is a further reason why the recursive reading cannot be correct. … Accordingly, the statutory text makes clear that the reference to "foreign state" in subsection (b)(2) means *only* the foreign sovereign itself and not any additional entity included within the definition of "foreign state" by subsection (a).

Although its opinion did not explicitly address the recursive reading, the Supreme Court necessarily rejected that construction of subsection (b)(2) when it squarely held, in *Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003), that a "corporation is an instrumentality of a foreign state under the FSIA *only* if the foreign state *itself* owns a majority of the corporation's shares." *Id*. at 477, 123 S.Ct. 1655 (emphasis added). The Court thus construed the reference to "foreign state" in subsection (b)(2) as referring *only* to the actual "foreign state itself," *i.e.*, the foreign sovereign, and *not* to any "agency or instrumentality" of that foreign state. *Id*. Under that understanding of the statute, the defendant "Dead Sea Companies" in that case, which were indirectly owned by the State of Israel through "one or more intermediate corporate tiers," were not agencies or instrumentalities of a foreign state within the meaning of the FSIA. *Id*. at 473–77, 123 S.Ct. 1655.

The Dead Sea Companies in *Dole Food* instead attempted to squeeze themselves into subsection (b)'s definition of "agency or instrumentality" by arguing for an expansive reading of the phrase "owned by a foreign state." According to the companies, the term "owned" includes indirect ownership, at least as that term is used in "common parlance" and in its "colloquial sense." 538 U.S. at 474, 123 S.Ct. 1655. The Court rejected this contention, concluding that it ignores both the language of the FSIA and the background principles of corporate law that would necessarily inform the understanding of the statute's terms. *Id*. In particular, the Court noted that subsection (b)(2) "refers to ownership of '*shares*,' showing that Congress intended statutory coverage to turn on formal corporate ownership." *Id*. (emphasis added). And although subsection (b)(2) also refers to a foreign state's owning a majority of an "ownership interest" other than "shares," that phrase was "best understood" as referring to the possibility of "ownership forms in other countries, or even in this country, that depart from conventional corporate structures." *Id*. at 476, 123 S.Ct. 1655.

Accordingly, what mattered in *Dole Food* was whether Israel owned a majority of "the Dead Sea Companies as a matter of corporate law, irrespective of whether Israel could be said to have owned the Dead Sea Companies in everyday parlance." *Id*. at 474, 123 S.Ct. 1655. Because

the Dead Sea Companies had corporate shares, and not some other form of "ownership interest," their status turned on who owned a majority of those shares. *Id*. at 473–75, 123 S.Ct. 1655 (simplified). Because "Israel did *not* own a majority of shares in the Dead Sea Companies," but instead "owned a majority of shares, at various times, in companies one or more corporate tiers *above* the Dead Sea Companies," the latter companies, as subsidiaries, were not agencies or instrumentalities of Israel. *Id*. at 475, 123 S.Ct. 1655 (emphasis added). As the Court stated, "only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement," and Israel lacked such direct ownership. *Id*. at 474, 123 S.Ct. 1655.

Dole Food also addressed the separate question of whether a defendant's status as an instrumentality should be judged as of the time of the underlying conduct or as of the time of the suit. 538 U.S. at 478–80, 123 S.Ct. 1655. The Court held that, because subsection (b)(2) "is expressed in the present tense," it "requires that instrumentality status be determined at the time suit *is filed*." *Id*. at 478, 123 S.Ct. 1655 (emphasis added). The Court noted that this understanding of the statute was also "consistent with the longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Id*. (citations and internal quotation marks omitted). Assuming that the FSIA applies in the criminal context, this aspect of *Dole Food* would indicate that a defendant's status as an "agency or instrumentality of a foreign state" must be determined as of the time it was first indicted.

2

With these standards in mind, we consider whether the allegations of the indictment here are sufficient to establish that the Pangang Companies were "agenc[ies] and instrumentalit[ies] of a foreign state" within the meaning of the FSIA as of February 7, 2012, the day that they were first indicted.

a

The indictment includes several allegations about the ownership structure of the Pangang Companies, which we take as true for purposes of this appeal. *See supra* at 954-55. Like the other allegations of the indictment, these claims about corporate structure are alleged to be true "at all relevant times." Because the dates of the alleged conspiracy are 1998 through October 2011, at least that timeframe is included within the indictment's understanding of the "relevant times." Although that timeframe does not expressly include the date of the indictment four months later, the latter date is close enough in time that we will assume, for purposes of argument, that the indictment's allegations concerning the companies' corporate structure on October 2011 may properly be relied upon to establish a prima facie case as to the corporate structure as of February 2012.

As to PGC, the indictment alleges that it was a "state-owned enterprise controlled by" the "State-Owned Assets Supervision and Administration Commission of the State Council (SASAC)," which is a "special government agency" of the PRC. The remaining Pangang Companies—PGSVTC, PGTIC, and PGIETC—are alleged to be direct or indirect "subsidiaries" of PGC. Specifically, the indictment states that PGC "controlled" the "subsidiar[y]" PGSVTC, "which shared senior management" with PGC. PGTIC and PGIETC were "subsidiaries" that "w[ere] owned and controlled by [PGC] and PGSVTC."

In light of these allegations, we can readily dispose of three of the four entities charged in this case. Taken as true, the allegations affirmatively *negate* the premise that PGSVTC, PGTIC, or PGIETC may be considered agencies or instrumentalities of the PRC. The indictment describes all three of these entities as being "subsidiaries" of *the fourth defendant—i.e.*, PGC. Because the corporate-law concept of a "subsidiary" refers to a company in which the parent

"has a controlling share," *see Corporation—subsidiary corporation*, Black's Law Dictionary (11th ed. 2019); *see also* 1 F. Hodge O'Neal & Robert B. Thompson, Close Corporations and LLCs: Law and Practice § 1:7 (Rev. 3d ed. 2021) ("Subsidiary corporations" are those "where all or most of the stock is owned by another corporation."), the indictment indicates that PGC is a parent corporation *between* the other three companies and SASAC. PGC, of course, is not the "foreign state itself," *Dole Food*, 538 U.S. at 477, 123 S.Ct. 1655, nor is it a "political subdivision thereof," 28 U.S.C. § 1603(b)(2). Because PGSVTC, PGTIC, and PGIETC thus "were subsidiaries of [an]other corporation[ ]," 538 U.S. at 475, 123 S.Ct. 1655, they were not *directly* owned by the PRC or SASAC, and they therefore cannot be deemed to be "agenc[ies] or instrumentalit[ies] of a foreign state" within the meaning of § 1603(b).

The indictment's allegations as to the ownership structure of PGC require a somewhat different analysis. The operative indictment alleges that, "at all times relevant," PGC was a "state-owned enterprise controlled by SASAC," a "special government agency" of the PRC. Even assuming *arguendo* that SASAC counts as a "political subdivision" of the PRC rather than an "agency or instrumentality," *cf. Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 495 F.3d 1024, 1034–36 (9th Cir. 2007) (Iranian Defense Ministry is part of the Iranian State rather than an "agency or instrumentality"), *rev'd on other grounds*, 556 U.S. 366, 129 S.Ct. 1732, 173 L.Ed.2d 511 (2009), the indictment's allegations are insufficient to establish a prima facie case that PGC is an agency or instrumentality of SASAC.

As an initial matter, the allegation that PGC was "controlled by SASAC" is not enough. *Dole Food* explicitly rejected the proposition that, "in determining instrumentality status under the [FSIA], control may be substituted for an ownership interest." 538 U.S. at 477, 123 S.Ct. 1655. The crucial question, instead, is whether a "majority of [PGC's] shares or other ownership interest is owned" by SASAC or the PRC. 28 U.S.C. § 1603(b)(2). The indictment's unadorned allegation that PGC is "state-owned" does not resolve that issue, because it does not indicate whether that term is used merely in the "colloquial sense of that term"—which would include indirect ownership—or whether the term is instead meant to refer to "own[ing] shares ... as a matter of corporate law." *Dole Food*, 538 U.S. at 474, 123 S.Ct. 1655. The former sense of ownership is *not* sufficient to satisfy § 1603(b)(2), and direct ownership of a majority of shares is required. *See supra* at 956-57. Because the indictment's ambiguous allegation that PGC is "state-owned" glosses over this distinction, alleging nothing about ownership of *shares*, it is insufficient to establish the requisite "direct ownership of a majority of shares by the foreign state." *Dole Food*, 538 U.S. at 474, 123 S.Ct. 1655.

Two other points underscore the inherent ambiguity in the indictment's use of the phrased "state-owned." First, the indictment refers to PGTIC and PGIETC as being "owned and controlled by [PGC] *and PGSVTC*," but the indictment also alleges that PGSVTC, PGTIC, and PGIETC are each "subsidiaries" of PGC (emphasis added). The indictment thus alleges that PGTIC and PGIETC are owned by two companies (PGC and PGSVTC) that are at different levels of the corporate hierarchy (given that PGSVTC is itself a subsidiary of PGC). Perhaps the indictment means that ownership of PGTIC and PGIETC is split between the two other companies (*i.e.*, PGC, and its subsidiary, PGSVTC), or perhaps it means that PGTIC and PGIETC are subsidiaries of PGSVTC, which in turn is a subsidiary of PGC. But, in all events, because two companies cannot both have "direct ownership of a majority of shares" of another company, *Dole Food*, 538 U.S. at 474, 123 S.Ct. 1655, it seems clear that the indictment is *not* using "owned" in the corporate law sense when it says that PGTIC and PGIETC are "owned and

controlled by [PGC] and PGSVTC." Instead, the indictment appears to be using "owned" only in the "colloquial sense of that term"—which *Dole Food* held is insufficient. *Id*. Consequently, when the indictment alleges that PGC is "state-owned," it likewise presumably uses that term only in its colloquial sense.

Second, we note that the Government, in opposing the Pangang Companies' earlier efforts to quash service of summons, submitted evidence affirmatively asserting that SASAC's ownership of PGC was *indirect*. Specifically, the Government contended that in 2010, after a reorganization, PGC was "100 percent owned by the Anshan Iron and Steel Group Corporation, which is 100 percent owned by central SASAC." Although we do not take judicial notice of the truth of this earlier-submitted evidence concerning the Government's theory of PGC's corporate ownership, we can take judicial notice of the fact that the Government *asserted* such a theory. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689–90 (9th Cir. 2001). And the fact that the Government did so further underscores the already amply-supported conclusion that the indictment's use of the term "state-owned" was not intended to speak to the corporate-structure issues that are dispositive under *Dole Food*.

b

In the district court, the Pangang Companies relied principally on the indictment's additional allegation that each company was a "foreign instrumentality" *under the EEA*, and they contended that this allegation was sufficient to establish their status as instrumentalities under the FSIA. When asked at the hearing on the motion to dismiss whether it disagreed with this representation, the Government said that it did not. In its subsequent order, the district court noted that there are "some differences" between the relevant definitions in the EEA and the FSIA, but it concluded that they were "not material." The court therefore proceeded on the assumption that the indictment's allegation that the Pangang Companies were "foreign instrumentalities" under the EEA was sufficient to establish that they were instrumentalities under the FSIA.

Because the issue goes to subject matter jurisdiction, we are not bound by the Government's failure to object below to the Pangang Companies' argument on this score. … Considering the jurisdictional issue independently, *see Herklotz v. Parkinson*, 848 F.3d 894, 897 (9th Cir. 2017), we conclude that the allegation that the Pangang Companies are "foreign instrumentalities" under the EEA, without more, is insufficient to trigger applicability of the FSIA.

As noted earlier, one of the elements of the charged offenses under the EEA is that the defendant must have acted "intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent." 18 U.S.C. § 1831(a). The indictment asserts that this element was satisfied because the defendants knew that the charged offenses "would benefit a foreign government, namely the PRC, and *foreign instrumentalities*, namely [PGC], PGSVTC, [PGTIC], and P[G]IETC" (emphasis added). The EEA expressly defines the term "foreign instrumentality" to "mean[ ] any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government," 18 U.S.C. § 1839(1), and so the indictment necessarily alleges that each of the Pangang Companies met this definition.

On its face, however, the EEA's definition of "foreign instrumentality" is much broader than the FSIA's definition of "agency or instrumentality of a foreign state," as construed in *Dole Food*. In particular, the EEA's definition is satisfied if the "corporation" is "*controlled*" by the

foreign government, *see* 18 U.S.C. § 1839(1) (emphasis added), but *Dole Food* expressly rejected the view that "control may be substituted for [the] ownership interest" required by the FSIA's definition of covered instrumentalities. 538 U.S. at 477, 123 S.Ct. 1655; *see id*. ("Control and ownership ... are distinct concepts."); *see also* 28 U.S.C. § 1603(b)(2) (requiring that a "majority" of "shares or other ownership interest" be "owned" by the foreign state or its political subdivision). And unlike the FSIA's definition, the EEA's does not mention "shares" or other similar corporate formalities. *Cf. Dole Food*, 538 U.S. at 474, 123 S.Ct. 1655 ("The language of § 1603(b)(2) refers to ownership of 'shares,' showing that Congress intended statutory coverage to turn on formal corporate ownership."). Instead, a company falls under the EEA's definition merely by being "s*ubstantially* owned" by the foreign government. 18 U.S.C. § 1839(1) (emphasis added).

Because the EEA's definition of "foreign instrumentality" sweeps so much more broadly than the FSIA's definition of "agency or instrumentality of a foreign state," the indictment's allegation that the Pangang Companies satisfy the former is insufficient to establish a prima facie case that they meet the latter.

* * * *

2. Commercial Activities Exception

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).

For cases involving the commercial activities exception, see discussion of *Jam v. IFC*, section D.4, *infra*, and *Rodriquez v. Pan American Health Organization*, section D.5, *infra*.

3. Expropriation Exception to Immunity: *Germany v. Philipp* and *Hungary v. Simon*

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).

As discussed in *Digest 2020* at 192-94, *Germany v. Philipp*, No. 19-351, before the Supreme Court of the United States, involves claims arising out of the taking of a collection of medieval relics known as the "Welfenschatz" by the German government after World War II, which the heirs of its original Jewish owners sought to recover. The district court denied Germany's motion to dismiss. The U.S. Court of Appeals for the D.C. Circuit held that the expropriation exception to jurisdiction applies in the case, because a state's confiscation of its own citizens' property, while not a violation of the international law of takings, does violate international law, when it amounts to the commission of genocide. The Supreme Court issued its unanimous decision on February 3, 2021, vacating and remanding the D.C. Circuit's judgment. *Germany v. Philipp*, 592 U.S. ___, 141 S. Ct. 703 (2021). The Supreme Court held that the expropriation exception does not cover domestic takings even in the context of a human-rights violation and declined to consider the comity question. *Id.* On the same date, the Supreme Court also vacated and remanded the D.C. Circuit's decision in *Hungary v. Simon*, 592 U. S. ___, 141 S. Ct. 691 (2021), for further proceedings consistent with the decision in *Germany v. Philipp* (see *Digest 2020* at 185-192 for additional background on *Hungary v. Simon*). The Supreme Court's opinion in *Germany v. Philipp* is excerpted below.

* * * *

Enacted in 1976, the Foreign Sovereign Immunities Act supplies the ground rules for "obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). The Act creates a baseline presumption of immunity from suit. §1604. "[U]nless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia* v. *Nelson*, 507 U. S. 349, 355 (1993).

The heirs contend that their claims fall within the exception for "property taken in violation of international law," §1605(a)(3), because the coerced sale of the Welfenschatz, their property, constituted an act of genocide, and genocide is a violation of international human rights law. Germany argues that the exception is inapplicable because the relevant international law is the international law of property—not the law of genocide—and under the international law of property a foreign sovereign's taking of its own nationals' property remains a domestic affair. This "domestic takings rule" assumes that what a country does to property belonging to its own citizens within its own borders is not the subject of international law. See *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U. S. ___, ___ (2017) (slip op., at 10) (citing Restatement (Third) of Foreign Relations Law of the United States §712 (1986) (Restatement (Third))).

A

Known at the founding as the "law of nations," what we now refer to as international law customarily concerns relations among sovereign states, not relations between states and individuals. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 422 (1964) ("The

traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another.").

The domestic takings rule invoked by Germany derives from this premise. Historically, a sovereign's taking of a foreigner's property, like any injury of a foreign national, implicated the international legal system because it "constituted an injury to the state of the alien's nationality." Bradley & Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 831, n. 106 (1997); see S. Friedman, Expropriation in International Law 5, 139 (1953). Such mistreatment was an affront to the sovereign, and "therefore the alien's state alone, and not the individual, could invoke the remedies of international law." Bradley, *supra*, at 831, n. 106. A domestic taking by contrast did not interfere with relations among states. See E. de Vattel, 3 The Law of Nations §81, p. 138 (C. Fenwick transl. 1916) ("Even the property of individuals, taken as a whole, is to be regarded as the property of the Nation with respect to other Nations."); see also *United States* v. *Belmont*, 301 U. S. 324, 332 (1937) ("What another country has done in the way of taking over property of its nationals . . . is not a matter for judicial consideration here.").

The domestic takings rule has deep roots not only in international law but also in United States foreign policy. Secretary of State Cordell Hull most famously expressed the principle in a 1938 letter to the Mexican Ambassador following that country's nationalization of American oil fields. The Secretary conceded "the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern." Letter from C. Hull to C. Nájera (July 21, 1938), reprinted in 5 Foreign Relations of the United States Diplomatic Papers 677 (1956). The United States, however, could not "accept the idea" that "these plans can be carried forward at the expense of our citizens." *Ibid.*

The domestic takings rule endured even as international law increasingly came to be seen as constraining how states interacted not just with other states but also with individuals, including their own citizens. The United Nations Universal Declaration of Human Rights and Convention on the Prevention of Genocide became part of a growing body of human rights law that made "how a state treats individual human beings . . . a matter of international concern." Bradley, *supra*, at 832 (quoting Restatement (Third), pt. VII, Introductory Note, at 144–145). These human rights documents were silent, however, on the subject of property rights. See Friedman, *supra*, at 107. International tribunals therefore continued to maintain that international law governed "confiscation of the property of foreigners," but "measures taken by a State with respect to the property of its own nationals are not subject to these principles." *Gudmundsson* v. *Iceland*, Appl. No. 511/59, 1960 Y. B. Eur. Conv. on H. R. 394, 423–424 (decision of the European Commission on Human Rights).

Some criticized the treatment of property rights under international law, but they did so on the ground that *all* sovereign takings were outside the scope of international law, not just domestic takings. In the 1950s and 1960s, a growing chorus of newly independent states, particularly in Latin America, resisted any foreign restraint on their ability to nationalize property. See Young, The Story of Banco Nacional de Cuba v. Sabbatino, in Federal Courts Stories 422–423 (V. Jackson & J. Resnik eds. 2010). Put differently, states and scholars disagreed over whether international law provided a remedy for a sovereign's interference with anyone's property rights, not whether domestic takings were outside the purview of international law. That principle was beyond debate.

We confronted this dispute over the existence of international law constraints on sovereign takings in *Sabbatino*, where we were asked to decide claims arising out of Cuba's

nationalization of American sugar interests in 1960. 376 U. S., at 403. This Court observed that there were "few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property *of aliens*." *Id.,* at 428 (emphasis added). Hesitant to delve into this controversy, we instead invoked the act of state doctrine, which prevents United States courts from determining the validity of the public acts of a foreign sovereign. *Id.,* at 436.

Congress did not applaud the Court's reticence. Within months of *Sabbatino,* it passed the Second Hickenlooper Amendment to the Foreign Assistance Act of 1964. The Amendment prohibits United States courts from applying the act of state doctrine where a "right[ ] to property is asserted" based upon a "taking . . . by an act of that state in violation of the principles of international law." 22 U. S. C. §2370(e)(2). Courts and commentators understood the Amendment to permit adjudication of claims the *Sabbatino* decision had avoided—claims against foreign nations for expropriation of American-owned property. But nothing in the Amendment purported to alter any rule of international law, including the domestic takings rule. See *F. Palicio y Compania, S. A.* v. *Brush,* 256 F. Supp. 481, 487 (SDNY 1966) (interpreting the Hickenlooper Amendment to displace *Sabbatino* but dismissing the suit on the ground that "confiscations by a state of the property of its own nationals, no matter how flagrant . . . , do not constitute violations of international law"), summarily aff 'd, 375 F. 2d 1011 (CA2 1967); *Banco Nacional de Cuba* v. *Farr,* 383 F. 2d 166, 173– 176 (CA2 1967); Restatement (Second) of Foreign Relations Law of the United States §185 (1965) (Restatement (Second)); Lillich, The Proper Role of Domestic Courts in the International Legal Order, 11 Va. J. Int'l L. 9, 29, 34 (1970).

Congress used language nearly identical to that of the Second Hickenlooper Amendment 12 years later in crafting the FSIA's expropriation exception. As noted, it provides that United States courts may exercise jurisdiction over a foreign sovereign in any case "in which rights in property taken in violation of international law are in issue." 28 U. S. C. §1605(a)(3).

Based on this historical and legal background, courts arrived at a "consensus" that the expropriation exception's "reference to 'violation of international law' does not cover expropriations of property belonging to a country's own nationals." *Republic of Austria* v. *Altmann,* 541 U. S. 677, 713 (2004) (BREYER, J., concurring).

B

The heirs urge us to change course. They read "rights in property taken in violation of international law" not as an invocation of the international law governing property rights, but as a broad incorporation of any international norm. Focusing on human rights law, the heirs rely on the United Nations Convention on Genocide, which defines genocide as "deliberately inflicting on [a] group conditions of life calculated to bring about its physical destruction in whole or in part." Convention on the Prevention and Punishment of the Crime of Genocide, Art. II, Dec. 9, 1948, 78 U. N. T. S. 277, 280. According to the heirs, the forced sale of their ancestors' art constituted an act of genocide because the confiscation of property was one of the conditions the Third Reich inflicted on the Jewish population to bring about their destruction.

We need not decide whether the sale of the consortium's property was an act of genocide, because the expropriation exception is best read as referencing the international law of expropriation rather than of human rights. We do not look to the law of genocide to determine if we have jurisdiction over the heirs' common law property claims. We look to the law of property.

And in 1976, the state of that body of law was clear: A "taking of property" could be "wrongful under international law" only where a state deprived "an alien" of property. Restatement (Second) §185; see also *Permanent Mission of India to United Nations* v. *City of New York*, 551 U. S. 193, 199–200 (2007) (noting our consistent practice of interpreting the FSIA in keeping with "international law at the time of the FSIA's enactment" and looking to the contemporary Restatement for guidance). As explained above, this rule survived the advent of modern human rights law, including the United Nations Convention on Genocide. Congress drafted the expropriation exception and its predecessor, the Hickenlooper Amendment, against that legal and historical backdrop. See *Taggart* v. *Lorenzen*, 587 U. S. ___, ___ (2019) (slip op., at 5).

The heirs concede that at the time of the FSIA's enactment the international law of expropriation retained the domestic takings rule. See Restatement (Second) §192. But they argue that Congress captured all of international law in the exception—not just the international law of expropriation—and that other areas of international law do not shield a sovereign's actions against its own nationals. In support of that assertion, they note that the exception concerns "property *taken* in violation of international law"— not "property *takings* in violation of international law." Tr. of Oral Arg. 70. This distinction between "takings" and "taken," they say, is the difference between incorporating the specific international law governing takings of property and incorporating international law writ large. *Ibid.*

We would not place so much weight on a gerund. The text of the expropriation exception as a whole supports Germany's reading. In its entirety the clause provides that United States courts may exercise jurisdiction over a foreign sovereign in any case "in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such 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 or any property exchanged for such 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 places repeated emphasis on property and property-related rights, while injuries and acts we might associate with genocide are notably lacking. That would be remarkable if the provision were intended to provide relief for atrocities such as the Holocaust. A statutory phrase concerning property rights most sensibly references the international law governing property rights, rather than the law of genocide.

What is more, the heirs' interpretation of the phrase "taken in violation of international law" is not limited to violations of the law of genocide but extends to any human rights abuse. Their construction would arguably force courts themselves to violate international law, not only ignoring the domestic takings rule but also derogating international law's preservation of sovereign immunity for violations of human rights law. As the International Court of Justice recently ruled when considering claims brought by descendants of citizens of Nazi-occupied countries, "a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law." *Jurisdictional Immunities of the State* (*Germany* v. *Italy*), 2012 I. C. J. 99, 139 (Judgt. of Feb. 3); see also Bradley & Goldsmith, Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation, 13 Green Bag 2d 9, 21 (2009). Respondents would overturn that rule whenever a violation of international human rights law is accompanied by a taking of property.

Germany's interpretation of the exception is also more consistent with the FSIA's express goal of codifying the restrictive theory of sovereign immunity. §1602. Under the absolute or classical theory of sovereign immunity, foreign sovereigns are categorically immune from suit. *Altmann*, 541 U. S., at 690. Under the restrictive view, by contrast, immunity extends to a sovereign's public but not its private acts. *Ibid*. Most of the FSIA's exceptions, such as the exception for "commercial activity carried on in the United States," comport with the overarching framework of the restrictive theory. §1605(a)(2).

It is true that the expropriation exception, because it permits the exercise of jurisdiction over some public acts of expropriation, goes beyond even the restrictive view. In this way, the exception is unique; no other country has adopted a comparable limitation on sovereign immunity. Restatement (Fourth) of Foreign Relations Law of the United States §455, Reporters' Note 15 (2017). History and context explain this nonconformity. As events such as Secretary Hull's letter and the Second Hickenlooper Amendment demonstrate, the United States has long sought to protect the property of its citizens abroad as part of a defense of America's free enterprise system. *Sabbatino*, 376 U. S., at 430.

Given that the FSIA "largely codifies" the restrictive theory, however, we take seriously the Act's general effort to preserve a dichotomy between private and public acts. *Nelson*, 507 U. S., at 359 (internal quotation marks omitted). It would destroy that distinction were we to subject all manner of sovereign public acts to judicial scrutiny under the FSIA by transforming the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations. See *Helmerich*, 581 U. S., at ___ (slip op., at 9) (rejecting the suggestion that Congress intended the expropriation exception to operate as a "radical departure" from the "basic principles" of the restrictive theory).

C

Other provisions of the FSIA confirm Germany's position. The heirs' approach, for example, would circumvent the reticulated boundaries Congress placed in the FSIA with regard to human rights violations. Where Congress did target injuries associated with such acts, including torture or death, it did so explicitly and with precision. The noncommercial tort exception provides jurisdiction over claims "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property," but only where the relevant conduct "occurr[ed] in the United States." §1605(a)(5). Similarly, the terrorism exception eliminates sovereign immunity for state sponsors of terrorism but only for certain human rights claims, brought by certain victims, against certain defendants. §§1605A(a), (h).

These restrictions would be of little consequence if human rights abuses could be packaged as violations of property rights and thereby brought within the expropriation exception to sovereign immunity. And there is no reason to suppose Congress thought acts of genocide or other human rights violations to be especially deserving of redress only when accompanied by infringement of property rights. We have previously rejected efforts to insert modern human rights law into FSIA exceptions ill suited to the task. *Nelson*, 507 U. S., at 361 (commercial activity exception does not encompass claims that foreign state illegally detained and tortured United States citizen, "however monstrous such abuse undoubtedly may be"). We do so again today.

We have recognized that " 'United States law governs domestically but does not rule the world.'" *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, 115 (2013) (quoting *Microsoft Corp.* v. *AT&T Corp.*, 550 U. S. 437, 454 (2007)). We interpret the FSIA as we do other statutes affecting international relations: to avoid, where possible, "producing friction in our relations

with [other] nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation." *Helmerich*, 581 U. S., at ___ (slip op., at 12) (internal quotation marks omitted); *RJR Nabisco, Inc.* v. *European Community*, 579 U. S. ___, ___–___ (2016) (slip op., at 7–8) (interpreting civil Racketeer Influenced and Corrupt Organizations Act "to avoid the international discord that can result when U. S. law is applied to conduct in foreign countries"); *Kiobel*, 569 U. S., at 116 (interpreting Alien Tort Statute so as not to "adopt an interpretation of U. S. law that carries foreign policy consequences not clearly intended by the political branches").

As a Nation, we would be surprised—and might even initiate reciprocal action—if a court in Germany adjudicated claims by Americans that they were entitled to hundreds of millions of dollars because of human rights violations committed by the United States Government years ago. There is no reason to anticipate that Germany's reaction would be any different were American courts to exercise the jurisdiction claimed in this case.

* * * *

We do not address Germany's argument that the District Court was obligated to abstain from deciding the case on international comity grounds. Nor do we consider an alternative argument noted by the heirs: that the sale of the Welfenschatz is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction. See Brief for Respondents 27–28; but see Brief for Petitioners 19, n. 7 (claiming that the heirs forfeited this argument). The Court of Appeals should direct the District Court to consider this argument, including whether it was adequately preserved below.

The judgment of the Court of Appeals for the D. C. Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

* * * *

On March 16, 2021, the D.C. Circuit issued its mandate, remanding to the district court, in accordance with the Supreme Court's opinion, to "consider whether the sale of the Welfenschatz is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction, including whether this argument was adequately preserved in the District Court." *Philipp v. Fed. Republic of Germany*, 839 Fed. Appx. 574 (D.C. Cir. 2021). The district court filed its opinion in *Phillip*, No. 15-cv-00266 (D.D.C.), on July 26, 2021, denying plaintiffs' motion for leave to amend.

On December 30, 2021, the district court in *Simon* issued its decision on remand. *Simon v. Hungary*, No. 10-cv-01770 (D.D.C.). The district court in *Simon* granted defendants' motion to dismiss as to four plaintiffs for lack of subject matter jurisdiction due to sovereign immunity and due to those plaintiffs' clear Hungarian nationality at the time of the alleged expropriation. However, it denied the motion to dismiss as to nine plaintiffs, and dismissed with leave to amend as to one other.

4. Discretionary Act Carve-out to the Tort Exception

Usoyan v. Turkey arises out of violent clashes between Turkish security forces and protestors outside the Turkish ambassador's residence in Washington, D.C. on May 16, 2017. Injured protestors, including Lusik Usoyan and Kasim Kurd, brought suit against the Republic of Turkey. Turkey moved to dismiss based on foreign sovereign immunity, the political question doctrine, and international comity. The district court denied the motion to dismiss. Excerpts follow from the *amicus* brief of the United States, filed in the U.S. Court of Appeals for the D.C. Circuit on March 9, 2021. *Usoyan v. Turkey*, No. 20-7017 (D.C. Cir.).

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* * * *

A. Both Sending And Receiving States Have Responsibilities To Protect Diplomats And Officials

International law has long recognized the importance of protecting diplomats and senior government officials during their travels abroad. *See, e.g.*, 4 E. de Vattel, *The Law of Nations* § 82, at 465 (J. Chitty ed. 1844) (an act of violence to a foreign public minister is "an offense against the law of nations"). The United States' respect for that principle is as old as the nation itself. As far back as 1781, for example, "the Continental Congress adopted a resolution calling on the States to enact laws punishing 'infractions of the immunities of ambassadors and other public ministers[,]' … targeting in particular 'violence offered to their persons, houses, carriages and property.'" *Boos v. Barry*, 485 U.S. 312, 323 (1988); *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004). The United States' commitment to protect visiting diplomats and foreign officials reflects not just "our Nation's important interest in international relations" but also our need to "ensure[] that similar protections will be accorded those that we send abroad to represent the United States." *Boos*, 485 U.S. at 323-324; *cf. Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1396-1397 (2018) (discussing provisions of the Constitution and the Judiciary Act of 1789 allowing U.S. courts to resolve disputes involving diplomats).

International law assigns to the "receiving state"—that is, the nation receiving foreign diplomats or senor officials—primary responsibility for protecting those officials. The Vienna Convention on Diplomatic Relations provides that "[t]he receiving State shall … take all appropriate steps to prevent any attack on" the "person, freedom or dignity" of "a diplomatic agent." Vienna Convention on Diplomatic Relations art. 29, Dec. 13, 1972, 23 U.S.T. 3227, 3240, T.I.A.S. No. 7502. Congress has authorized both the Secret Service and the State Department to protect visiting foreign officials, *see* 18 U.S.C. § 3056(a)(5), (6); 22 U.S.C. § 2709(a)(3)(A), (D), and both agencies routinely exercise that authority. There is good reason to assign receiving states the primary responsibility for protecting visiting foreign government officials and diplomatic missions: Otherwise, "the task of repulsing invasions of [an] embassy and its grounds would be left largely to the foreign nation's security forces," and "[v]iolence between [domestic] citizens and foreign security forces … is hardly calculated to improve relations between governments." *Finzer v. Barry*, 798 F.2d 1450, 1463 (D.C. Cir. 1986), *aff 'd in part, rev'd in part sub nom*. *Boos v. Barry*, 485 U.S. 312 (1988).

But although receiving states have primary responsibility for protecting visiting

foreign government officials and diplomats, sending states retain the inherent authority and responsibility to protect their own personnel when they travel overseas, subject to the authorization of the receiving state. The United States routinely exercises this authority to protect U.S. diplomats and diplomatic facilities overseas, supplementing the host government's protection with Diplomatic Security personnel, U.S. Marine Security Guards, and local contractors. See 22 U.S.C. § 4802(a) (directing the Secretary of State to "develop and implement … policies and programs" for protecting U.S. government personnel and missions abroad). The United States also exercises its authority to protect senior U.S. officials, including the President, when they travel overseas. The United States would not rely entirely on a foreign government, even that of a close ally, to protect senior U.S. officials traveling abroad; nor would the United States expect other nations to fully cede the protection of their diplomats and senior officials to our own personnel.

Congress has explicitly recognized our government's authority to protect U.S. diplomats and officials overseas, as discussed above, and it has impliedly recognized foreign nations' authority to protect their diplomats and senior officials in the United States. In 1999, Congress prohibited the possession of firearms by persons admitted to the United States on nonimmigrant visas, but it exempted from that prohibition certain "official representative[s] of a foreign government" and "foreign law enforcement officer[s] of a friendly foreign government entering the United States on official law enforcement business." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, § 121, 112 Stat.2681, 2681–72 (1998) (codified at 18 U.S.C. § 922(y)(2)). The amendment's sponsor explained that the exception was meant to cover "categories of people [who] might" need to possess a gun "for very legitimate purposes," such as a member of the "security contingent" of "any head of state" visiting the United States. 144 Cong. Rec. 16,493 (1998) (Sen. Durbin). The State Department has accordingly informed foreign missions that foreign "Protective Escorts" may import weapons "for the purpose of protecting the visiting foreign government dignitary they are accompanying." Circular Diplomatic Note (June 10, 2015), *available at* https://go.usa.gov/xsxPX; *see also United States v. Alkhaldi*, 2012 WL 5415579, at *4 (E.D. Ark. Nov. 6, 2012) ("The statute allows certain representatives of foreign governments the same security and right to firearms that the United States might desire for its personnel abroad[.]").

The principle that sending states are authorized to protect diplomats and officials traveling abroad has not been codified in a treaty, as has the obligation of receiving states to protect foreign diplomatic and consular personnel, but that does not reflect any uncertainty about whether the authority exists. To the contrary, this principle is widely accepted in international practice and reflects the fact that nations have inherent authority to protect their diplomats and senior officials outside their borders, subject to the authorization of the receiving state.

B. Foreign Security Personnel Have Discretion To Use Force Against Domestic Civilians On Domestic Territory Only When It Reasonably Appears Necessary To Defend A Protected Person

As noted above, foreign states have the authority and responsibility to protect their diplomats and senior officials abroad, and that authority includes the discretion to use force against domestic civilians on domestic territory in certain circumstances. But that authority is subject to an important limitation: Foreign security personnel may use force against domestic civilians on domestic territory only in the exercise of their protective function—that is, when the use of force reasonably appears necessary to protect against a threat of bodily harm. That

limitation is reflected, for example, in the State Department's guidance to foreign missions that protective escorts "may only bring weapons into the United States for the purpose of protecting the visiting foreign government dignitary they are accompanying." Circular Diplomatic Note (June 10, 2015), *supra*. No source of law affords foreign security personnel discretion to use force against civilians on U.S. territory except in the exercise of their protective function.

U.S. security personnel charged with protecting U.S. diplomatic and consular personnel and senior officials in foreign territory (including agents of both the State Department and the Secret Service) are required as a matter of policy to respect that constraint. The State Department, for example, permits Diplomatic Security personnel to use less-than-lethal force only when doing so "reasonably appears necessary … to limit, disperse, or address a threatening situation" and to use deadly force "only when necessary" in light of "a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the special agent or to another person." 12 Foreign Affairs Manual 091, 092, https://go.usa.gov/xsPrZ.

C. The FSIA's Discretionary Function Rule Does Not Protect Sending States Whose Agents Use Force Outside Any Reasonable Conception Of Their Protective Function

The Foreign Sovereign Immunities Act (FSIA) provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States … in any case … in which money damages are sought against a foreign state 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 that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5). The Act qualifies that exception to immunity, however, by stating that it "shall not apply" to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." *Id.* § 1605(a)(5)(A). Decisions construing the discretionary function exception of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a), may provide "guidance" on the construction of the FSIA's discretionary function rule, *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921-922 (D.C. Cir. 1987), although the two provisions serve distinct purposes.

The protection of diplomats and senior officials against threats of bodily harm would ordinarily involve the sort of discretion insulated from suit under the FSIA. Agents performing that function must exercise sophisticated, often split-second judgment in detecting potential threats and determining the appropriate response. *See, e.g.*, *Reichle v. Howards*, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring in the judgment) ("Officers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy."); *Galella v. Onassis*, 487 F.2d 986, 993-994 & n.9 (2d Cir. 1973) (explaining that the duties of Secret Service agents "involve an element of discretion" and that "the duty of protecting" senior officials and their family members "is *toto coelo* different from the normal police function"). And as in the Fourth Amendment context, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Indeed, the very "purpose of " immunity for the exercise of discretionary functions "is to prevent judicial second-guessing of " discretionary governmental decisions "through the medium of an action in tort." *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (quotation marks omitted). For that reason, the FSIA expressly provides that foreign states retain immunity for the

exercise of a discretionary function "regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A).

The district court was therefore incorrect to the extent it suggested that the discretionary function rule categorically cannot immunize conduct involving the use of "violent physical" force or "sudden, violent, physical acts," 438 F. Supp. 3d at 17-18. Although security personnel for the United States take all appropriate actions to modulate the use of force when protecting U.S. diplomats and senior officials abroad, the use of violent force may unfortunately be necessary in certain circumstances to repel or neutralize threats to a protectee. As long as a security agent is exercising discretion to defend a protected person, in circumstances where the use of force reasonably appears necessary to protect against bodily harm, the discretionary function rule preserves immunity whether or not the agent "abuse[s]" his or her discretion, 28 U.S.C. § 1605(a)(5).

The discretionary function rule cannot apply, however, when agents have no lawful discretion to exercise. That is the case when foreign security personnel use force against civilians on U.S. territory in a manner that cannot be understood to fall within any reasonable conception of their protective function. Thus, in determining whether a foreign state is subject to suit for the use of force by its security personnel against domestic civilians, the relevant question is whether—from the perspective of an agent on the scene—the agents' use of force can reasonably be regarded as protective in character. If so, it is protected by the discretionary function rule, whether or not it canbe regarded as an abuse of discretion; but if not, it is unprotected by the discretionary function rule.

D. The District Court's Account Of The Facts Establishes That The Force Used By Turkish Security Personnel Was Not Protective In Character

The district court's description of the facts establishes that Turkish security personnel used force in a manner outside any reasonable conception of their protective function and therefore not protected by the FSIA's discretionary function rule. That is true for two reasons.

First, at the time of the principal altercation between plaintiffs and the Turkish security personnel, plaintiffs—along with other protesters—"were standing and remaining on the Sheridan Circle sidewalk which had been designated for protesting by United [S]tates law enforcement." *Usoyan*, 438 F. Supp. 3d at 19-20. Both the Turkish agents (along with supporters of President Erdoğan) and U.S. law enforcement separated the protesters from the Ambassador's Residence at which President Erdoğan had arrived. *Id*. at 8. Yet the Turkish agents "crossed [the] police line" separating them from the protesters in order "to attack the protesters" "violently," and they took that aggressive action without any indication (according to the district court) "that an attack by the protesters was imminent," *id*. at 20, and without any finding by the district court of some other reasonable basis for perceiving a threat to President Erdoğan. There is no basis in the district court's account of the facts to regard the "attack" by Turkish agents as protective in nature.

Second, the actions the Turkish agents took after the initial attack leave little doubt that they were using force for a purpose outside their proper protective function. The district court observed that "[t]he protesters did not rush to meet the attack"; they "either fell to the ground … or ran away." 438 F. Supp. 3d at 20. Yet the Turkish agents "continued to strike and kick the protesters who were lying prone on the ground," and they "chased … and violently physically attacked many of " the protesters who were running away from the scene. *Id*. at 9; *see id*. at 20. They then "ripped up the protesters' signs." *Id*. at 9. None of those actions could reasonably be regarded as protective in character. Later the same day, moreover, Turkish agents

"emerged from a van that was part of President Erdogan's motorcade" and assaulted plaintiff Lacey MacAuley. *Id*. At 10. MacAuley was doing nothing more than standing "behind a police line," "holding a sign and chanting" as the motorcade drove by—yet Turkish agents "physically attacked [her] by forcibly covering her mouth, grabbing her wrist and arm, and snatching and crumbling her sign," all "after President Erdogan's motorcade had already passed." *Id*. at 20. Those actions, too, cannot reasonably be regarded as protective in character.

As the district court properly recognized, the conclusion that the actions of the Turkish security personnel are not protected by the discretionary function rule is "very narrow [and] fact-specific." 438 F. Supp. 3d at 20. "[P]roviding security for a president is extremely challenging and often requires split-second decision making," and those "challenges are especially fraught when providing security for a leader such as President Erdogan who has been the victim of multiple assassination threats and attempts." *Id*. at 20-21. "Had the facts of these cases differed slightly," Turkey's entitlement to immunity might "have differed as well." *Id*. at 21. But because the district court's account of the facts makes clear that the Turkish agents' use of force was not protective in character, the agents were not exercising legally protected discretion, and Turkey is accordingly subject to these suits under the FSIA's noncommercial tort exception, 28 U.S.C. § 1605(a)(5).

* * * *

In its opinion in *Usoyan v. Turkey*, issued July 27, 2021, the D.C. Circuit affirmed the district court's denial of Turkey's motion to dismiss on sovereign immunity grounds. Consistent with the views of the United States government in its *amicus* brief, excerpted *supra*, a panel of the court of appeals found that, while Turkey did have some discretion to protect President Erdogan while in the United States under the discretionary act carve-out to the FSIA's tort exception, the facts as found by the district court made clear that the actions alleged in the complaint were not in furtherance of a protective function. Excerpts follow from the section of the opinion of the court on the FSIA. *Usoyan v. Turkey*, 6 F.4th 31 (D.C. Cir. 2021). See Chapter 5 for discussion of the court's opinion regarding the political question doctrine and international comity.

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* * * *

Under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602 *et seq.*, a foreign state is "presumptively immune from the jurisdiction of United States courts." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). The FSIA codifies a limited number of exceptions to the presumption, which exceptions are "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989).

The district court determined that it had jurisdiction under the FSIA's "tortious acts exception," which strips immunity in any case

> in which money damages are sought against a foreign state 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 that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.

28 U.S.C. § 1605(a)(5), (a)(5)(A). Invoking the § 1605(a)(5)(A) exception to the exception, Turkey argues that the "discretionary function" exception preserves its sovereign immunity.

The FSIA's discretionary function exception is modeled after a similarly worded exception in the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a). *See* H.R. Rep. 94-1487, at 21 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6620. Because the United States Supreme Court has not yet interpreted the FSIA's discretionary function exception, we look to what it has said about the FTCA's analogous provision. *See MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921–22 (D.C. Cir. 1987) (FTCA precedent provides "guidance" in FSIA cases). Using the same rationale, the district court applied FTCA precedent *mutatis mutandis*.

The Supreme Court has said that the FTCA's discretionary function exception applies—and sovereign immunity is preserved—if two conditions are met. *First*, there must be no "federal statute, regulation, or policy [that] *specifically prescribes* a course of action for an employee to follow." *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988) (emphasis added). *See also United States v. Gaubert*, 499 U.S. 315, 322, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). *Second*, the employee's exercise of discretion must be "the kind that the discretionary function exception was designed to shield"—that is, "based on considerations of public policy." *Berkovitz*, 486 U.S. at 536–37, 108 S.Ct. 1954. *See also Gaubert*, 499 U.S. at 322–23, 111 S.Ct. 1267. The district court held that only the first *Berkovitz* condition was satisfied. Reviewing *de novo, see de Csepel v. Republic of Hungary*, 714 F.3d 591, 597 (D.C. Cir. 2013), we agree.

A. First *Berkovitz* Condition

Under *Berkovitz*, we first determine whether the challenged conduct "involves an element of judgment or choice." 486 U.S. at 536, 108 S.Ct. 1954 (citing *Dalehite v. United States*, 346 U.S. 15, 34, 73 S.Ct. 956, 97 L.Ed. 1427 (1953)). An action is not discretionary if an employee is "bound to act in a particular way." *Gaubert*, 499 U.S. at 329, 111 S.Ct. 1267. If a governing law or policy "mandates particular conduct" and the employee violates the mandate, "there will be no shelter from liability because there is no room for choice." *Id.* at 324, 111 S.Ct. 1267. Nor is an action discretionary if "the decisionmaker is acting without actual authority." *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986). *See also Birnbaum v. United States*, 588 F.2d 319, 329 (2d Cir. 1978) (discretionary function "can derive only from properly delegated authority"). In essence, *Berkovitz*'s first condition asks whether the challenged conduct is rightfully the product of independent judgment. *See Berkovitz*, 486 U.S. at 536, 108 S.Ct. 1954 (citing *Westfall v. Erwin*, 484 U.S. 292, 296–97, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988)).

We see two issues that need to be resolved. *First*, Turkey is a foreign power and—as Turkey itself concedes—its agents do not have the authority to perform law enforcement functions inside the United States. *See* Restatement (Fourth) of the Foreign Relations Law of the United States § 432(b) (Am. L. Inst. 2018) ("[A] state may not exercise jurisdiction to enforce in the territory of another state."). Accordingly, if we are to find that the Turkish security detail was exercising its discretion in taking its challenged actions, we must identify the source of that

discretion. *Second*, whatever the source of Turkey's discretion, the plaintiffs allege that Turkey exceeded that discretion by violating various laws of Washington, D.C. We must also determine, then, whether these alleged violations take Turkey's conduct outside the ambit of the discretionary function exception.

1.

In FTCA cases, we usually do not ponder the source of the government's discretion. The cases typically arise in contexts in which the government's authority to act is uncontroversial. …

There are exceptions, of course. …

Because U.S. law does not confer the same powers on foreign sovereigns as it does on the federal government, the question of an employee's initial authority to act is more likely to exist in an FSIA case. If a foreign government has no authority to take a certain type of action in the United States, its employee's action in that sphere cannot constitute an exercise of discretion. We need not ponder whether Turkey's discretion was taken away if it never existed in the first place. The first *Berkovitz* condition therefore requires that we understand the source of Turkey's discretion—if any—to defend visiting officials using physical force.

During oral argument, counsel for both parties were asked about the source of the Turkish security detail's authority to use physical force in the United States. Although the plaintiffs' counsel responded that there was no evidence that the Turkish security detail "received any authorization to act in any manner," Turkey's counsel maintained that the security detail's authority was grounded in "the international law about the relations between sovereigns."

We invited the United States to provide its views "on the source and scope of any discretion afforded to foreign security personnel with respect to taking physical actions against domestic civilians on public property." In its brief, the United States declares that no source of positive law explicitly grants Turkey the authority to use physical force in the protection of diplomats on U.S. soil. Instead, the United States locates Turkey's right in customary international law:

The principle that sending states are authorized to protect diplomats and officials traveling abroad has not been codified in a treaty, as has the obligation of receiving states to protect foreign diplomatic and consular personnel, but that does not reflect any uncertainty about whether the authority exists. To the contrary, this principle is widely accepted in international practice and reflects the fact that nations have inherent authority to protect their diplomats and senior officials outside their borders, subject to the authorization of the receiving state.

Although the United States does not use the phrase "customary international law," that is the clear implication of its reference to international practice and the "inherent authority" of nations. Customary international law, after all, is simply the "general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (Am. L. Inst. 1987).

The plaintiffs seize on the Government's statement, noting that Turkey did not "identify any statute, regulation, or other source of law that either confers or limits its discretion to act" nor did the Government "identify any such specific authorization in this case." Turkey responds that the Government's position is consistent with its own view that its right to protect President Erdogan with physical force inheres in its sovereignty.

We think that Turkey—following the United States' lead—has the better view. International law is the source of many powers that are incidental to sovereignty. Although the United States Constitution does not affirmatively grant the federal government the power to

"acquire territory by discovery and occupation," "expel undesirable aliens" or "make such international agreements as do not constitute treaties in the constitutional sense," the Supreme Court has described these powers as "inherently inseparable from the conception of nationality." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318, 57 S.Ct. 216, 81 L.Ed. 255 (1936). And in each case, the Court found the power not in the Constitution or some other source of positive law but, instead, in "the law of nations." *Id.* (citing *Jones v. United States*, 137 U.S. 202, 212, 11 S.Ct. 80, 34 L.Ed. 691 (1890) (territory); *Fong Yue Ting v. United States*, 149 U.S. 698, 705, 13 S.Ct. 1016, 37 L.Ed. 905 *et seq.* (1893) (aliens); *B. Altman & Co. v. United States*, 224 U.S. 583, 600–01, 32 S.Ct. 593, 56 L.Ed. 894 (1912) (treaties)). The United States' view, then, is legally plausible.

The next question is whether it is well-supported. As evidence of international law, we look to obvious sources like treaties and legislative acts, *see The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900), as well as "the general usage and practice of nations" and "judicial decisions recognizing and enforcing that law," *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61, 5 L.Ed. 57 (1820)).

The United States first notes that diplomats should be able to execute their duties in safety and without fear of molestation. Of this proposition we have no doubt. The Vienna Convention on Diplomatic Relations—ratified by the United States in 1972—declares that "[t]he person of a diplomatic agent shall be inviolable." Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Art. 29, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502 (entered into force in U.S. Dec. 13, 1972). The Supreme Court has recognized that this "concern for the protection of ambassadors and foreign ministers even predates the Constitution." *Boos v. Barry*, 485 U.S. 312, 323, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). *See also Frend v. United States*, 100 F.2d 691, 693 (D.C. Cir. 1938) ("[A]mbassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection." (quoting Pres. Fillmore, Message to Congress, Dec. 2, 1851)). Emer de Vattel's 1758 treatise called violence against a foreign minister "an offense against the law of nations." 4 E. de Vattel, *The Law of Nations* § 82, at 465 (J. Chitty ed. 1844).

A sending state's right to use force in defense of its officials, however, does not necessarily follow from the right of those officials to carry out their business unmolested. As the United States notes, "[t]here is good reason to assign receiving states the primary responsibility for protecting visiting foreign government officials." We made a similar point when faced with a First Amendment challenge brought by individuals who sought to demonstrate outside the Nicaraguan embassy: "Peace and dignity would be destroyed outright" if "the task of repulsing invasions of the embassy and its grounds would be left largely to the foreign nation's security forces." *Finzer v. Barry*, 798 F.2d 1450, 1463 (D.C. Cir. 1986), *rev'd in part on other grounds sub nom. Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). In sum, the inviolability of diplomats suggests, but does not affirmatively establish, that a sending state has the right to use force in the defense of diplomats.

Next, the United States refers to the Government's practice overseas. U.S. diplomats and diplomatic facilities are protected by the State Department's Bureau of Diplomatic Security, U.S. Marine Corps security guards and local contractors. The United States argues that this principle is reciprocal and that the reciprocity has been impliedly codified: although aliens on non-immigrant visas are generally prohibited from possessing firearms in the United States, *see* 18 U.S.C. § 922(g)(5)(B), the Congress exempts "foreign law enforcement officer[s] of a friendly

foreign government entering the United States on official law enforcement business," *id.* at § 922(y)(2)(D).

Reciprocity undoubtedly "governs much of international law in this area." *Boos*, 485 U.S. at 323, 108 S.Ct. 1157 (citing Clifton E. Wilson, *Diplomatic Privileges and Immunities* 32 (1967)). Thus, we give significant weight to the Government's contention that "[t]he United States would not rely entirely on a foreign government, even that of a close ally, to protect senior U.S. officials traveling abroad; nor would the United States expect other nations to fully cede the protection of their diplomats and senior officials to our own personnel."

Finally, we note that the United States' legal position is itself evidence of international law, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432–33, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (Executive Branch is "an interpreter of generally accepted and traditional rules" of international law), and worthy of some deference. In *Al Bahlul v. United States*, for example, we said that a "highest-level Executive Branch deliberation is worthy of respect in construing the law of war." 767 F.3d 1, 25 (D.C. Cir. 2014) (en banc) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733–34, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004)) (referring to Attorney General's legal opinion to President Andrew Johnson). And this is a hoary principle. In *Jones v. United States*, for example, the Supreme Court deferred to the President's international law determination that a certain island was not subject to Haiti's jurisdiction. *See* 137 U.S. at 214, 222–23, 11 S.Ct. 80. *See also Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 418, 10 L.Ed. 226 (1839) (similar); *Ex parte Republic of Peru*, 318 U.S. 578, 589, 63 S.Ct. 793, 87 L.Ed. 1014 (1943) (in pre-FSIA suit against Peruvian vessel, State Department request that vessel be declared immune was conclusive). Although the Government's legal brief—even when offered as a non-party—may lack the force of a presidential decree, the Executive Branch often speaks through its lawyers. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 417, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) (Solicitor General speaks for State Department); *Al-Bihani v. Obama*, 619 F.3d 1, 46 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of reh'g en banc) (Executive Branch speaks through Justice Department's Office of Legal Counsel and Office of Solicitor General).

In summary, the United States' legal position is well-reasoned and comports with the strong evidence that a sending state has a right in customary international law to protect diplomats and other high officials representing the sending state abroad. Accordingly, we agree with its determination.

2.

Although we have established that the Turkish security detail had a right to protect President Erdogan, that does not automatically satisfy *Berkovitz*'s first condition. We must address the plaintiffs' argument that "Turkey did not have discretion to commit criminal assaults." Turkey allegedly violated several District of Columbia laws, including assault with a dangerous weapon and aggravated assault, *see* D.C. Code §§ 22-402, 404.01. After reviewing the entire record, including video footage of the confrontations, we think it clear that the plaintiffs' allegations are plausible. *See Loumiet*, 828 F.3d at 946 (plaintiffs must "plausibly allege[ ]" government violated legal mandate). *See also Gaubert*, 499 U.S. at 324–25, 111 S.Ct. 1267. We also note that fifteen members of the Turkish security detail were subsequently indicted by the United States on criminal assault charges. The remaining question is whether these allegations strip Turkey's immunity.

We conclude that Turkey's immunity is not removed by the plaintiffs' allegations that it violated local law. Unless a "*specific* directive exists," we cannot say that an employee has "no

choice" in his actions. *Cope*, 45 F.3d at 448 (emphasis added) (internal quotations omitted). Not every law prescribes specific conduct. …

In the abstract, it can be difficult to determine whether a law is so specific that its violation takes challenged conduct outside the discretionary function exception. But *Cope* provides a good guideline: "If a specific directive exists," then the "only issue is whether the employee followed the directive, and is thus exempt," or, alternatively, "whether the employee did not follow the directive, thus opening the government to suit." 45 F.3d at 448. Refraining from assaulting protestors would not have automatically made the Turkish security detail's conduct discretionary. Likewise, generally applicable laws prohibiting criminal assault did not give the Turkish security detail a sufficiently "specific directive" to strip Turkey of its immunity.

This is not to suggest that violation of a proscription never implicates the first *Berkovitz* condition. What is important is not whether a law or policy is phrased in affirmative or negative terms—prescribing or prohibiting certain conduct—but how specifically the directive speaks to the challenged conduct. …

* * * *

B. Second *Berkovitz* Condition

The FSIA, like the FTCA, does not shield all exercises of discretion. Under *Berkovitz*, the discretionary function exception "protects only governmental actions and decisions based on considerations of public policy." 486 U.S. at 537, 108 S.Ct. 1954. Mere "garden-variety" discretion receives no protection. *Cope*, 45 F.3d at 448. Only discretionary actions "grounded in social, economic, and political policy" fall within the exception. *Gaubert*, 499 U.S. at 323, 111 S.Ct. 1267. *See also Red Lake Band*, 800 F.2d at 1195–96. "Grounded in" does not mean "motivated by." Our focus "is not on the agent's subjective intent" but rather "on the nature of the actions taken." *Gaubert*, 499 U.S. at 325, 111 S.Ct. 1267.

Determining which discretionary actions qualify is "admittedly difficult"—after all, "nearly every government action is, at least to some extent, subject to 'policy analysis.' " *Cope*, 45 F.3d at 448. But we have resisted invitations to shield actions implicating only "the faintest hint of policy concern[ ]." *Id.* at 449. Moreover, blatantly careless or malicious conduct cannot be recast in the language of cost-benefit analysis. *Berkovitz*'s second condition is met "only where the question is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency." *Id.* at 450 (internal quotations omitted).

In a "fact-specific decision," the district court concluded that Turkey's actions were not covered by the exception. *Usoyan*, 438 F. Supp. 3d at 20. We agree. Although the Turkish security detail's protective mission was discretionary as a general matter, that does not mean that every action a Turkish officer may take is an immunized exercise of that discretion. Discrete injury-causing actions can, in certain cases, be "sufficiently separable from protected discretionary decisions to make the discretionary function exception inapplicable." *Moore v. Valder*, 65 F.3d 189, 197 (D.C. Cir. 1995), *abrogated on other grounds by Ziglar v. Abbasi*, —— U.S. ——, 137 S. Ct. 1843, 198 L.Ed.2d 290 (2017). In *Moore*, we spoke of the vast discretion committed to federal prosecutors while at the same time recognizing that a prosecutor's decision to disclose grand jury testimony to unauthorized parties was not "inextricably tied" to his discretion. *Id. Accord Linder v. United States*, 937 F.3d 1087, 1091 (7th Cir. 2019) ("To say that criminal investigation and prosecution are suffused with discretion does not imply that *every*

possible step must be within the scope of [the discretionary function exception]." (emphasis added)).

Relying on *Macharia v. United States*, Turkey asserts that all decisions about how to protect President Erdogan are susceptible to policy analysis, given that those decisions required its employees to "weigh varying security risk levels against the cost of specific countermeasures." 334 F.3d 61, 66 (D.C. Cir. 2003) (quoting U.S. Dep't of State Foreign Affairs Manual, 12 FAM 314.1). But *Macharia*, which arose from al Qaeda's attack on the U.S. Embassy in Kenya, illustrates a contrary point. There, the government's allegedly negligent conduct—a failure to provide proper Embassy security—involved archetypical public policy considerations. Decisions like "how much safety equipment should be provided to a particular embassy, how much training should be given to guards and embassy employees, and the amount of security-related guidance that should be provided necessarily entail[ ] balancing competing demands for funds and resources." *Id.* at 67 (citation omitted).

Although certain Turkish security officers may be responsible for "weigh[ing] varying security risk levels," those are not the decisions giving rise to the plaintiffs' suit. Per *Macharia*, examples of policy tradeoffs that involve weighing security risk levels against the cost of countermeasures might include, for example, how many security officers to deploy and how to train and arm them; how the Turkish security detail used those resources here is not a policy tradeoff. …

The Turkish security detail's conduct was grounded in public policy only in the limited way that a police officer effectuates public policy when he gives chase to a fleeing vehicle. It is "universally acknowledged that the discretionary function exception never protects against liability for the negligence of a vehicle driver." *Gaubert*, 499 U.S. at 336, 111 S.Ct. 1267 (Scalia, J., concurring). *See also Cope*, 45 F.3d at 448; *MacArthur*, 809 F.2d at 921; *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 n.10 (D.C. Cir. 1984); *Dalehite*, 346 U.S. at 28, 73 S.Ct. 956. For good reason. "Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy." *Gaubert*, 499 U.S. at 325 n.7, 111 S.Ct. 1267. This is true even though a negligent government driver may have been acting in the service of some greater policy. "Viewed from 50,000 feet, virtually any action can be characterized as discretionary. But the discretionary function exception requires that an inquiring court focus on the specific conduct at issue." *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009). When viewed up close, we believe the decisions by the Turkish security detail giving rise to the plaintiffs' suit were not the kind of security-related decisions that are " 'fraught with' economic, political, or social judgments." *Cope*, 45 F.3d at 450. The nature of the challenged conduct was not plausibly related to protecting President Erdogan, which is the only authority Turkey had to use force against United States citizens and residents. Our analysis might have been affected if Turkey had consulted with the United States regarding the specific decisions giving rise to the plaintiffs' suit, *see Macharia*, 334 F.3d at 67, but there is no such allegation here and, as noted earlier, the United States has indicted fifteen Turkish security officials as a result of their actions. Turkey's claim to sovereign immunity thereby fails.

Importantly, we do not base our conclusion on whether Turkey's actions were justifiable; that is a merits question, not a jurisdictional one. In the same way that speeding down a residential street may occasionally be justifiable but is not an execution of policy, the Turkish security detail's actions may have been justified in some circumstances but cannot be said in this

case to have been plausibly grounded in considerations of security-related policy and thus do not fall within the discretionary function exception.

* * * *

5. Choice-of-Law in FSIA Cases

The United States filed an *amicus* brief in the Supreme Court of the United States in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. 20-1566, on November 22, 2021. The United States had previously filed an *amicus* brief in the case in the Supreme Court in 2011. See *Digest 2011* at 268-69 (regarding exhaustion) and 298-303 (regarding the expropriation exception). The 2021 brief argues that state choice-of-law rules provide the rule of decision in an FSIA suit based on state law claims, rather than federal rules. Excerpts follow from the U.S. brief (with footnotes omitted).[*]

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* * * *

A. Section 1606 Of The FSIA Requires The Application Of State Choice-Of-Law Rules In These Circumstances

1. The FSIA sets forth "comprehensive rules governing sovereign immunity." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 496 (1983) (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976) (House Report)). Because "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States," *id.* at 493, Congress deemed it critical to enact " 'a uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (quoting House Report 32). The FSIA's sovereign-immunity standards and service-of-process requirements thus establish the exclusive standards, as a matter of federal law, for determining whether a suit against a foreign state may be maintained in the United States. 28 U.S.C. 1605, 1607, 1608.

The FSIA, however, was "not intended to affect the substantive law of liability." *First Nat'l City Bank*, 462 U.S. at 620 (quoting House Report 12). Section 1606 provides:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances[.]

28 U.S.C. 1606. Accordingly, once jurisdiction is established, the FSIA generally functions as a "pass-through" to the substantive law that would govern suits between private individuals. *Oveissi* v. *Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009) (citation omitted); see *Jam* v. *International Fin. Corp.*, 139 S. Ct. 759, 768 (2019) (explaining that " 'same as'

[*] Editor's note: On April 21, 2022, the Supreme Court issued its opinion, holding that the forum State's choice-of-law rule, not a rule deriving from federal common law, applies in FSIA cases such as this one. *Cassirer v. Thyssen-Bornemisza Collection Found*., 596 U.S. ___, 142 S. Ct. 1502 (2022).

provisions" "dot the statute books, and federal and state courts commonly read them to mandate ongoing equal treatment of two groups or objects"). "[W]here state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *First Nat'l City Bank*, 462 U.S. at 622 n.11. Cf. 28 U.S.C. 1605A, 1605B (provisions enacted in 2008 and 2016 creating federal causes of action for certain terrorism-related claims).has a foreign component, the determination of liability on such a claim may, of course, be governed by foreign law. Where Congress wanted to depart from the equal treatment principle, it said so explicitly. See 28 U.S.C. 1606 (providing that a foreign state "shall not be liable for punitive damages," even where an individual under like circumstances would be so liable).

2. Applying Section 1606 here suffices to resolve this case. Section 1606 specifically provides that where Section 1605 or 1607 creates an exception to immunity for a particular "claim for relief," "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. A "foreign state" includes an "instrumentality of a foreign state," and therefore includes respondent. See 28 U.S.C. 1603(a). And this case has proceeded under an exception to immunity found in "section 1605," 28 U.S.C. 1606, namely the expropriation exception in Section 1605(a)(3), see 616 F.3d 1019, 1037; Pet. App. C55.

Petitioner has asserted property-law claims for conversion, constructive trust, and possession (also known as replevin) against respondent, treating the painting as stolen property for purposes of those claims, and has sought a declaration of those state-law rights under the Declaratory Judgment Act, 28 U.S.C. 2201 (2012). 461 F. Supp. 2d 1157, 1178; Compl. 14-15. If the respondent were a private individual, the district court would apply the forum State's (here, California's) choice-of-law rules to select the applicable law. See *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Petitioner contends (Pet. 17; Pet. Br. 13) that California choice-of-law rules would lead to the application of California law, which provides that a good-faith purchaser cannot acquire good title to stolen property. See Pet. App. B20; 862 F.3d 951, 960; *Crocker Nat'l Bank* v. *Byrne & McDonnell*, 173 P. 752, 754 (Cal. 1918). It is undisputed at this stage, by contrast, that the application of federal common-law choice-of-law rules results in the application of Spanish law, which allowed respondent to acquire title to the stolen painting by acquisitive prescription, making respondent rather than petitioner its lawful owner. See Pet. App. A2, C20.

Accordingly, if federal common-law rules govern this suit, respondent could "be liable," 28 U.S.C. 1606, in a different manner and to a different extent than a private individual under like circumstances. In fact, assuming that California's choice-of-law rules would lead to the selection of California law here (a question that the court of appeals left open, Pet. App. C20 n.9, and on which the United States takes no position), and that petitioner's view of the correct result under California law is sound, adopting federal common-law choice-of-law rules would mean that respondent is *not* liable, while a private party in like circumstances *would be* liable. Applying California choice-of-law rules to this suit would then be the only way to hold respondent "liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606.

Regardless of whether the selection of choice-of-law rules would ultimately make a difference in this case, the governing substantive law selected under federal common-law choice-of-law rules and state choice-of-law rules could diverge in some instances. And using a different rule of decision could make the foreign state liable in a different "manner" or to a different

"extent" than a private individual. 28 U.S.C. 1606. For that reason, using the same choice-of-law rules in suits against foreign states that would be applied against private defendants is the only way to "ensure identity of liability" between a foreign state and a private individual. *Barkanic* v. *General Admin. of Civ. Aviation of the People's Republic of China*, 923 F.2d 957, 960 (2d Cir. 1991); see, *e.g.*, *Oveissi*, 573 F.3d at 841 (explaining that "the goal of applying identical substantive laws to foreign states and private individuals cannot be achieved unless a federal court utilizes the same choice of law analysis in FSIA cases as it would apply if all the parties to the action were private") (quoting *Barkanic*, 923 F.2d at 959-960) (brackets and ellipsis omitted).

Confirming that analysis, the Court has previously held that the application of a State's choice-of-law rules best effectuates a statutory requirement that another sovereign—the United States—be treated "in the same manner and to the same extent as a private individual under like circumstances." *Richards* v. *United States*, 369 U.S. 1, 6 (1962) (citation omitted); see *id.* at 11-12. In *Richards*, the Court considered choice of law under the FTCA. The FTCA waives the United States' immunity from suit in some cases involving injuries caused by the negligence of government employees acting within the scope of their employment. See 28 U.S.C. 1346(b)(1). The FTCA—unlike the FSIA—specifies that the governing law is "the law of the place where the act or omission occurred." *Ibid.* Based on that provision, the petitioners in *Richards* contended that there was no need to apply choice-of-law rules at all because the internal law of the State " 'where the act or omission occurred' " would always provide the rule of decision. See 369 U. S. at 5 (citation omitted). The Court disagreed, interpreting " 'the law of the place' " to encompass a State's "whole law (including choice-of-law rules) of the place where the negligence occurred," *id*. at 2-3 (citation omitted); see *id*. at 11-13. That interpretation, the Court emphasized, would best give effect to the FTCA's separate requirement that the United States be liable "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, because applying the whole law of a State "enables the federal courts to treat the United States as a 'private individual under like circumstances,' and thus is consistent with the Act considered as a whole." *Richards*, 369 U.S. at 11 (quoting 28 U.S.C. 2674).

Effectuating the FSIA's identical "same manner and to the same extent" requirement, 28 U.S.C. 1606, likewise requires application of a State's choice-of-law rules. Indeed, the analysis is even more straightforward because the FSIA, unlike the FTCA, is silent about the governing law in cases raising state-law claims. In *Richards*, there was some tension between the "same manner" and "same extent" requirement and Congress's specification that the law where the negligent act occurred should govern, because applying state choice-of-law principles would ensure equal treatment between the United States and a private individual in like circumstances only "where the forum State is the same as the one in which the act or omission occurred." See 369 U.S. at 12. No such tension obtains here.

Moreover, Congress enacted the FSIA after the *Richards* decision, specifically adopting an identical "same manner" and "same extent" requirement after this Court had relied on it to incorporate state choice-of-law rules into the FTCA. See 122 Cong. Rec. 17,468 (1976) (explaining Section 1606, then numbered Section 1605(c), "is based upon 28 U.S.C. 2674"). Use of the FTCA's language incorporates this Court's interpretation of that language to require the application of a State's whole law, including its choice-of-law rules. See *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("When a statutory term is obviously transplanted from another legal source, it brings the old soil with it.") (citation and internal quotation marks omitted).

3. Section 1606's specification that a foreign state should be held liable in the same manner and to the same extent as a private individual reflects its judgment that, where state law applies (and unless otherwise specified), it should generally apply in full, rather than being displaced in whole or in part based solely on the involvement of a foreign government. A state's conflict-of-law rules are as "definitely a part of the law as any other branch of the state's law." Restatement (Second) of Conflict of Laws § 5 cmt. a, at 9 (1971); see *id.* § 2, at 2; *A.I. Trade Fin., Inc.* v. *Petra Int'l Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995) ("A choice-of-law rule is no less a rule of state law than any other[.]"). And the general Congressional determination in Section 1606 that state law should govern also applies to a State's choice-of-law principles, which reflect a State's "local policies" about how to settle competing interests where a case has a significant relationship to more than one jurisdiction. *Klaxon*, 313 U.S. at 496; see *Richards*, 369 U.S. at 12-13 (rejecting an interpretation of the FTCA that would "prevent the federal courts from implementing" a State's "policy in choice-of-law rules," including its decision about how "to take into account the interests of the State having significant contact with the parties to the litigation"). A State's substantive law may, for example, reflect a determination that, quite apart from any limitations under federal law, there are territorial limits on the law's application under state law. Cf. *Coca-Cola Co.* v. *Harmar Bottling Co.*, 218 S.W.3d 671, 682 (Tex. 2006) (interpreting the state antitrust statute to apply only to injuries that occur within the state, not those "that occurred in other states"); *State Sur. Co.* v. *Lensing*, 249 N.W.2d 608, 612 (Iowa 1977) (holding that a state bond statute does not apply to "out-of-state transactions"). Its approach to conflicts of law more broadly warrants comparable treatment.

B. Application Of State Choice-Of-Law Rules Comports With The Normal Treatment Of State Law Applied By Federal Courts

Beyond Section 1606's "same manner" and "same extent" requirement, the application of state law normally includes state choice-of-law principles, and at the very least nothing in the FSIA directs a contrary approach. Under this Court's decision in *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), a federal court applies all of a State's substantive rules in applying that State's law. *Id.* at 78; see Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408 n.122 (1964) (explaining that "the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law") (citation omitted); 19 Charles Alan Wright et al., *Federal Practice and Procedure* § 4520, at 892, 896 (2016). And under this Court's decision in *Klaxon*, a State's choice-of-law rules are substantive for purposes of *Erie*, see *Klaxon*, 313 U.S. at 496, meaning that, absent a contrary federal law or constitutional limit, see pp. 21-22, *infra*, state law applied by federal courts includes the State's choice-of-law rules.

Given that backdrop, Congress would have expected that, unless it provided to the contrary when it enacted the FSIA in 1976, the application of state law would include the State's choice-of-law rules. That is especially so because the year before Congress enacted the FSIA, this Court reaffirmed the *Klaxon* rule that the forum State's choice-of-law rules apply in a suit between private parties based on a death that occurred in Cambodia. *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3, 3 (1975) (per curiam).

C. The Presence Of A Foreign State As A Defendant In An FSIA Suit Does Not Justify The Creation Of Federal Common-Law To Govern Choice Of Law

Applying a State's choice-of-law rules also comports with the principle that federal courts should not create federal common law to displace state-created rules in the absence of strong justifications. See *Rodriguez* v. *FDIC*, 140 S. Ct. 713, 718 (2020) (emphasizing "the care

federal courts should exercise before taking up an invitation to try their hand at common lawmaking"). "[C]ases in which judicial creation of a special federal rule would be justified" are " 'few and restricted,' " *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994) (citation omitted), and creating a federal rule "must be necessary to protect uniquely federal interests." *Rodriguez*, 140 S. Ct. at 717 (citation and internal quotation marks omitted).

Creating federal common law can be appropriate for matters concerning "relationships with other countries." *Atherton* v. *FDIC*, 519 U.S. 213, 226 (1997); see, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425-426 (1964) (fashioning federal common-law Act of State doctrine limiting the authority of U.S. courts to determine the validity of the public acts of a foreign sovereign). But the selection of a choice-of-law rule under the FSIA for state-law-based claims does not usually implicate foreign policy concerns. Congress has determined that applying state law is generally appropriate in resolving the substance of a dispute with a foreign state, see p. 12, *supra*, and there is no reason to expect that state choice-of-law principles ordinarily pose a greater threat to foreign relations than other state-law principles providing a rule of decision as to the rights and liabilities of the parties.

The ultimate selection of state law to govern a claim under the FSIA could, however, have implications for foreign relations or other distinct federal interests in particular cases. And there could be instances in which a State's choice-of-law rules were hostile to or improperly dismissive of a foreign state's interests—especially its interests in regulating certain matters within its own territory—that state law should not control. But those concerns are best addressed by applying limits on the application of state law derived from the Constitution, applicable treaties or statutes, international comity, the Act of State doctrine, or other sources reflecting distinctly federal interests—rather than displacing state choice-of-law rules across the board.

The federal government's exclusive constitutional authority over foreign affairs limits the application of a State's law to foreign conduct where the state law conflicts with the Nation's foreign policy or interferes in an area of exclusively federal control. See, *e.g.*, *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413-427 (2003); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372-388 (2000); *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968). More generally, the Constitution limits a State's ability "to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state." *Lauritzen* v. *Larsen*, 345 U.S. 571, 590-591 (1953). Other constitutional provisions provide additional limits. See *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 304 (1981) (recognizing that the Due Process Clause and the Full Faith and Credit Clause of the Constitution limit a State's ability to select a particular law under its choice-of-law analysis); *Healy* v. *The Beer Inst.*, 491 U.S. 324, 336 (1989) (recognizing Commerce Clause constraints on a State's ability to regulate activity that occurs outside its borders); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 821 (1985) (explaining that the Constitution does not permit a State to "take a transaction with little or no relationship to the forum and apply the law of the forum"). In light of those safeguards, concerns about foreign relations in the context of international conflict-of-law problems "limit the scope and reach of state law" in certain instances, but "they ordinarily do not supply a conflicts rule or a uniform rule of substantive law to be followed by state courts or by federal courts sitting in diversity." See Eugene F. Scoles & Peter Hay, *Conflict of Laws* § 3.56, at 149 (1982).

Relying on rules that limit the scope and reach of state law in particular instances, rather than adopting a federal choice-of-law rule across the board, is also appropriate because a result that is problematic from the perspective of comity could obtain in some circumstances regardless of whether state law or federal common-law governs the choice of law. Cf. *Day & Zimmermann*,

423 U.S at 4 (rejecting lower courts' use of federal choice-of-law rules to select Texas law over Cambodian law for a suit involving a death in Cambodia based on the lower courts' view that it should be "effectuating the laws and policies of the United States"). Moreover, it appears likely, as respondent itself has recognized, that the application of federal and state choice-of-law principles would lead to the same result in the great majority of cases. …. For those reasons, the prophylactic of adopting federal common law to govern the choice-of-law analysis in suits under the FSIA as a categorical matter is neither necessary nor particularly well-tailored to the specific concern about an application of domestic law in a manner that is unfair to a foreign sovereign or that may otherwise interfere with the United States's conduct of foreign affairs.

D. The Reasons Advanced By Respondents And The Court Of Appeals For Developing A Federal Common-Law Rule Lack Merit

Interpreting the FSIA to apply the forum State's choice-of-law rules where state law provides the rule of decision comports with the holdings of the Second, Fifth, Sixth, and D.C. Circuits. *Barkanic*, 923 F.2d at 959-960; *Northrop Grumman Ship Sys., Inc.* v. *Ministry of Def. of the Republic of Venez.*, 575 F.3d 491, 498 (5th Cir. 2009); *O'Bryan* v. *Holy See*, 556 F.3d 361, 381 n.8 (6th Cir.), cert. denied, 558 U.S. 819 (2009); *Oveissi*, 573 F.3d at 841. The Ninth Circuit stands alone in requiring federal courts to develop and apply federal common-law choice-of-law rules. The Ninth Circuit has identified no persuasive reason to adopt its approach.

In *Harris* v. *Polskie Linie Lotnicze*, 820 F.2d 1000 (1987), the Ninth Circuit stated that "[i]n the absence of specific statutory guidance, [it] prefer[s] to resort to the federal common law for a choice-of-law rule." *Id.* at 1003. But the FSIA does provide specific statutory guidance, see 28 U.S.C. 1606;…. And the Ninth Circuit's "prefer[ence]," *Harris*, 820 F.2d at 1003, does not comport with this Court's more demanding standards for creating federal common law. …

In the decision below, the Ninth Circuit relied on its prior decision in *Schoenberg* v. *Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (1991). See Pet. App. C19. But that decision is no more persuasive, concluding that federal common law applies simply because "jurisdiction in this case is based on FSIA, not diversity." *Schoenberg*, 930 F.2d at 782. The Ninth Circuit's focus on the basis for a court's subject-matter jurisdiction was mistaken. As a leading treatise explains, "the law to be applied is not selected by reference to the basis of the court's subject matter jurisdiction"; rather it "turns upon the source or genesis of the right or issue being adjudicated." *Federal Practice and Procedure* § 4520, at 896; see p. 18, *supra*. The Ninth Circuit has not attempted to explain why a State's choice-of-law rules should not apply to claims based on state law, merely because the FSIA provides the jurisdictional basis for the suit.

* * * *

6. Execution on Judgments

See discussion of *FG Hemisphere v. DRC* in section C.2.b, *infra*.

B. HEAD OF STATE AND OTHER FOREIGN OFFICIAL IMMUNITY

See discussion in section D, *infra*, of *Soltan v. El Beblawi*, a case filed against the former interim prime minister of Egypt.

C. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. 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.

As discussed in *Digest 2020* at 415, the United States and the United Arab Emirates signed an enhanced consular privileges and immunities agreement in 2020. The U.S.-UAE Agreement Regarding Consular Privileges and Immunities entered into force March 3, 2021. The agreement is available at https://www.state.gov/united_arab_emirates-21-303.

2. Vienna Convention on Diplomatic Relations ("VCDR")

a. Muthana v. Pompeo

See *Digest 2019* at 361-68 for background on this case, in which the father of Hoda Muthana asserted that his daughter acquired U.S. citizenship at birth after he had been terminated as a Yemeni diplomat but before the United States was notified of the termination. On January 19, 2021, the D.C. Circuit affirmed the district court decision, agreeing with the U.S. government that Ms. Muthana is not, and never was, a citizen of the United States. *Muthana v. Pompeo*, 985 F.3d 893 (D.C. Cir. 2021). Excerpts follow from that decision.

* * * *

Although Muthana's claims focus on the revocation of citizenship for Hoda and John Doe, this case requires us to first ascertain whether Hoda and John Doe were United States citizens. That question turns on whether Muthana possessed diplomatic immunity when Hoda was born. Under the Fourteenth Amendment, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. CONST. amend. XIV, § 1. A child born on U.S. soil to a foreign diplomat possessing diplomatic immunity is not eligible for citizenship by birth because she is not born "subject to the jurisdiction" of the United States. *See United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898); *Nikoi v. Att'y Gen.*, 939 F.2d 1065, 1066 (D.C. Cir. 1991) ("The jurisdiction clause was intended to exclude from its operation children of ministers of foreign States born within the United States.") (cleaned up). We agree with the district court that because Muthana enjoyed diplomatic immunity at the time of Hoda's birth, she did not become a citizen at birth and therefore John Doe did not acquire citizenship because he was born abroad to non-citizen parents.

The argument proceeds as follows. First, under the Vienna Convention, diplomatic immunity continues until notification of a diplomat's termination to the host country. Muthana's

arguments to the contrary cannot be squared with the plain meaning of the Convention and longstanding diplomatic practice. Second, in this case the State Department certified to the district court that it was notified of Muthana's termination on February 6, 1995. Under our precedents, such certification provides conclusive evidence that Muthana enjoyed diplomatic immunity at the time of Hoda's birth in October 1994, and therefore that Hoda did not become a U.S. citizen at birth. Finally, we cannot grant Muthana equitable relief because courts have no power to confer citizenship where it otherwise does not exist under the laws of the United States.

A.

Diplomatic immunity is governed by the Vienna Convention on Diplomatic Relations. *See* 23 U.S.T. 3227. When interpreting treaties, "we are guided by principles similar to those governing statutory interpretation." *Iceland S.S. Co., Ltd.-Eimskip v. Dep't of Army*, 201 F.3d 451, 458 (D.C. Cir. 2000). Muthana argues that the Convention allows diplomatic immunity to cease on the date of his *termination* from his diplomatic post, which was prior to Hoda's birth. Because he lost diplomatic immunity before his daughter's birth, Muthana maintains that Hoda is a birthright citizen. The government argues that the Convention requires diplomatic immunity to continue until a reasonable period after *notification of termination* to the host country. Because the State Department was not notified of Muthana's termination until after Hoda's birth, she is not a citizen by virtue of her birth in the United States. "[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Starr Int'l Co. v. United States*, 910 F.3d 527, 537 (D.C. Cir. 2018) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)).

Here, the State Department's interpretation comports with the plain meaning of the Convention that diplomatic immunity ceases when the host country is notified of the termination. Article 43 of the Convention states in full:

> The function of a diplomatic agent comes to an end, inter alia: (a) on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end; (b) 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.

23 U.S.T. 3227, art. 43. Article 39 of the Convention connects the end of diplomatic functions with diplomatic immunity, providing that "[w]hen the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease" when the diplomat leaves the country or after a "reasonable period in which to do so, but shall subsist until that time." *Id.* at art. 39. The text of the Convention plainly provides that a diplomat's functions end upon "notification" to the receiving state and that diplomatic immunities continue from the date of notification for a "reasonable period" or until the diplomat leaves the country.

This notification condition comports with longstanding principles of international law and state practice, which allowed diplomatic immunity to continue for a reasonable period after diplomatic service ended and thereby protected diplomats by giving them some breathing room to leave the country or to make other arrangements without exposure to the jurisdiction of the host country. *See, e.g.*, Emer de Vattel, THE LAW OF NATIONS bk. IV, ch. IX § 125 (B. Kapossy & R. Whatmore eds., 2008) ("[W]hen he is obliged to depart on any account whatever, his functions cease: but his privileges and rights do not immediately expire. ... His safety, his independence, and his inviolability, are not less necessary to the success of the embassy in his

return, than at his coming."). The notification standard ensures that decisions regarding the status of diplomats generally turns on the determinations of the sending state.5 Luke T. Lee, CONSULAR LAW AND PRACTICE 95 (2d ed. 1991) (explaining that the notification standard respects state sovereignty by preventing "the receiving State [from] investigating the internal administration of the foreign consular organization in order to determine what status the [diplomatic or consular officer] holds"); *cf.* Vattel, THE LAW OF NATIONS bk. IV, ch. IX § 78 (noting a sovereign's exclusive control over its diplomatic missions abroad). Thus, under the plain meaning of the Convention, reinforced by historical practice, diplomatic immunity continues at least until the host country is notified of a diplomat's termination.

To support his interpretation, Muthana asserts that the term "inter alia" in Article 43 demonstrates that diplomatic immunity can cease either on the date the receiving state is notified of termination or the date of actual termination. Muthana argues that "inter alia" is a term of illustration, not of exclusion, so although notification is an example of when diplomatic immunity may cease, it is not the only standard. According to Muthana, Article 43 does not foreclose an interpretation that diplomatic immunity ends as of the dateoftermination. He reasons that, because termination is a possible standard, the State Department's decisions in 2005 and 2014 to issue a passport to Hoda were exercises of the Department's "discretion" to determine that Muthana did not have diplomatic immunity at the time of Hoda's birth.

Muthana's arguments, however, cannot be squared with the text, structure, purpose, and history of the Convention. As already discussed, the plain meaning of the Convention provides for a diplomat's functions to continue until notification of termination to the receiving state. The Convention's use of "inter alia" in Article 43 refers to other established circumstances that might end diplomatic functions, such as the death of a diplomat, the extinction of the sending or receiving state, a regime change, severance of diplomatic relations, and war. *See, e.g.*, 23 U.S.T. 3227, art. 39(3) (death of a diplomat), art. 45 (war and severance of diplomatic relations). Thus, "'*inter alia*', as used in the Vienna Convention indicate[s] also the existence of other conditions. All of these are now described." Lee, CONSULAR LAW AND PRACTICE 94. What "inter alia" does not include is allowing diplomatic immunity to turn on termination, a condition nowhere specified in the Convention and inconsistent with longstanding diplomatic practice.

Muthana's reading of coexisting termination and notification standards also runs afoul of one of the purposes of the Convention, namely to provide certainty and clarity in diplomatic relations. If either termination or notification of termination could govern the end of a diplomat's functions, diplomats could not be certain of the continuation of their immunity and host countries would not be certain of the status of lingering diplomats. *See id.* at 93 (explaining that international crises have arisen due to disagreement and confusion over when diplomatic immunity terminates). The Convention seeks to establish uniform standards for the diplomatic intercourse between nations in order to promote predictability and reciprocity. *See id.* (highlighting the importance of a "[c]lear statement of the condition under which the consular status of an individual terminates") (citation and quotation marks omitted); *see also* 23 U.S.T. 3227 pmbl. (explaining the Vienna Convention was created to ensure there is "an international convention on diplomatic intercourse" to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems"). As the government stresses here, the Convention "serves to protect United States diplomats abroad, which is a critical national interest of the United States." Gov't Br. 6. An interpretation that renders the standard governing the end of diplomatic immunity uncertain would provide less

protection to diplomats and the nations they represent and could undermine reciprocal treatment of American diplomats abroad.

Finally, although the State Department has some discretion over questions of diplomatic immunity even within the terms of the Convention, the government does not suggest that such discretion was exercised here to deny Muthana diplomatic immunity before notification of his termination and thereby to recognize Hoda's citizenship by birth. To the contrary, the government maintains that at the time of Hoda's birth, Muthana continued to enjoy diplomatic privileges and immunities. In addition to its certification, the government presented several contemporaneous records corroborating that Muthana had diplomatic status after Hoda's birth. For example, it presented a file from the U.N. Office of Protocol reflecting that Muthana's diplomatic status continued until February 6, 1995. S.A. 109. The government maintains that the issuance of a passport to Hoda in 2005 and 2014 was in error. It would seem far afield of the judicial role to convert a government error into an exercise of executive discretion in the sensitive

Consistent with historical practice, the Vienna Convention explicitly recognizes that diplomatic functions continue until notification of termination to the host country and that immunity is maintained for some "reasonable period" after such notification. We therefore hold that Muthana's diplomatic immunity continued at least until the United States was notified of his termination by Yemen.

B.

Whether Hoda and John Doe are citizens depends on whether Muthana enjoyed diplomatic immunity at the time of Hoda's birth. Under the Vienna Convention, the question turns on one dispositive fact: when was the United States notified that Muthana was no longer a diplomat? The State Department certified to the district court that the United States received notice of Muthana's termination on February 6, 1995. The district court accepted this certification as conclusive proof that Muthana had diplomatic immunity when his daughter was born in October 1994. Muthana attempts to rebut this conclusion by relying on a document obtained when applying for Hoda's passport. That letter states Muthana was "notified to the United States Mission" as a diplomat from October 15, 1990, to September 1, 1994. In light of more than a century of binding precedent that places the State Department's formal certification of diplomatic status beyond judicial scrutiny, we conclude the certification is conclusive and dispositive evidence as to the timing of Muthana's diplomatic immunity. With no dispute of material fact, summary judgment for the government was appropriate.

The Constitution vests the President with the sole power to "receive Ambassadors and other public Ministers." U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."), § 3 ("[H]e shall receive Ambassadors and other public Ministers."). The Reception Clause recognizes the President's authority to determine the status of diplomats, a fact long confirmed by all three branches. *See, e.g.*, Crimes Act of 1790 ch. IX § 25, 1 Stat. 112, 117–18; Presidential Power to Expel Diplomatic Personnel from the United States, 4A Op. O.L.C. 207, 208–09 (Apr. 4, 1980); *In re Baiz*, 135 U.S. 403, 432 (1890). Just as the President is vested with the "exclusive" power to recognize foreign governments, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 17 (2015), his "action in ... receiving ... diplomatic representatives is conclusive on all domestic courts," *Guar. Tr. Co. of N.Y. v. United States*, 304 U.S. 126, 138 (1938).

Recognizing the vesting of these diplomatic powers with the President, courts have afforded conclusive weight to the Executive's determination of an individual's diplomatic status.

See In re Baiz, 135 U.S. at 432 (Courts may not "sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister."). Justice Bushrod Washington, riding circuit, explained why the Constitution compels this rule:

> The constitution of the United States having vested in the president the power to receive ambassadors and other public ministers, has necessarily bestowed upon that branch of the government, not only the right, but the exclusive right, to judge of the credentials of the ministers so received; and so long as they continue to be recognized and treated by the president as ministers, the other branches of the government are bound to consider them as such.

United States v. Ortega, 27 F. Cas. 359, 361 (C.C.E.D. Pa. 1825) (Washington, J.). This understanding has survived to the present day. *See Carrera v. Carrera*, 174 F.2d 496, 497–98 (D.C. Cir. 1949); *Zdravkovich v. Consul Gen. of Yugoslavia*, 1998 WL 389086, at *1 (D.C. Cir. June 23, 1998) ("The courts are required to accept the State Department's determination that a foreign official possesses diplomatic immunity from suit.").

In litigation implicating the status of diplomats, the courts and the Executive have developed a practice in which the Executive submits a certification of a diplomat's status to the court. For example, in *Carrera*, we explained that the Executive's certification of immunity is entitled to conclusive weight when it is "transmitted to the district judge" by the State Department: "It is enough that an ambassador has requested immunity, that the State Department has recognized that the person for whom it was requested is entitled to it, and that the Department's recognition has been communicated to the court." 174 F.2d at 497. We noted that this was the process that was "approved by the Supreme Court in *In re Baiz*." *Id.*; *see also United States v. Al-Hamdi*, 356 F.3d 564, 569 (4th Cir. 2004); *Abdulaziz v. Met. Dade County*, 741 F.2d 1328, 1330– 31 (11th Cir. 1984); 4A Op. O.L.C. at 208–09. In this case, the State Department has submitted under this longstanding process a formal certification that the United States was notified of Muthana's termination from his diplomatic position on February 6, 1995.

In response, Muthana argues that the certification is not conclusive as to the dates of immunity because the district court was required to weigh the additional evidence he submitted, which he claims at least creates a dispute of material fact sufficient to prevent summary judgment. Specifically, Muthana attached a 2004 letter from Russell Graham (the "Graham Letter"), in which the United States Mission to the United Nations informed the Bureau of Citizenship and Immigration Services that Muthana was "notified to the United States Mission" as a diplomat from October 15, 1990, to September 1, 1994. Muthana argues that the district court should have given more weight to the Graham Letter than the State Department's certification, which was produced twenty years after Hoda's birth and after this lawsuit was filed. Because the Graham Letter was dated from before Hoda received her passport, Muthana suggests the Letter demonstrates that the State Department understood he was not in a diplomatic role when Hoda was born.

Even on its own terms, however, the Graham Letter creates no dispute over the relevant legal fact of when the United States was *notified* of Muthana's termination. The Graham Letter notes only two dates: Muthana's date of appointment as a diplomat, October 15, 1990, and his date of termination, September 1, 1994. The Graham Letter merely addresses the duration of Muthana's diplomatic position and when it was terminated. The Graham Letter says nothing

about when the United States was notified of Muthana's termination and therefore when his diplomatic immunity ended.

In any event, we must accept the State Department's formal certification to the Judiciary as conclusive proof of the dates of diplomatic immunity. *See, e.g.*, *Carrera*, 174 F.2d at 497. The Executive's determination cannot be attacked by "argumentative or collateral proof." *See In re Baiz*, 135 U.S. at 432. When a diplomat has been recognized by the Executive, "the evidence of those facts is not only sufficient, but in our opinion, conclusive upon the subject of his privileges as a minister." *Ortega*, 27 F. Cas. at 362. *See also Carrera*, 174 F.2d at 498 ("[T]he Secretary having certified Carrera's name as included in the list, judicial inquiry into the propriety of its listing was not appropriate."); *Al-Hamdi*, 356 F.3d at 573 (explaining that the State Department's certification "is conclusive evidence as to [] diplomatic status"). The State Department made a formal certification in this case, and it cannot be undermined by collateral evidence such as the Graham Letter, a document of unknown provenance that Muthana attached to his complaint.

By accepting the certification as conclusive, we decline to second-guess the Executive's recognition of diplomatic status. If courts could rely upon extrinsic evidence submitted by private parties to impeach the credibility of the Executive's formal certification, the certification would not be conclusive, and the courts rather than the Executive would have the final say with respect to recognizing a diplomat's immunity.10 *See United States v. Pink*, 315 U.S. 203, 230 (1942) ("We would usurp the executive function if we held that that [the recognition] decision was not final and conclusive in the courts."). The district court properly held that the State Department's certification is conclusive proof of the dates of Muthana's immunity and declined Muthana's request to look behind the certification or to order discovery.

Under the Vienna Convention, immunity continues at least until notification of termination, and the State Department here certified to the district court that notification of Muthana's termination occurred on February 6, 1995. Thus, Muthana possessed diplomatic immunity when his daughter was born in October 1994. As a consequence, Hoda Muthana was not born "subject to the jurisdiction" of the United States and is not a citizen by birth under the Fourteenth Amendment. *See Nikoi*, 939 F.2d at 1066. This also means that John Doe did not acquire citizenship based on parentage under 8 U.S.C. § 1401(g), since neither of his parents was a U.S. citizen when he was born.

* * * *

On June 16, 2021, Muthana filed a petition for a writ of certiorari in the U.S. Supreme Court. *Muthana v. Blinken*, No. 21-489. The petition presents the following question: "Is the U.S. State Department's certification of an individual's diplomatic status reasonably considered conclusive and unreviewable evidence, even where it conflicts with the Department's own prior certification for the same individual, and creates legal inconsistency as to the validity of previously recognized U.S. citizenship?" On December 8, 2021, the United States filed its brief in opposition to the petition. Excerpts follow from the U.S. brief.[**]

[**] Editor's note: On January 10, 2022, the Supreme Court denied the petition.

* * * *

Petitioner renews his contention (Pet. 13-27) that the State Department's official certification of his diplomatic status, the Donovan Certification, is not "reasonably considered conclusive and unreviewable evidence" of his diplomatic status because it purportedly "conflicts with the Department's own prior certification." Pet. i. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Furthermore, this case would be a poor vehicle in which to address the question presented because the Graham Letter on which petitioner relies does not conflict with the Donovan Certification's establishment of the date on which the United States received notice of petitioner's termination as a diplomat. No further review is warranted.

1. a. The court of appeals correctly determined that the Donovan Certification is conclusive and unreviewable evidence of petitioner's diplomatic status at the time of Ms. Muthana's birth. The Constitution vests the President with "[t]he executive Power," including the sole power to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, §§ 1, 3. Just as "the President since the founding has exercised [the] unilateral power to recognize new states," *Zivotofsky* v. *Kerry*, 576 U.S. 1, 15 (2015), the Executive's "action * * * in receiving [a foreign government's] diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination," *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 138 (1938).

Recognizing that the Constitution vests diplomatic powers in the Executive, this Court has long held that courts may "not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister." *In re Baiz*, 135 U.S. 403, 432 (1890). The "certificate of the Secretary of State" has therefore been seen as "the best evidence to prove the diplomatic character of a person accredited as a minister by the government of the United States." *Id.* at 421 (summarizing a holding from *United States* v. *Liddle*, 26 F. Cas. 936 (Washington, Circuit Justice, C.C.D. Pa. 1808) (No. 15,598)). Courts "have the right to accept the certificate of the State Department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof." *Id.* at 432; see *id.* at 421- 422 (describing cases where courts deemed a "certificate" of the State Department as "proper to establish whether a person is a public minister within the meaning of the Constitution and the laws," and explaining that "the inquiry" into a person's diplomatic character "may be answered by such evidence, if adduced"). Consistent with this Court's decision in *Baiz*, the lower courts in this case permissibly viewed the Donovan Certification as conclusive evidence that the State Department accorded petitioner diplomatic privileges and immunities in the United States until February 6, 1995, when the United Nations notified the U.S. Mission to the United Nations that petitioner had been previously terminated from his diplomatic post.

Petitioner mistakenly contends (Pet. 23) that *Baiz* is inapposite because the facts of that case "do not square" with the facts of this case, insofar as the petitioner in *Baiz* "was unable to present *any* credible State Department certification at all." But the *Baiz* Court did "not care[] to dispose of " the case "upon the mere absence of technical evidence." 135 U.S. at 431-432. The Court relied instead on correspondence from the Secretary of State, which demonstrated that the State Department never recognized the petitioner as a diplomat. See *id.* at 429 (explaining that

the Secretary's "correspondence disposes of the question before us"). So too here. The lower courts properly viewed the Donovan Certification and the accompanying declaration and exhibits as dispositive proof that petitioner enjoyed diplomatic privileges and immunities until February 6, 1995.

Petitioner contends (Pet. 24) that the Donovan Certification should not be controlling because there are "not one, but two separate and contradictory State Department certifications" here, "both produced for the identical purpose of establishing [petitioner's] diplomatic status." Petitioner thus concludes (Pet. 25) that courts should "afford at least the same deference to the Graham Letter" as to the Donovan Certification. That contention and conclusion are incorrect and inapposite. As the court of appeals observed (Pet. App. 24a), the Donovan Certification, not the Graham Letter, is "the State Department's formal certification to the Judiciary" regarding "the dates of diplomatic immunity." And this Court made clear in *Baiz* that courts "have the right to accept the certificate of the State Department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof." 135 U.S. at 432.

Moreover, as the district court, the court of appeals, and Judge Tatel's concurrence recognized, "nothing in the Graham letter contradicts the Donovan letter's statement that the United States received notification of Muthana's termination on February 6, 1995." Pet. App. 32a; see *id.* at 24a, 67a. The Graham Letter states only that petitioner was a "diplomatic member of the Permanent Mission of Yemen to the United Nations from October 15, 1990 to September 1, 1994," and that "[d]uring *this* period of time, [petitioner] was recognized by the United States Department of State as entitled to full diplomatic privileges and immunities." C.A. App. 12 (emphasis added). The Graham Letter does not make any representations about petitioner's diplomatic immunity (or lack thereof) during *other* periods of time. The Donovan Certification, by contrast, makes clear that because the State Department did not receive notification of petitioner's termination until February 6, 1995, petitioner continued to be recognized by the State Department as entitled to immunity until that date. Nothing in the Graham Letter contradicts that certification.

Petitioner's reliance (Pet. 25-26) on another letter from Mr. Graham in *Baoanan* v. *Baja*, 627 F. Supp. 2d 155 (S.D.N.Y. 2009), which petitioner contends uses language similar to that in the Graham Letter here, is misplaced. *Baoanan* addressed the distinct question of *residual immunity*, which is immunity that "shall continue to subsist" even after the diplomat's functions have ended "with respect to *acts performed* by such a person in the exercise of his functions *as a member of the mission*." Vienna Convention art. 39(2), 23 U.S.T. 3245 (emphases added). The only purpose of the letter in *Baoanan* was to establish that the allegedly unlawful acts occurred during the defendant's tenure as a member of the mission, thereby making him potentially "eligible for the residual immunity afforded by Article 39(2)" as long as the acts were " 'official acts.' " 627 F. Supp. 2d at 162. The *Baoanan* court had no need to (and thus did not) consider—and the letter in that case (like the Graham Letter here) did not address—the separate question of how long the defendant continued to enjoy general diplomatic privileges and immunities following his termination from the mission.

Finally, petitioner asserts (Pet. 28) that the court of appeals' decision gives the Executive "unrestrained authority to reverse its own prior positions and thereby alter an individual's status, and simultaneously shield that reversal from both judicial review and the protections of due process." That assertion is unsound. Congress has expressly authorized the Secretary of State "to cancel any United States passport * * * if it appears that such document was * * * erroneously obtained." 8 U.S.C. 1504(a); see 22 C.F.R. 51.62(a)(2). Here, the State Department concluded,

based on a thorough review of all available information and documentation, that Ms. Muthana erroneously obtained her passport because petitioner and family members in his household enjoyed diplomatic immunity at the time of her birth, and she therefore did not acquire birthright citizenship. See C.A. App. 105-106 (Donovan Decl. ¶¶ 17-19); see also *id.* at 111 (TOMIS record indicating that petitioner's "Termination Received Date" was "02/06/1995"). Petitioner's suggestion (Pet. 24) that the State Department was precluded from cancelling or revoking Ms. Muthana's passport because it "had all of the same evidence and information before it in 2004 as it does today" cannot be squared with Congress's recognition that passports are sometimes obtained in error, which is precisely why it has granted the Secretary of State the authority to cancel or revoke a passport whenever such an error "appears." 8 U.S.C. 1504(a).

Furthermore, to the extent petitioner contends (Pet. 28) that the cancellation of an erroneously obtained passport "alter[s] an individual's status" without "the protections of due process," that contention is incorrect. For one thing, Ms. Muthana had the opportunity to request a hearing to challenge the basis and evidence upon which the passport was revoked. 22 C.F.R. 51.71(h); see 22 C.F.R. 51.70-51.74 (2015); see also C.A. App. 15 (revocation letter informing Ms. Muthana of her right to a hearing). More importantly, Congress has made clear that the cancellation of a passport "shall affect only the document and not the citizenship status of the person in whose name the document was issued." 8 U.S.C. 1504(a). Here, the government has revoked Ms. Muthana's passport as having been erroneously obtained; it has not formally altered her citizenship status. Cf. 8 U.S.C. 1451(a). And to the extent Ms. Muthana wishes to establish her citizenship status, Congress has provided procedures for her to use in pursuing that from the Executive. See 8 U.S.C. 1503.

b. Alternatively, petitioner contends (Pet. 15-21) that under the Vienna Convention, his diplomatic immunity expired upon his termination from the mission in September 1994, irrespective of when the State Department received notification of his termination. That contention is incorrect. Interpretation of a treaty "must, of course, begin with the language of the Treaty itself," and the "clear import of treaty language controls" as a general matter. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982); see *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 699-700 (1988). "Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji*, 457 U.S. at 184-185; see *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1512 (2017) ("The Court also gives 'great weight' to 'the Executive Branch's interpretation of a treaty.' ") (citation omitted). Accordingly, "because the State Department is charged with the responsibility of enforcing the Vienna Convention," courts should "give 'substantial deference' to the State Department's interpretation of that treaty's provisions." *United States* v. *Al-Hamdi*, 356 F.3d 564, 570 (4th Cir. 2004) (brackets and citation omitted); see *United States* v. *Li*, 206 F.3d 56, 63 (1st Cir.) (en banc), cert. denied, 531 U.S. 956 (2000).

Here, the Vienna Convention's text clearly supports the State Department's interpretation even without any deference. Article 39 provides that "[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." Vienna Convention art. 39(2), 23 U.S.T. 3245. That text makes clear that a diplomat enjoys immunity *at least* until his "functions * * * have come to an end." *Ibid.* Article 43, in turn, explains in relevant part that "[t]he function of a diplomatic agent comes to an end, *inter alia*: (*a*) on notification by the sending State to the receiving State that the function of the

diplomatic agent has come to an end." 23 U.S.T. 3247. Under the plain text of Articles 39 and 43, therefore, a diplomat enjoys immunity at least until the receiving State has received notification of his termination or has taken action to terminate his status. Indeed, as the court of appeals observed, the Vienna Convention on Consular Relations, *done* Apr. 24, 1963, T.I.A.S. No. 6820, 21 U.S.T. 77 (entered into force with respect to the United States Dec. 24, 1969), deliberately "replaced the termination standard with the notification standard" for determin- ing the duration of *consular* immunity, which "but- tresses the conclusion that notification and termination are distinct periods for marking the end of diplomatic immunity." Pet. App. 16a n.6.

That interpretation is consistent with the purposes of the Vienna Convention on Diplomatic Relations and longstanding principles and practices of international law. See *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999) (adopting the interpretation that "is most faithful to the Convention's text, purpose, and overall structure"). The preamble to the Vienna Convention expressly states that "the purpose of [diplomatic] privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States," and that "an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations." Vienna Convention, preamble, 23 U.S.T. 3230; see *Abdulaziz* v. *Metropolitan Dade County*, 741 F.2d 1328, 1330 (11th Cir. 1984). The United States' practice of "not terminat[ing] a diplomat's privileges and immunities without official notice" furthers those purposes "because anything short of [official notification], 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." C.A. App. 104-105 (Donovan Decl. ¶ 14).

Petitioner's reliance (Pet. 17-18) on the phrase "inter alia" in Article 43 is misplaced. As the court of appeals explained, the Convention's use of that phrase "refers to other established circumstances that might end diplomatic functions, such as the death of a diplomat, the extinction of the sending or receiving state, a regime change, severance of diplomatic relations, and war." Pet. App. 17a; see Vienna Convention art. 39(3) (death of diplomat) and art. 45 (war and severance of diplomatic relations), 23 U.S.T. 3245 and 3248; see also arts. 9(2) and 43(*b*), 23 U.S.T. 3234 and 3247 (declaring a diplomat *persona non grata*). Those established circumstances are well-known in international law or set forth in the Convention itself. See Pet. App. 17a-18a. Petitioner's reading of "inter alia" as requiring a host country to end a diplomat's privileges and immunities without official notification of his termination contravenes not only the Convention's plain text, which does not provide for a date-of-termination rule, but also its purpose to "contribute to the development of friendly relations among nations." Vienna Convention, preamble, 23 U.S.T. 3230; cf. Luke T. Lee & John Quigley, *Consular Law and Practice* 85 (3d ed. 2008) (explaining in the consular- immunity context that under a termination rule, "the receiving State would be investigating the internal administration of the foreign consular organisation to determine a consul's status," which "would be neither feasible nor in accord with the prohibition against interference in the internal affairs of another State").

2. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. As explained above, the lower court's decision to give the State Department's certification conclusive weight as to petitioner's diplomatic status at the time of Ms. Muthana's birth followed this Court's decision in *Baiz*. And petitioner does not contest that every court of appeals to address the issue has adopted the same rule. See *Al-Hamdi*, 356 F.3d at 573 ("[W]e hold that the State Department's certification * * * is conclusive evidence as to the

diplomatic status of an individual."); *Abdulaziz*, 741 F.2d at 1331 ("The courts have the right to accept the certificate of the State Department as to diplomatic status."); *United States* v. *Lumumba*, 741 F.2d 12, 15 (2d Cir. 1984) ("[R]ecognition by the executive branch—not to be second-guessed by the judiciary—is essential to establishing diplomatic status."); *Carrera* v. *Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949) ("It is enough that an ambassador has requested immunity, that the State Department has recognized that the person for whom it was requested is entitled to it, and that the Department's recognition has been communicated to the court.").

Petitioner suggests (Pet. 18) that "[d]ecisions out of the Second, Seventh and D.C. Circuits accept and implement the * * * position that termination of duties, rather than receipt of notification, serves as the determinative trigger point for the end of diplomatic immunity." That suggestion is incorrect because it once again conflates residual immunity with the duration of general privileges and immunities following termination of diplomatic functions. Each case that petitioner identifies (Pet. 18-20) addressed the scope of a former diplomat's residual immunity, and therefore focused on whether the allegedly unlawful acts occurred during the defendant's tenure as a diplomat. See *Swarna* v. *Al- Awadi*, 622 F.3d 123, 134 (2d Cir. 2010); *United States* v. *Al Sharaf*, 183 F. Supp. 3d 45, 51 (D.D.C. 2016); *Baoanan*, 627 F. Supp. 2d at 162 (S.D.N.Y. 2009); *United States* v. *Wen*, No. 04-cr-241, 2005 WL 2076724, at *1 (E.D. Wis. Aug. 24, 2005); *United States* v. *Guinand*, 688 F. Supp. 774, 775 (D.D.C. 1988). None of those cases involved the distinct question of when the "function of [the] diplomatic agent comes to an end" for purposes of the general diplomatic privileges and immunities that affect the ability to acquire birthright citizenship. Vienna Convention art. 43, 23 U.S.T. 3247; see art. 39(2), 23 U.S.T. 3245.

3. In any event, this case would be a poor vehicle in which to resolve the question presented. Even if the Donovan Certification were not to be treated as conclusive proof of petitioner's diplomatic status at the time Ms. Muthana was born, nothing in the Graham Letter (or in the record in this case) contradicts the Certification's conclusion that the State Department did not receive notification of petitioner's termination as a diplomat until February 1995. See p. 15, *supra*. And as the district court observed, Mr. Donovan's conclusion in the Certification, which was reiterated in his declaration, was based on the contemporaneously created KARDEX record, TOMIS record, and U.N. termination list, all of which unambiguously establish that the State Department was not notified of petitioner's termination as a diplomat until February 1995. See C.A. App. 105-106 (Donovan Decl. ¶¶ 17-19); see also *id.* at 109, 111-112, 114. As a result, the only reasonable conclusions to be drawn from the evidence in the record are that petitioner enjoyed diplomatic privileges and immunities until February 1995, that Ms. Muthana therefore did not acquire United States citizenship at birth, and that the State Department's revocation of her passport as having been erroneously obtained was justified. Accordingly, petitioner would not be entitled to relief even if the question presented were resolved in his favor.

* * * *

b. FG Hemisphere v. DRC

The United States filed a statement of interest in *FG Hemisphere v. Democratic Republic of Congo ("DRC")*, No. 10-00232, in U.S. District Court for the Southern District of New York on December 17, 2021. The U.S. statement, excerpted below, asserts that certain court actions to enforce judgments against the DRC—such as executing on UN Mission accounts or diplomats' accounts, or expedited discovery from diplomats or the UN

Mission— are precluded by the VCDR and the UN Headquarters Agreement. The United States previously submitted its views regarding the availability of contempt sanctions in an earlier stage of the case in the U.S. Court of Appeals for the D.C. Circuit, *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373 (D.C. Cir. 2011). See *Digest 2011* at 330-31 and 458. See also *Digest 2006* at 621-26 for a discussion of *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 447 F.3d 835 (D.C. Cir. 2006), involving prior consideration by the D.C. Circuit of the availability of diplomatic properties for execution in the case.

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* * * *

I. The Protections Under the VCDR Shield the DRC's UN Mission Bank Accounts Used for Diplomatic Purposes from Restraint

The United States' treaty obligations preclude FG Hemisphere's attempt to execute on bank accounts used by the DRC's UN Mission for diplomatic purposes. In general, under the FSIA, the property of a foreign state may be subject to attachment or execution to satisfy a judgment if the property is both "in the United States" and "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). But Congress enacted the FSIA "[s]ubject to existing international agreements to which the United States is a party," 28 U.S.C. § 1609, and the FSIA therefore does not circumscribe the broad protections and immunities conferred by the VCDR, *see* H.R. Rep. No. 94-1487, at 12 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630 (the FSIA is "not intended to affect either diplomatic or consular immunity"). In other words, the FSIA's exceptions to immunity from attachment and execution are "inapplicab[le]" to an analysis of the validity of attachment where an international agreement such as the VCDR provides immunity. *767 Third Ave. Assocs. v. Permanent Mission of Republic of Zaire to the United Nations*, 988 F.2d 295, 297 (2d Cir. 1993).

Article 25 of the VCDR shields the bank accounts of foreign diplomatic missions from attachment and execution. That article provides that "[t]he receiving State shall accord full facilities for the performance of the functions of the mission." VCDR, art. 25, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502. Accordingly, the standard for determining whether a diplomatic bank account is immune from attachment under the VCDR is not whether that account is used for commercial activities, but rather whether such immunity is necessary to ensure the "full facilities" to which the diplomatic mission of the sending state is entitled. VCDR, art. 25; *see also id.*, Preamble (privileges and immunities conveyed by the VCDR are meant "to ensure the efficient performance of the functions of diplomatic missions"). The protections afforded by the VCDR extend by international agreement to UN missions and therefore extend, and apply equally, to the DRC's UN Mission bank accounts. *See* Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, art. V, § 15, June 26, 1947, T.I.A.S. 1676 (UN representatives entitled to the same privileges and immunities as the United States accords to diplomatic envoys); Convention on Privileges and Immunities of the United Nations, art. IV, § 11(g) (member state representatives to the UN receive the same privileges and immunities as diplomatic envoys) (collectively, the "UN Agreements"); *accord 767 Third Ave. Assocs.*, 988 F.2d at 298 (applying VCDR to define protection afforded to UN permanent mission).

Courts have routinely held that according "full facilities" to a diplomatic mission as required by Article 25 includes providing immunity from execution or attachment on embassy or mission bank accounts that are used for diplomatic purposes, because such bank accounts are critical to the functioning of a diplomatic mission. *See, e.g.*, *Avelar v. J. Cotoia Const., Inc.*, 11-CV-2172

(RMM)(MDG), 2011 WL 5245206, at *4 (E.D.N.Y. Nov. 2, 2011) ("Bank accounts used for diplomatic purposes are immune from execution under [Article 25], as facilities necessary for the mission to function."); *Sales v. Republic of Uganda*, 90 Civ. 3972 (CSH), 1993 WL 437762, at *1 (S.D.N.Y. Oct. 23, 1993) ("It is well settled that a foreign state's bank account cannot be attached if the funds are used for diplomatic purposes."); *Foxworth v. Permanent Mission of the Republic of Uganda to the United Nations*, 796 F. Supp. 761, 763 (S.D.N.Y. 1992) (the "attachment of [the Uganda UN Mission's] bank account is in violation of the United Nations Charter and the [VCDR] because it would force defendant to cease operations"); *see also Wyatt v. Syrian Arab Republic*, 83 F. Supp. 3d 192, 195-96 (D.D.C. 2015) ("To hold otherwise would put to foreign embassies the dilemma of either avoiding United States banks entirely or keeping money in this country subject to the threat of confiscation at any time. This would be contrary to the VCDR's stated purpose of ensuring the efficient performance of the functions of diplomatic missions." (quotation marks and alteration omitted)); *Devengoechea v. Bolivarian Republic of Venezuela*, No. 12-cv-23743, 2014 WL 12488572, at *5 (S.D. Fla. Oct. 28, 2014) ("In addressing the 'full facilities' language from the VCDR . . . , courts have found that bank accounts used by a mission for diplomatic purposes are immune, as they are necessary for the mission to function."), *report and recommendation adopted*, No. 12-cv-23743, 2014 WL 12488573 (S.D. Fla. Nov. 12, 2014); *Liberian Eastern Timber Corp. v. Gov't of the Republic of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987) ("The Liberian Embassy lacks the 'full facilities' the Government of the United States has agreed to accord if, to satisfy a civil judgment, the Court permits a writ of attachment to seize official bank accounts used or intended to be used for purposes of the diplomatic mission.").

Moreover, in applying Article 25 in this context, courts have relied on sworn affidavits submitted by mission officials attesting that the bank accounts at issue were used for the functioning of the mission. *See, e.g.*, *Avelar*, 2011 WL 5245206, at *4 ("A sworn statement from the head of mission is sufficient to establish that a bank account is used for diplomatic purposes."); *Sales*, 1993 WL 437762, at *2 (reliance on mission head's affidavit, rather than "painstaking examination of the Mission's budget and books of account," is consistent with principle of diplomatic immunity); *Foxworth*, 796 F. Supp. at 762 (relying on declaration to describe nature and purpose of accounts); *Liberian Eastern Timber Corp.*, 659 F. Supp. at 610 (same).

Here, the Declaration of Paul Losoko Efambe Empole— the Mission's Chargé d'affaires and currently its highest-ranking diplomat—submitted by the DRC in support of its motion to amend the Order is sufficient to establish that the DRC's UN Mission accounts are protected from attachment and execution under Article 25. *See* Declaration of Paul Losoko Efambe Empole, dated Nov. 4, 2021 ("Empole Decl.") (ECF No. 20) ¶ 3. The Empole Declaration states that the accounts in question "have been used during [Empole's] tenure as Chargé d'affaires exclusively for the Permanent Mission's diplomatic purposes." *Id.* ¶ 4. It further states that because these accounts have been frozen pursuant to the Court's Order, "the Permanent Mission cannot perform its diplomatic function to represent the Democratic Republic of the Congo before the United Nations." *Id.* ¶ 5. Because the declaration attests to the diplomatic nature of the accounts at issue, Article 25 of the VCDR prohibits the accounts' restraint.

FG Hemisphere's arguments to the contrary are unavailing. To begin, FG Hemisphere is wrong to suggest that attachment and execution on the Mission accounts is permissible under the FSIA, *see* ECF No. 31 ("Pl. Opp.") at 5, and that case law construing the FSIA's commercial activity exception is relevant to assessing the scope of the VCDR's protections, *see id.* at 7. As explained above, the FSIA does not "affect either diplomatic or consular immunity," H.R. Rep. No. 94-1487, at 12, and its commercial activity exception is therefore "inapplicab[le] to an analysis of the validity of attachment" under the VCDR, *767 Third Ave. Assocs.*, 988 F.2d at 297. Indeed, the Second Circuit has explained that "[t]he FSIA, as a statute that was enacted after the VCDR and was not intended to affect diplomatic immunity under the VCDR, is generally inappropriate for use as an

interpretive guide to the Vienna Convention." *Broidy Capital Mgmt. LLC v. Benomar*, 944 F.3d 436, 444 (2d Cir. 2019) (quotation marks omitted). Under the VCDR, the sole question is whether "the funds are used for diplomatic purposes"; if so, they "cannot be attached." *Sales*, 1993 WL 437762, at *1. And "[a] sworn statement from the head of mission is sufficient to establish that a bank account is used for diplomatic purposes." *Avelar*, 2011 WL 5245206, at *4.

For similar reasons, FG Hemisphere's allegation that at least portions of the accounts have been used for "commercial activities," Pl. Opp. 10-11, is also misplaced. The cases it cites for this proposition should not be followed here because they fail to address the international obligations applicable to the restraint of the bank account of a diplomatic mission, and are otherwise inapposite because they addressed attachment and execution under either the FSIA's exceptions to execution immunity, *see Weston Compagnie de Finance et D'Investissement, S.A. v. La Republica del Ecuador*, 823 F. Supp. 1106, 1114 (S.D.N.Y. 1993) (finding that funds in a central bank account where the central bank "merely acts as an intermediary bank" were not property of a foreign central bank "held for its own account" under 28 U.S.C. § 1611(b)); *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F. Supp. 311, 313 (D.D.C. 1980), or the Terrorism Risk Insurance Act ("TRIA"), *see Hill v. Republic of Iraq*, No. 99 Civ. 03346 (TP), 2003 WL 21057173, at *2 & n.4 (D.D.C. Mar. 11, 2003) (affording the President an opportunity to exercise the waiver authority under TRIA if the accounts in question were subject to the VCDR). In applying Article 25 of the VCDR, by contrast, courts have "decline[d] to order that if any portion of a bank account is used for a commercial activity then the entire account loses its immunity." *Liberian Eastern Timber Corp.*, 659 F. Supp. at 610; *see also NML Capital, Ltd. v. Republic of Argentina*, 680 F.3d 254, 259 (2d Cir. 2012) ("We do not consider, much less decide, the question of whether funds held by a foreign sovereign in a United States bank account for the exclusive or primary purpose of conducting consular or diplomatic functions would be subject to attachment under the FSIA. The attachment of such funds is subject to a different analysis under the FSIA and . . . the [VCDR].").

Finally, FG Hemisphere's allegations concerning the Mission accounts' use in a "scheme to embezzle DRC funds," Pl. Opp 8, are not dispositive. FG Hemisphere relies on those allegations in an effort to distinguish this matter from case law applying VCDR Article 25 to protect diplomatic bank accounts. *See id.* at 6, 8-9. But none of those cases relied on a plaintiffs' allegations regarding the use of funds in diplomatic accounts, let alone conducted an independent examination of the use of such funds to determine how they had been used. Rather, the courts in those cases looked to whether the sending states asserted in sworn declarations that the funds in question were "used for diplomatic purposes," and thus "necessary for the mission to function." *Avelar*, 2011 WL 5245206, at *4. Where, as here, the sending state has submitted such a declaration, the United States' obligation under VCDR Article 25 to afford "full facilities" to diplomatic missions obliges courts to refrain from permitting restraint of diplomatic and consular accounts. To hold otherwise—in this case, to permit a "painstaking examination of the Mission's budget and books of account" in order to test the validity of FG Hemisphere's allegations—would be inconsistent with the principle of diplomatic immunity, *Sales*, 1993 WL 437762, at *2, and would force foreign missions to either "avoid[] United States banks entirely or keep[] money in this country subject to the threat of confiscation at any time," *Wyatt*, 83 F. Supp. 3d at 195-96. That outcome would interfere with the performance of the functions of Mission. *See* VCDR, art. 3. Moreover, U.S. diplomatic missions abroad would be at risk of reciprocal treatment.

II. The VCDR Protects the Bank Accounts of Accredited Diplomats from Restraint, and Principles of Reciprocity Weigh Against Allowing the Restraint of the Remaining Personal Accounts

The United States' treaty obligations likewise protect the personal bank accounts of the three individuals listed in the Court's Order who are currently accredited diplomats assigned to the DRC's UN Mission: Empole, Victoria Lieta Liolocha, and Hippolyte Kingonzila Mfulu. That is because the

VCDR provides that, subject to certain exceptions, the property of a diplomatic agent "shall enjoy . . . inviolability[,]" VCDR, art. 30(2), and "[n]o measures of execution may be taken in respect of a diplomatic agent[,]" *id.*, art. 31(3). Here again, the protections afforded by the VCDR are extended by the UN Agreements to accredited diplomats of a foreign mission to the UN.

No exception to immunity applies here. FG Hemisphere contends that neither VCDR Article 25 nor its related case law supports shielding the accounts of individual diplomats from restraint. *See* Pl. Opp. at 12-13. But that is irrelevant because the plain language of VCDR articles 30(2) and 31(3), which FG Hemisphere does not address, does shield individual diplomats and their property. Likewise, while FG Hemisphere is correct that the VCDR does not provide for immunity in "an 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); *see* Pl. Opp. at 13-14, FG Hemisphere has failed to explain the outside commercial activity in which these individuals are purported to have engaged that would make them liable for the debts of the DRC. It is unclear at best how FG Hemisphere's allegations concerning these individuals—that their bank accounts contain funds embezzled from the Mission bank accounts—could fall within that exception. *See, e.g., Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996) ("commercial activity" under the VCDR is "the pursuit of trade or business activity").

Moreover, FG Hemisphere's allegations suggest that funds in the personal accounts properly belong to the DRC, not the individuals; but the DRC has not asserted an ownership interest in those funds. Rather, it has submitted declarations from all of these individuals attesting to the propriety of the payments they received. *See* ECF Nos. 19-24. And as explained above, even under FG Hemisphere's theory, the FSIA's commercial activity exception still would not govern here. *See Broidy Capital Mgmt.*, 944 F.3d at 444.

Although the other three individuals subject to the Order—former Ambassador Gata and local hires Bianza Therese Yvette Mpinga and Marie Hugette Nkus Ngung—are not presently accredited diplomatic personnel and are therefore outside the scope of immunity provided by the VCDR, permitting restraint on their personal accounts would implicate serious reciprocity concerns. The United States would object strongly to any attempts by a foreign court to restrain the accounts of current or former U.S. diplomatic staff to satisfy a foreign court judgment against the United States, and allowing restraint on any of the personal accounts at issue in this case would undermine the United States' ability to vindicate its interests and those of its employees.

III. The VCDR Protects Accredited Diplomats and the Information of a Foreign Diplomatic Mission from Discovery

The VCDR also bears on the expedited discovery provided for by the Order. Since the Order was issued, FG Hemisphere has withdrawn without prejudice the subpoenas it issued to the DRC's UN Mission, Empole, Liolocha, Mfulu, Mpinga, and Ngung. Def. Br. at 23 n.1. Nonetheless, to the extent FG Hemisphere were to seek discovery from the DRC's UN Mission or the DRC's accredited diplomats (*i.e.*, Empole, Liolocha, and Mfulu), several provisions of the VCDR would severely limit if not prohibit that discovery.

The archives and documents of the DRC's UN Mission are protected from discovery. *Cf. Liberian Eastern Timber Corp.*, 659 F. Supp. at 610 n.5 (in light of the VCDR's provisions, it would be "a difficult task at best" to obtain discovery regarding diplomatic accounts). VCDR Article 24 provides that "[t]he archives and documents of the mission are 'inviolable' at any time and wherever they may be." VCDR, art 24. According to a leading diplomatic law expert, "the expression 'inviolable' was deliberately chosen by the International Law Commission to convey both that the receiving State must abstain from any interference through its own authorities and that it owes a duty of protection of the archives in respect of unauthorized interference by others." Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 192 (3d ed. 2008); *see also 767 Third Ave. Assocs.*, 988 F.2d at 300 (the VCDR "was intended to and did provide

for the inviolability of mission premises, archives documents, and official correspondence," and "recognize[s] no exceptions to mission inviolability"). Compelled production of financial and operational records from the DRC's UN Mission would conflict with this provision. Similarly, VCDR Article 27 provides for the inviolability of official correspondence of the mission. Insofar as the discovery sought by FG Hemisphere seeks correspondence concerning diplomatic funds between the DRC's UN Mission and the DRC Government, it could compromise the ability of the Mission to carry out its functions in confidence, thus implicating the United States' obligation to "permit and protect free communication on the part of the mission for all official purposes" and to ensure the inviolability of the Mission's official correspondence. VCDR, art. 27(1)-(2); *see also* Denza, Diplomatic Law at 211 ("Free and secret communication between a diplomatic mission and its sending government is from the point of view of its effective operation probably the most important of all the privileges and immunities accorded under international diplomatic law.").

The VCDR protections also shield the accredited diplomats to the DRC's UN Mission from discovery. VCDR Article 31 provides that diplomatic agents "enjoy immunity from [the receiving state's] civil and administrative jurisdiction" and may not be compelled "to give evidence as [ ] witness[es]." Indeed, under Article 31, "[s]itting diplomats are accorded near-absolute immunity in the receiving state to avoid interference with the diplomat's service for his or her government." *Swarna v. Al-Awadi*, 622 F.3d 123, 137 (2d Cir. 2010). Any attempt by FG Hemisphere to compel deposition testimony from the DRC's diplomats would thus contravene the protections afforded under the VCDR.

Further, to the extent that discovery from Ambassador Gata and local hires Mpinga and Ngung would implicate the inviolability of the Mission's documents and archives by seeking information that these individuals obtained in the exercise of their official duties with the DRC's UN Mission, the DRC may properly assert archival inviolability under Article 24 of the VCDR. The United States regularly asserts this archival inviolability in foreign proceedings with respect to protected information sought from locally engaged staff and U.S. diplomats who have completed their assignment at the U.S. mission, and has a reciprocal interest in affording the same treatment to protect inviolable archives of foreign missions in the United States.

* * * *

c. Usoyan v. Turkey

See U.S. *amicus* brief in *Usoyan v. Turkey*, discussed in section A.4., *supra*, for discussion of the VCDR provisions regarding responsibility for protection of diplomats.

D. INTERNATIONAL ORGANIZATIONS

1. *FG Hemisphere v. DRC*

See discussion of *FG Hemisphere v. DRC* in section C.2.b, *infra*, involving immunities of UN mission and diplomats accounts.

2. *Soltan v. El Beblawi*

On April 1, 2021, the United States filed a statement of interest in *Soltan v. El Beblawi*, No. 20-cv-01437 (D.D.C.). Plaintiff alleged that, during El Beblawi's tenure as prime

minister of Egypt from July 9, 2013 to March 1, 2014, he bore responsibility, under the Torture Victim Protection Act, for abuses committed against protestors and activists such as Soltan. At the time that the complaint was filed and plaintiff attempted service, El Beblawi was serving as the principal resident representative of the Arab Republic of Egypt to the International Monetary Fund ("IMF"). The State Department issued a certification of El Beblawi's diplomatic status. The U.S. statement of interest asserts that the State Department's certification of El Beblawi's diplomatic status is conclusive and that El Beblawi enjoyed diplomatic agent level immunity when the suit was commenced. Further, the statement explains that, because El Beblawi enjoyed diplomatic status when the suit was commenced, the claims falling within the scope of his immunity should be dismissed even though he had since left his position. Excerpts follow from the U.S. statement of interest.

* * * *

I. The State Department's Certification of El Beblawi's Diplomatic Status is Conclusive as to his Status.

In response to the Court's inquiry, the Department of State's Certification of El Beblawi's diplomatic status is conclusive as to his status. Article II, Section 3 of the Constitution, the Reception Clause, expressly grants the President the authority to "receive Ambassadors and other public Ministers." "The Reception Clause recognizes the President's authority to determine the status of diplomats, a fact long confirmed by all three branches." *Muthana v. Pompeo*, 985 F.3d 893, 907 (D.C. Cir. 2021). The President's "'action in receiving diplomatic representatives is conclusive on all domestic courts.'" *Id.* (quoting *Guar. Tr. Co. of N.Y. v. United States*, 304 U.S. 126, 138 (1938)) (cleaned up). Accordingly, "more than a century of binding precedent . . . places the State Department's formal certification of diplomatic status beyond judicial scrutiny[.]" *Id.* at 906. The law is clear that courts must defer completely to the Executive Branch's determination that a foreign official has diplomatic status. See *In re Baiz*, 135 U.S. 403, 432 (1890) (noting that courts do "not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the state department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof"); *Abdulaziz v. Metro. Dade Cnty.*, 741 F.2d 1328, 1331 (11th Cir. 1984) ("Although defendants argue that the State Department certificate is reviewable in court, the courts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status"); *Montuya v. Chedid*, 779 F. Supp. 2d 60, 62 (D.D.C. 2011) ("The Court must accept the State Department's determination that Defendants have diplomatic status."). In other words, once the Department of State determines an individual's diplomatic status, courts must not look behind the certification to perform their own analysis of its basis.

In the present case, and consistent with Department policy, the State Department provided the Government of Egypt with the Seagroves Certification on July 7, 2020, and El Beblawi has provided a copy to the Court. ECF No. 32-1. This formal certification that El Beblawi enjoyed diplomatic status at the time he was purportedly served with legal process "cannot be undermined by collateral evidence." See *Muthana*, 985 F.3d at 908; see also 7 Op. Atty. Gen. 186, 186, 209 (1855) ("Ambassadors and other Public Ministers" subject to Reception

Clause include "all possible diplomatic agents which any foreign power may accredit to the United States" and "all officers having diplomatic functions whatever their title or designation."). For this reason, this Court must "decline to second-guess the Executive's recognition of [El Beblawi's] diplomatic status." See *Muthana*, 985 F.3d at 908; see also *Carrera v. Carrera*, 174 F.2d 496, 498 (D.C. Cir. 1949) (explaining that once the State Department certified an individual's name as being on the list of those with diplomatic status, "judicial inquiry into the propriety of its listing was not appropriate").

Foreign policy considerations underscore the requirement that this Court give "conclusive weight to the Executive's determination of an individual's diplomatic status," see *Muthana*, 985 F.3d at 907, regardless of whether that status arises from a traditional diplomatic mission or from a foreign state's participation in an international organization hosted by the United States, see 7 Op. Atty. Gen. at 186, 209. Given U.S. obligations arising from binding agreements, and the ensuing expectations of foreign governments sending representatives to the United States as the host nation of the United Nations and affiliated specialized agencies, disregarding the certification of El Beblawi's status or of any other foreign representatives to such agencies for whom the State Department has recognized diplomatic status would seriously damage U.S. foreign policy interests.

Given the questions posed by the Court, we note solely for the Court's cognizance that the State Department Certification is consistent with Article V, Section 15(4) of the Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations ("UN Headquarters Agreement"), and the process followed is in keeping with the Department's standard practice.

In this case, all three entities referred to in Section 15(4) of the UN Headquarters Agreement—the IMF, Egypt, and the United States—agreed as to El Beblawi's diplomatic status, even though no tripartite agreement is required for Principal Resident Representatives by the terms of Section 15(4) of the UN Headquarters Agreement. That is reflected in standard accreditation practice outlined above and in the Seagroves Declaration. In accordance with that practice, the IMF notified El Beblawi to the State Department as assuming his duties as Egypt's Principal Resident Representative to the IMF, which would have been based on a notification of the appointment by the Egyptian government to the IMF. Seagroves Decl. ¶ 2. State then accepted the IMF's notification and recorded El Beblawi's diplomatic status. *Id.* ¶ 3.

Here, El Beblawi's status as Principal Resident Representative entitled him to the same immunities as are accorded to diplomatic agents under the VCDR, including those specified in Article 31 of the VCDR. See Seagroves Certification. As noted above, this Court must give conclusive weight to the State Department's determination of El Beblawi's diplomatic status. In addition, courts must accord the Government's views "great weight" when determining the scope of immunity conferred by any relevant treaty or statute. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."). See also, *e.g.*, *Carrera*, 174 F.2d at 498 (adjudicating plaintiff's claims that the case involved exceptions to statutory immunity after explaining that "judicial inquiry into the propriety of [State's] listing" of a foreign official as having diplomatic status "was not appropriate"); *Montuya*, 779 F. Supp. 2d at 62 ("Because Defendants have diplomatic status under the VCDR, they are entitled to diplomatic immunity, unless one of the exceptions in the VCDR applies."). Although the United States does not understand the parties to dispute that Plaintiff's claims fall within the scope of immunity conferred by Article 31, this Court should

find, giving great weight to the Department of State's views, that the scope of immunity under Article 31 encompasses the claims against El Beblawi in the Complaint.

II. Suits That Are Commenced When an Official Has Diplomatic Status Continue to be Governed by that Status.

The State Department's records indicate that the IMF notified the Department of State of El Beblawi's termination as the Principal Resident Representative of the Arab Republic of Egypt to the IMF, effective October 31, 2020. Seagroves Decl. ¶ 4. El Beblawi's change of status has no effect on the instant case because Plaintiff claims to have served El Beblawi while he enjoyed diplomatic agent status. See *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980-81 (D.C. Cir. 1965) (holding that "Ambassador's diplomatic immunity would have been violated by any compulsory service of process on him by [a U.S.] Marshal"); *United States v. Khobragade*, 15 F. Supp. 3d 383, 387 (S.D.N.Y. 2014) ("Courts in civil cases have dismissed claims against individuals who had diplomatic immunity at an earlier stage of the proceedings, even if they no longer possessed immunity at the time dismissal was sought."). Accordingly, El Beblawi held diplomatic status at the time when the suit was commenced, and the Court should dismiss without prejudice claims falling with the scope of his immunity. Whether a new action could be served and maintained were it to be refiled in the future is beyond the scope of this submission.

* * * *

The district court issued its opinion on September 17, 2021, granting defendant's motion to dismiss. The opinion is excerpted below.

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* * * *

Defendant argues that dismissal of this action is mandated pursuant to the Vienna Convention on Diplomatic Relations and the Diplomatic Relations Act. Specifically, Defendant contends that because he was a Principal Resident Representative to the IMF at the time he was served with process, he is entitled to diplomatic immunity pursuant to Article V of the UN Headquarters Agreement—the basis for the State Department's certification. Plaintiff, however, argues that the State Department's certification of Defendant's immunity does not conclusively establish Defendant's immunity absent evidence of the IMF's consent to Defendant's diplomatic status and immunity. Simply put, the question the Court confronts is whether diplomatic immunity shields Defendant from suit. The answer requires an examination of the underlying statutory and treaty framework.

A. Vienna Convention and Diplomatic Relations Act

The Vienna Convention provides that a "diplomatic agent shall . . . enjoy immunity from [the receiving state's] civil and administrative jurisdiction[.]" Vienna Convention Art. 31(1). In accordance with the Vienna Convention, Congress enacted the Diplomatic Relations Act, which 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 Vienna Convention on Diplomatic Relations . . . shall be dismissed." 22 U.S.C. § 254d. Accordingly, if the Court concludes that Defendant is entitled to diplomatic immunity, it must dismiss the action. *See Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 191 (D.D.C. 2007); *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 130

(D.D.C. 2009).

Under the Diplomatic Relations Act, immunity "may be established upon motion or suggestion by or on behalf of the individual." 22 U.S.C. § 254d. Here, Defendant filed a "certification of [Defendant's] immunity" in the form of a letter from the State Department dated July 7, 2020. *See* Broas Decl. Ex. A, ECF No. 32. The certification confirms that the State Department "was notified" of Defendant's position as a "Principal Resident Representative" to the IMF "effective November 2014" and that, as of the date of the certification, "he continues to serve in that position." *Id.* The certification also provided the basis for the State Department's conclusion, relying on Section 15(4) of the UN Headquarters Agreement (discussed in greater detail *infra* Section III(B)).

Although Plaintiff raised "questions" about the certification from the State Department, *see* Pl.'s Mot. to Stay at 5–6, other courts have accepted similar documents as an appropriate method to confirm the State Department's view on immunity. *See, e.g.*, *Sabbithi*, F. Supp. 2d at 126 (relying on a "letter from the State Department" filed "as an exhibit" to the motion to dismiss); *Montuya*, 779 F. Supp. 2d at 62 (relying on letter from the State Department as basis for diplomat's immunity). As the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has explained, "[i]t is enough that [the diplomat] has requested immunity, that the State Department has recognized that the person for whom it was requested is entitled to it, and that the Department's recognition has been communicated to the court." *Carrera v. Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949) (internal quotation and citation omitted); *see also Muthana v. Pompeo*, 985 F.3d 893, 907 (D.C. Cir. 2021) ("In litigation implicating the status of diplomats, the courts and the Executive have developed a practice in which the Executive submits a certification of a diplomat's status to the court."). That is precisely what happened here: the State Department provided its recognition of Defendant's immunity after correspondence from the Egyptian embassy, and that recognition was presented to the Court. The United States also indicated in its Statement of Interest that the "State Department's Certification is consistent with [the UN Headquarters Agreement] . . . and the process followed is in keeping with the Department's standard practice." Gov.'s Stmt. at 8.

The Court concludes that the certification filed by Defendant confirms the State Department's position that Defendant's status as a Principal Resident Representative to the IMF entitles him to diplomatic immunity. The State Department's confirmation of diplomatic status and immunity ordinarily ends the Court's inquiry. *See Carrera*, 174 F.2d at 497 ("The courts are disposed to accept as conclusive of the fact of the diplomatic status of an individual claiming an exemption, the views thereon of the political department of their government." (internal citations and quotation marks omitted)); *see also Zdravkovich v. Consul General of Yugoslavia*, No. 98-7034, 1998 WL 389086, at *1 (D.C. Cir. June 23, 1998) (per curiam) ("The courts are required to accept the State Department's determination that a foreign official possesses diplomatic immunity from suit.") (internal citations and quotation marks omitted); *Abdulaziz*, 741 F.2d 1328, 1331 (11th Cir. 1984) ("Although defendant argue that the State Department certificate is reviewable in court, the courts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status."); *Jungquist v. Nahyan*, 940 F. Supp. 312, 321–22 (D.D.C. 1996) ("[T]he determination of a diplomat's status . . . is made by the State Department, not the Court."), *rev'd in part on other grounds*, 115 F.3d 1020 (D.C. Cir. 2017); *Montuya*, 779 F. Supp. at 62 ("The Court must accept the State Department's determination that Defendants have diplomatic status."). Courts afford such "conclusive weight to the Executive's determination of an individual's diplomatic status" in recognition of the Constitution's "vesting"

of "diplomatic powers with the President." *Muthana*, 985 F.3d at 907. "The Constitution vests the President with the sole power to 'receive Ambassadors and other public Ministers.'" *Id.* (quoting U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."), §3 ("[H]e shall receive Ambassadors and other public Ministers.")). And the "Reception Clause recognizes the President's authority to determine the status of diplomats, a fact long confirmed by all three branches." *Id.* (citing Crimes Act of 1790 ch. IX § 25, 1 Stat. 112, 117–18; Presidential Power to Expel Diplomatic Personnel from the United States, 4A Op. O.L.C. 207, 208–09 (Apr. 4, 1980); *In re Baiz*, 135 U.S. 403, 432 (1890)).

Here, however, Plaintiff argues that the State Department's position is not dispositive because the State Department "cannot . . . speak to whether [Defendant] has complied with the provisions of Article V, Section 15(4) of the UN Headquarters Agreement," which is the basis for the State Department's conclusion that Defendant is a diplomatic agent, immune from suit. *See* Pl.'s Reply at 1, 10–11. Accordingly, the Court shall next address the relevant sections of the UN Headquarters Agreement underlying the Defendant's claim of diplomatic immunity based on the State Department's certification.

B. UN Headquarters Agreement

The UN Headquarters Agreement affords certain United Nations officials "the same diplomatic immunity as diplomats accredited to the United States." *Devi v. Silva*, 861 F. Supp. 2d 135, 141 (S.D.N.Y. 2012). In its certification of Defendant's immunity, the State Department relies on Article 5, Section 15 of the UN Headquarters Agreement, which provides:

> (1) Every person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary,
> (2) such resident members of their staffs as may be agreed upon between the Secretary–General, the Government of the United States and the Government of the Member concerned,
> (3) every person designated by a member of a specialized agency, as defined in Article 57, paragraph 2 of the Charter, as its principal resident representative, with the rank of ambassador or minister plenipotentiary at the headquarters of such agency in the United States, and
> (4) such other principal resident representatives of members to a specialized agency and such resident members of the staffs of representatives to a specialized agency as may be agreed upon between the principal executive officer of the specialized agency, the Government of the United States and the Government of the Member concerned, shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it.

UN Headquarters Agreement § 15. Specifically, the State Department (and Defendant) relies on Section 15(4) as the basis for Defendant's diplomatic immunity, indicating that the IMF is a "specialized agency" of the United Nations, so as a "principal resident representative" of the IMF, Defendant is "entitled . . . to the same privileges and immunities . . . as [the United States] accords diplomatic envoys accredited to it." *See* Broas Decl. Ex. A, ECF No. 32.

Plaintiff argues, however, that Section 15(4) of the UN Headquarters Agreement requires

Defendant to provide evidence of a "tripartite agreement" among the United States, Egypt, *and* the IMF to demonstrate that he was a "Principal Resident Representative," entitled to diplomatic immunity. Pl.'s Reply at 10–12. Defendant, citing the State Department's certification, argues that Principal Resident Representatives of the IMF are entitled to diplomatic immunity pursuant to the "plain language" of Section 15. Def.'s Opp'n to Mot. to Stay at 12–13. The issue, therefore, is whether the final clause of Section 15(4)—"as may be agreed upon between" the agency, the United States, and Egypt—compels Defendant to demonstrate the IMF's consent to his status as a Principal Resident Representative.

Neither party cites—and the Court has not identified—any caselaw considering whether the final clause of Section 15(4) applies *both* to "principal resident representatives" *and* "such resident members of the staffs of residents" or only to the latter category (which immediately precedes the phrase). Rather, the parties each discuss cases applying Sections 15(1) and 15(2). Section 15(1) entitles all "principal resident representatives" designated by a member country to the United Nations to immunity, without any requirement of a "tripartite agreement." Defendant cites two cases applying Section 15(1) to support his argument that the State Department's certification of Defendant's diplomatic status alone is sufficient and dispositive. *See* Def.'s Opp'n to Mot. to Stay at 13–15; *Devi*, 861 F. Supp. 2d at 140–41 (concluding that "Deputy Permanent Resident of Sri Lanka to the United Nations," as "formally recognized by the United States" was entitled to diplomatic immunity); *Ahmed v. Hoque*, No. 01 Civ. 7224(DLC), 2002 WL 1964806, at *1, *5 (S.D.N.Y. Aug. 23, 2002) (finding that defendant's status as "Economics Minister" for the Permanent Mission of Bangladesh "accords him full diplomatic immunity under the Headquarters Agreement").

Plaintiff, in contrast, relies on cases applying Section 15(2), which provides immunity to "resident members of their staffs *as may be agreed upon*" by the member state, the United States, and the Secretary General of the United Nations. UN Headquarters Agreement § 15(2) (emphasis added). Plaintiff argues that cases applying Section 15(2) require "evidence that there is agreement among all three necessary parties under the treaty." Pl.'s Reply at 15–16. But the cases cited by Plaintiff deal with members of the "staff" of United Nations members' representatives—not with individuals designated as "principal resident representatives" to the UN or to a UN agency. *See, e.g.*, *United States. ex rel. Casanova v. Fitzpatrick*, 214 F. Supp. 425, 427, 433 (S.D.N.Y. 1963) (concluding that "Resident Member of the Staff of the Permanent Mission of Cuba to the United Nations" did not have diplomatic immunity because the State Department certified that the United States had not agreed to grant diplomatic immunity); *United States v. Coplon*, 84 F. Supp. 472, 476 (S.D.N.Y. 1949) (concluding that "member of the staff of the Headquarters Planning Office"who was "not the principal resident representative" and whom the State Department declared "[did] not enjoy diplomatic status" did not qualify for diplomatic immunity); *United States v. Egorov*, 222 F. Supp. 106, 108–09 (E.D.N.Y. 1963) (concluding that defendant was not entitled to diplomatic immunity as an "employee" of the UN). And in several of the cases cited by Plaintiff, the courts have distinguished between "United Nations representatives or ministers" and "United Nations staff members or employees, noting that only representatives and ministers are accorded full diplomatic immunity, while staff members and employees are accorded only functional immunity." *Ahmed*, 2002 WL 1964806, at *5 (citing *United States v. Enger*, 472 F. Supp. 490, 502 (D.N.J. 1978); *Egorov*, 222 F. Supp. at 108; *Fitzpatrick*, 214 F. Supp. at 436).

The Court sees no reason to depart from the same distinction with respect to "specialized agencies" of the United Nations. That is, there is no reason to read Section 15(4) as requiring

"principal resident representatives of members to a specialized [UN] agency" to demonstrate the agency's assent, when there is no such requirement for a "principal resident representative to the United Nations" under Section 15(1). The familiar "rule of the last antecedent" counsels the same result. *See, e.g.*, *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016) ("[A] limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.") (internal citations and quotation marks omitted). So too does the State Department's reliance on Section 15(4) for its conclusion that Defendant is immune from suit based on his diplomatic status. *See United States v. Stuart*, 489 U.S. 353, 369 (1989) ("[A]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); *see also Gonzalez Paredes*, 479 F. Supp. 2d at 194 (deferring to the State Department's interpretation of "commercial activity" exception to Article 31 of the Vienna Convention). In its Statement of Interest, the United States explicitly confirms its position that "per Section 15(4), only the immunity accorded other 'resident members of the staffs or representatives' must be agreed between the specialized agency, the United States, and the government of the state concerned." Gov.'s Stmt. at 8 n.4.

Even if the Court adopted Plaintiff's interpretation of Section 15(4) as requiring "tripartite agreement" as to Defendant's Principal Resident Representative status, *see* Pl.'s Resp. to Gov.'s Stmt. at 7–8, the State Department indicates that the "*all three entities* referred to in Section 15(4) of the UN Headquarters Agreement—the IMF, Egypt, and the United States—*agreed* as to [Defendant's] diplomatic status[.]" *Id.* at 8 (emphases added). The State Department explains that "the IMF notified [Defendant] to the State Department as assuming his duties as Egypt's Principal Resident Representative to the IMF, which would have been based on a notification of the appointment by the Egyptian government to the IMF." *Id.*; *see also* Gov.'s Stmt. Ex. 1, Seagroves Decl. ¶ 2, ECF No. 44-1. The State Department's certification, supplemented by its Statement of Interest and supporting affidavit, belies Plaintiff's assertion that Defendant's "PRR status is unsubstantiated." Pl.'s Resp. to Gov.'s Stmt. at 1. The Court credits the State Department's certification and representations (under oath) that its records of Defendant's position and diplomatic status derive from notification by the IMF and Egypt. Gov.'s Stmt. at 8; Seagroves Decl. ¶ 2; *see, e.g.*, *Muthana*, 985 F.3d at 908 ("When a diplomat has been recognized by the Executive, "the evidence of those facts is not only sufficient, but in our opinion, conclusive upon the subject of his privileges as a minister." (internal citations and quotation marks omitted)).

Based on the State Department's certification that Defendant was a Principal Resident Representative to the IMF at the time Plaintiff filed his Complaint and attempted to serve Defendant with process, the Court concludes that Defendant is entitled to "the same privileges and immunities subject to corresponding conditions and obligations, as [the United States] accords to diplomatic envoys." UN Headquarters Agreement § 15; *see also United States v. Khobragade*, 15 F. Supp. 3d 383, 387 (S.D.N.Y. 2014) ("Courts in civil cases have dismissed claims against individuals who had diplomatic immunity at an earlier stage of the proceedings, even if they no longer possessed immunity at the time dismissal was sought."). Those "privileges and immunities" are defined by the Vienna Convention. *See Devi*, 861 F. Supp. 2d at 141. Under the Diplomatic Relations Act, the Court lacks jurisdiction to consider Plaintiff's Complaint. *See supra* Section III(A). The Court, therefore, does not consider Defendant's other grounds for dismissal.

In upholding Defendant's claim of diplomatic immunity from suit, the Court recognizes that it is "leaving Plaintiff without recourse—at least within the United States and at this time."

Gonzalez Paredes, 479 F. Supp. 2d at 194. Nonetheless, the Court is bound by the requirement that "[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations . . . *shall be dismissed*." 22 U.S.C. § 254d (emphasis added). The Court further grants Defendant's Motion to Quash, based on the "rather obvious point that if a diplomat is immune from suit, he or she is equally immune from service of process." *Aidi v. Yaron*, 672 F. Supp. 516, 518 (D.D.C. 1987); *see also Gonzalez Paredes*, 479 F. Supp. 2d at 195 (granting motions to quash service of process and to dismiss action against defendants entitled to diplomatic immunity under the Vienna Convention). Accordingly, Defendant's motions to quash service of process and to dismiss the Complaint shall be granted.

* * * *

3. *Drepina v. Tikhomirov*

As discussed in *Digest 2020* at 419-20, the United States filed a statement of interest in New Jersey state court, explaining the immunity of the United Nations in *Drepina v. Tihomirov*, No. L-000310-20. On February 17, 2021, the plaintiff voluntarily dismissed the UN from the case.

4. *Jam v. IFC*

As discussed in *Digest 2020* at 420-30 and *Digest 2019* at 368-375, the Supreme Court held in *Jam v. Int'l Finance Corp.*, that international organizations enjoy the same immunity from suit as foreign governments under the FSIA. 586 U.S. ___, 139 S. Ct. 759 (2019). The United States filed two statements of interest on remand of the case in the district court, which again dismissed. A panel of the D.C. Circuit issued its opinion on July 6, 2021, affirming the dismissal of the case in line with the district court's judgment, finding IFC immune under the IOIA. The court found the case to be similar to *Sachs v. OBB*, 577 U.S. 27 (2015), in that the gravamen of plaintiffs' claims was activity in India, such that the lawsuit did not fall under the FSIA's "commercial activities" exception. The opinion aligns with the U.S. statements of interest, as well as views offered by the U.S. government in oral argument when the case was previously before the Supreme Court. Excerpts follow from the opinion of the court of appeals. *Jam v. IFC*, 3 F.4th 405 (D.C. Cir.). Rehearing en banc was denied August 13, 2021.

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The parties dispute whether the district court's February 2020 order granting IFC's renewed motion to dismiss the complaint was final and appealable. The court need not resolve that issue. Appellants timely filed a motion to amend their complaint pursuant to Federal Rule of Civil Procedure 15 or, in the alternative, Rule 59(e). The pendency of such a motion tolls the time to appeal. Fed. R. App. P. 4(a)(4)(A)(iv)… After the district court's August 2020 denial of the

motion for leave to amend the complaint, appellants timely filed a notice of appeal. The August 2020 decision was a final, appealable order. Therefore, no matter whether the February decision was final, the appeal is timely, and this court has jurisdiction under 28 U.S.C. § 1291. We turn to the merits.

Under the International Organizations Immunities Act ("IOIA"), international organizations "enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a(b). In *Jam II*, the Supreme Court held that the IOIA confers on international organizations the same immunity available to foreign governments under the Foreign Sovereign Immunities Act ("FSIA"). 139 S. Ct. at 764–66, 772.

The FSIA, in turn, provides that foreign states are immune from the jurisdiction of United States' courts, 28 U.S.C. § 1604, subject to a handful of exceptions, *id.* §§ 1605–07. At issue in this appeal is the commercial activity exception, which provides that a foreign state shall not be immune from jurisdiction in any case ... in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] 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[.] *Id.* § 1605(a)(2). The third clause, concerning foreign activity with a direct effect in the United States, is not at issue here.

The "based upon" phrase in the commercial activity exception requires courts to identify the "gravamen" of the lawsuit: "[I]f 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." *Jam II*, 139 S. Ct. at 772. In *Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993), the Supreme Court explained that in identifying what an action is "based upon" — its "gravamen" — courts should examine "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357, 113 S.Ct. 1471. There, the plaintiff had been hired to work in a government-owned Saudi Arabian hospital. *Id.* at 351–52, 113 S.Ct. 1471. The plaintiff alleged that after he reported safety defects at the hospital, Saudi authorities detained and tortured him. *Id.* at 352–53, 113 S.Ct. 1471. The Court held that the lawsuit was not based upon domestic commercial activity, despite allegations that Saudi Arabia had tortiously failed to warn the plaintiff of the risks when it recruited him in the United States. *Id.* at 358, 363, 113 S.Ct. 1471.

More recently, in *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 136 S.Ct. 390, 193 L.Ed.2d 269 (2015), the Supreme Court clarified that the gravamen analysis does not require courts to undertake a "claim-by-claim, element-by-element analysis," but rather to "zero[ ] in on the core of [the] suit." *Id.* at 34–35, 136 S.Ct. 390. "What matters is the crux — or, in legal-speak, the gravamen — of the plaintiff's complaint, setting aside any attempts at artful pleading." *Fry v. Napoleon Cmty. Schs.*, ––– U.S. ––––, 137 S. Ct. 743, 755, 197 L.Ed.2d 46 (2017). In *Sachs*, the plaintiff had purchased a Eurail pass from a travel agent in the United States and was later injured by a government-owned railway car in Austria. 577 U.S. at 30, 136 S.Ct. 390. The plaintiff sued for, among other things, failure to warn that the train and boarding platform were defectively designed. *Id.* The Court concluded that the gravamen of the suit was tortious activity abroad, because the plaintiff's claims all "turn[ed] 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.* at 35, 136 S.Ct. 390. The domestic sale of the railway pass did not change the result because there was "nothing wrongful about the sale of the Eurail pass standing alone. Without the existence of the unsafe boarding conditions in [Austria], there would have been nothing to warn Sachs about when she bought the Eurail pass." *Id.* at 35–36, 136 S.Ct. 390. However the suit was "fram[ed]," "the incident in [Austria] remain[ed] at its foundation." *Id.* at 36, 136 S.Ct. 390. Any other approach, the Court observed, "would allow plaintiffs to evade the [FSIA's] restrictions through artful pleading." *Id.*

In the instant case, paralleling *Sachs*, all of appellants' claims turn on allegedly wrongful conduct in India, which has led to injuries suffered in India. The Washington, D.C. decisionmaking that appellants criticize consists of providing funding that facilitated conduct in India. Absent the operation of the Plant in India, or appellants' injuries in India, there would have been nothing wrongful about IFC's disbursement of funds. Even crediting the allegation that the Plant would not have been built without IFC's funding, *see* Prop. Am. Compl. ¶ 57, the operation of the Plant is what actually injured appellants, *cf. Sachs*, 577 U.S. at 34, 136 S.Ct. 390, and the manner of its construction and operation is the crux of their complaint. The gravamen of appellants' lawsuit is therefore conduct that occurred in India, not in the United States, and IFC consequently cannot be subjected to the jurisdiction of United States' courts under the commercial activity exception. That conclusion holds for each of the various theories that appellants have pleaded: negligent supervision, public nuisance, trespass, breach of contract to third party beneficiaries, and others.

Appellants' contrary arguments are unpersuasive. At the outset, appellants make the bold suggestion that *Jam I* "previously held" that IFC would not be immune under the FSIA, that such a result survived *Jam II*, and that it remains binding circuit precedent. Appellants' Br. 19. This is a transparent misreading of *Jam I*, which in fact held that IFC had "virtually absolute" immunity under the IOIA. 860 F.3d at 705–06. Insofar as *Jam I* suggested a potential outcome of the FSIA analysis it rejected, *see id.* at 707, that dictum is not binding circuit precedent, *see Doe v. Fed. Democratic Republic of Ethiopia*, 851 F.3d 7, 10 (D.C. Cir. 2017).

Appellants' principal contention is that the gravamen analysis must be categorically limited to the sovereign defendant's conduct, and correspondingly that the conduct of any non-sovereign entity must be ignored. *See* Appellants' Br. 15–17, 21–30. (Although IFC is not a "sovereign," the parties — and this opinion — use the term as a shorthand to include international organizations that enjoy sovereign-like immunity. *See generally Jam II*, 139 S. Ct. at 768.) Applying their proposed rule, appellants maintain that their lawsuit is "based upon" only IFC's decisionmaking in Washington, D.C., and that CGPL's operation of the Plant in India is irrelevant. Appellants' Br. 44–45. This view cannot be squared with *Sachs* and *Nelson*, which instruct courts to examine "the 'basis' or 'foundation' for a claim, 'those elements that, if proven would entitle a plaintiff to relief,' and 'the "gravamen of the complaint." ' " *Sachs*, 577 U.S. at 33–34, 136 S.Ct. 390 (alteration omitted) (citations omitted) (quoting *Nelson*, 507 U.S. at 357, 113 S.Ct. 1471); *cf. also Nestle USA, Inc. v. Doe*, 593 U.S. ——, 141 S.Ct. 1931, 1935–37, —— L.Ed.2d —— (2021). There is no suggestion that the examination is restricted to the sovereign's conduct, especially where, as here, the core of appellants' complaint is that IFC enabled or failed to adequately supervise the conduct of a non-sovereign third party. Insofar as appellants purport to identify authority to the contrary, those cases are either distinguishable on their facts, pre-date *Sachs*, or both. *See, e.g.*, *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002–04 (D.C. Cir. 1985); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 & n.22 (D.C.

Cir. 1982); *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 814 (6th Cir. 2015); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1108–09 (5th Cir. 1985).

Appellants' textual arguments on this point are similarly unavailing. The commercial activity exception denies immunity in "any case ... 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[.]" 28 U.S.C. § 1605(a)(2) (emphasis added). Appellants interpret the italicized text to "bar courts from basing immunity on a third party's acts." Appellants' Br. 29. This argument essentially reads "based upon" out of the statute. Appellants' position is that a court must look only to the alleged acts of the sovereign and then determine whether those acts are commercial and have a geographical nexus to the United States. *Id.* at 15–16, 29–30. This approach skips a step required by the statute: determining what the case is "based upon." The text of the commercial activity exception does not constrain the gravamen inquiry to only the sovereign acts alleged in the complaint or require courts to ignore the importance of third parties' conduct. Appellants' other textual arguments are no more persuasive. The congressional findings in 28 U.S.C. § 1602 concerning international law cannot overcome the operative language in § 1605. *Cf. Rothe Dev., Inc. v. U.S. Dep't of Def.*, 836 F.3d 57, 66 (D.C. Cir. 2016). And the statement in § 1606 — that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances" — applies only "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607." Since IFC is entitled to immunity under § 1605, the scope of liability specified by § 1606 is of no importance.

Appellants suggest that the "based upon" inquiry should function like a personal jurisdiction requirement, asking simply whether "there is a geographical nexus between [the] defendant's commercial activity and the United States." Appellants' Br. 30. Rather than determining the gravamen of the lawsuit, appellants therefore contend that courts should engage in a "defendant-focused 'minimum contacts inquiry[.]' " *Id.* at 32 (internal quotation marks omitted) (quoting *Walden v. Fiore*, 571 U.S. 277, 284, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014)). This is markedly not the approach that the Supreme Court has taken to the FSIA. In *Sachs*, for example, the Court found it unnecessary to determine whether the seller of the railway pass had acted as the agent of the sovereign entity, 577 U.S. at 31, 35–36, 136 S.Ct. 390, which would have been critical to a minimum contacts analysis, *see Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320–21, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Rather, the Court "zeroed in on the core of [the plaintiffs'] suit," the "wrongful conduct and dangerous conditions" abroad, which led to injuries suffered abroad. *Sachs*, 577 U.S. at 35, 136 S.Ct. 390. It was of no consequence whether the defendant had purposefully availed itself of the U.S. market through ticket sales. *Cf. J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880–81, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011).

Appellants warn against adopting a "last harmful act" requirement under the FSIA, in which "the sovereign must commit the last act preceding the injury, even though ordinary liability rules have no such limitation." Appellants' Br. 16. Like the Supreme Court's decision in *Sachs*, 577 U.S. at 36 & n.2, 136 S.Ct. 390, today's decision does not impose such a requirement. Rather, "the reach of our decision [is] limited," *id.* at 36, 136 S.Ct. 390 n.2, holding only that the gravamen of appellants' particular complaint is conduct occurring abroad.

Nor has IFC waived its immunity to appellants' lawsuit. This issue *was* actually decided by *Jam I*. 860 F.3d at 706–08. Appellants' petition for certiorari to the Supreme Court on that issue was not granted. *See* Petition for a Writ of Certiorari at i, 21, 24–27, *Jam v. Int'l Fin. Corp.*, No. 17-1011 (Jan. 19, 2018), *granted in part by* —— U.S. ——, 138 S. Ct. 2026, 2026,

201 L.Ed.2d 277 (2018). Nor did the reasoning of *Jam II* undermine this court's conclusion on the waiver issue. *Jam I* thus remains law of the circuit as to IFC's purported waiver, and the present panel is bound thereby. *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996).

Accordingly, United States' courts lack subject-matter jurisdiction over appellants' complaint because their claims are not based upon activity carried on in the United States, and IFC has not waived its immunity to the claims. We therefore affirm the judgment of the district court dismissing the complaint.

* * * *

5. *Rodriguez v. Pan American Health Organization (PAHO)*

On June 15, 2021, the United States filed an amicus brief in the Court of Appeals for the D.C. Circuit in *Rodriquez v. Pan American Health Organization*, No. 20-7114. The Pan American Health Organization ("PAHO") is an international organization headquartered in Washington, D.C., that is the specialized health agency of the Inter-American System and a regional office for the World Health Organization ("WHO"). Plaintiffs allege that PAHO inappropriately functioned as a financial intermediary between Cuba and Brazil as part of the Mais Medicos program, regarding which the plaintiffs raise allegations of forced labor. The U.S. brief, in support of neither party, explains that, (1) an international organization's receipt of program support costs from member states does not constitute "commercial activity" under the FSIA, and that (2) the immunity provision of the WHO Constitution is not self-executing and does not provide for absolute immunity from suit. Excerpts follow from the U.S. brief.

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* * * *

I. An International Organization's Receipt of Program Support Costs from Member States In Support of a National or Multinational Public Program Is Not Commercial Activity

In its opening brief, the Organization argues that its transfer of funds from Brazil to Cuba must be understood "in the context of" the "technical cooperation and support" the Organization provided for its "member states as part of a public-health program." Br. 26, 39; *see also, e.g.*, Br. 19. …

…As we demonstrate below, however, an international organization's receipt of program support costs paid by a member state to cover costs associated with the organization's implementation of a national or multinational public program is public rather than commercial in nature and so does not come within the commercial activity exception.

A. Under the FSIA, "[t]he commercial character of an activity [is] determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). The "nature" of an activity is "the outward form of the conduct that the foreign state performs or agrees to perform" while its "purpose" is "the reason why the foreign state engages in the activity." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 617 (1994) (emphasis omitted).

In some circumstances the nature/purpose distinction is easy to apply. For example, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods. *Weltover*, 504 U.S. at 614-15.

In other circumstances, however, it is more difficult to apply the nature/ purpose distinction because "the same activity can often be characterized in a number of different ways." *de Sanchez v. Banco Cent. de Nicar.*, 770 F.2d 1385, 1392 (5th Cir. 1985), *superseded on other grounds by Weltover*, 504 U.S. 607. For example, "[a] federal trial ... could be characterized in the broadest, generic terms as a form of dispute resolution," which might be commercial since private parties can use commercial arbitration to resolve disputes "or, more specifically, as government-sponsored adjudication," which is intrinsically sovereign. *Id.*

As the federal-trial example shows, identifying the nature of an activity as commercial or public often will turn on the level of generality used to describe it. Typically, describing an activity at a high level of generality is more likely to lead to the conclusion that the activity is commercial because the description abstracts away from characteristics that identify the activity as intrinsically public or sovereign. Describing a federal trial at the highest level of generality as "dispute resolution" would lead to the conclusion that the activity is commercial because there is a private commercial market for dispute resolution services. But such a general description obfuscates critical characteristics that reveal a federal trial's public nature. For instance, a defendant in a federal trial who is properly served with process is legally compelled to appear, regardless of consent. *See, e.g.*, *International Shoe Co. v. Washington, Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945). Private parties cannot impose such an obligation.

In *Jam*, the Supreme Court noted that "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." *Jam v. International Fin. Corp.*, 139 S. Ct. 759, 772 (2019). That observation reflects the Court's understanding that it may be a mistake to characterize the activity of an international organization such as an international financial institution at the highest level of generality. For instance, while private parties may make loans, even loans to governments, some international financial institutions, like the International Development Association, provide loans that countries would be unable to obtain in commercial markets. *See* Int'l Dev. Ass'n, Articles of Agreement, art. V, § 1(c) (Sept. 24, 1960), https://perma.cc/D65W-7E94 ("The Association shall not provide financing if in its opinion such financing is available from private sources on terms which are reasonable for the recipient or could be provided by a loan of the type made by the [World] Bank."); Int'l Dev. Ass'n, *What is IDA?*, https://perma.cc/C3VV-YP72 (noting that the organization's loans "have a zero or very low interest charge and repayments are stretched over 30 to 40 years, including a 5- to 10-year grace period"). Providing loans to countries that are unavailable on the private market is not " 'the *type*' of activity 'by which a private party engages in' trade or commerce." *Jam*, 139 S. Ct. at 772 (quoting *Weltover*, 504 U.S. at 614).

Thus, in considering whether an international organization's activity is commercial or public in nature, it is critical to describe the activity with sufficient specificity to capture any inherently public characteristics of the activity.

B. When described with the appropriate level of specificity, an international organization's receipt of payments for program support costs from a member state in connection with the organization's implementation of a national or multinational public program is properly

understood to be public rather than commercial in nature.

As an initial matter, member states' creation of an international organization is obviously a public act. International organizations are created by international agreements among sovereign states, which are their primary members. *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States § 221 (Am. Law Inst. 1987) (Third Restatement) (" '[I]nternational organization' means an organization that is created by an international agreement and has a membership consisting entirely or principally of states."). Private parties lack the capacity under international law to enter into international agreements. *See id*. § 301 (" '[I]nternational agreement' means an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law ...."). It follows that any payments states make to establish international organizations are sovereign rather than commercial in nature.

Member states' subsequent payments to an international organization, and the organization's receipt of those payments, might or might not be public, depending on the nature of the transaction between the member state and the organization. For instance, if member states created the organization to negotiate lower prices on certain commodities from manufacturers and then resell the commodities to the states, the organization's receipt of payments from the states for the purchases might be commercial in nature. Similarly, if a member state purchased excess property from an international organization in an arms-length transaction, unconnected to any public program undertaken by the international organization and its member state, the organization's receipt of payment may be commercial in nature. In both examples, the transactions might be ones that private parties undertake in commercial markets, even when the activity is described quite specifically.

But some payment transactions between member states and international organizations are inherently public. A single sovereign's actions taken in connection with national programs that can only be established by a state are not the "*type* of actions by which a private party engages in trade and traffic or commerce." *Weltover*, 502 U.S. at 613 (quotation marks omitted). For example, actions undertaken in connection with the administration of a state's national health program typically are not commercial, even if they "may relate in certain respects to commercial activity." *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1030 (D.C. Cir. 1997); *see Anglo-Iberia*, 600 F.3d at 178. Similarly, if multiple states created an international organization to administer a multinational health system, the organization's receipt of payment from the states for that activity would be public rather than commercial in nature. Because the creation and operation of a multinational health system is not the sort of activity in which private commercial actors can engage, private commercial actors also cannot receive payment for such activity.

As a general matter, the programs undertaken by international organizations typically are national or multinational and public in scope. For example, United Nations specialized agencies implement programs addressing "economic, social, cultural, educational, health, and related [issues]." U.N. Charter art. 57, ¶ 1. A member state may engage an international organization to apply its expertise in a specific public program of national scope. An organization's receipt of payment for program support costs from a member state in connection with the organization's implementation of such a program is public and not commercial in nature, just as would be a state agency's receipt of payment for administrative costs had the state implemented the program itself. The international organization's undertaking of the public program is not "a normal commercial function" that "could as easily" have been carried out by a private actor.

Transamerican S.S. Corp. v. Somali Democratic Republic, 767 F.2d 998, 1003 (D.C. Cir. 1985). And its receipt of payment in connection with such a program likewise is noncommercial.

At the highest level of generality, an international organization's provision of such assistance could be described as a commercial service contract. But a national or multinational public program undertaken by an international organization at the request of member states is not properly analogized to commercial service contracts. Just as private commercial actors cannot compel a party to engage in dispute resolution, private commercial actors cannot implement the collective will of sovereign member states in addressing public problems of a national or multinational scale. And just as a federal trial court's resolution of a suit is a sovereign act, an international organization's activity implementing a national or multinational public program at the request of its sovereign member states is a public act. An international organization's receipt of program support costs made in connection with such a public act is, like the act itself, public rather than commercial in nature.

The FSIA's legislative history offers support for this approach. In discussing the nature/purpose distinction, both the House and Senate reports contrast a foreign state's contract for the purchase of equipment with the state's participation in a foreign assistance program administered by the United States Agency for International Development. H.R. Rep. No. 94-1487, at 16 (1976); S. Rep. No. 94-1310, at 16 (1976). The purchase contract constitutes commercial activity, but the receipt of assistance from the United States "is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity." H.R. Rep. No. 94-1487, at 16; *see* S. Rep. No. 94-1310, at 16 (identical).

The United States' assistance to foreign states includes things such as loans that, at the highest level of generality, have commercial market analogs. … But the United States' provision of foreign assistance and another state's receipt of it are implementations of the United States' foreign policy. *See, e.g.*, U.S. Agency for Int'l Dev., *Who We Are*, https://perma.cc/6HWN-543P ("[The agency] carries out U.S. foreign policy by promoting broad-scale human progress at the same time it expands stable, free societies, creates markets and trade partners for the United States, and fosters good will abroad."). That is what gives foreign assistance its "essential[ly] ... public" nature. H.R. Rep. No. 94-1487, at 16; *see* S. Rep. No. 94-1310, at 16 (identical). Similarly, what distinguishes an international organization's receipt of program support costs from a member state is that the funding is part of the implementation of a national or multinational public program undertaken by the organization at the state's request.

*** * * ***

As noted, the United States takes no position on whether the Organization has established at this stage that the payments it received from Brazil were for program support costs made in connection with a national or multinational public program. Should the Court determine that the Organization has not established its immunity from suit based solely on the allegations in plaintiffs' complaint, however, it should not preclude such a determination if further factual development following remand to the district court demonstrates that the payments at issue were non-commercial program support costs, as described here.

II. The Immunity Provision of the World Health Organization Constitution Is Not Directly Enforceable in United States Courts and Does Not Provide for Absolute Immunity

The Organization argues on appeal that, independently of the IOIA, it is absolutely immune from suit under the World Health Organization Constitution. Br. 42-57. That argument

is mistaken, even assuming that the Organization is entitled to the immunities specified in that document.

First, as the district court correctly determined, the immunity provision of the World Health Organization Constitution is not effective as U.S. law because it is not self-executing. J.A. 200-01.

A provision in an international agreement is self-executing if it can be directly enforced in United States courts. *Medellín v. Texas*, 552 U.S. 491, 504-05 (2008). Whether the provision is self-executing is a question of interpretation that turns principally on whether the agreement's text reflects an understanding that the provision is directly enforceable in U.S. law. *Id*. at 521 ("Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect."). If the provision is ambiguous, courts also consider "the negotiation and drafting history of the [agreement] as well as the postratification understanding of signatory nations." *Id*. at 507 (quotation marks omitted). In addition, the Executive Branch's "interpretation of a treaty is entitled to great weight." *Id*. at 513 (quotation marks omitted); *see Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 & n.10 (1982) (giving deference to treaty interpretation in United States' amicus brief).

The text and context of Article 67 of the World Health Organization Constitution conclusively demonstrate that the provision is not self-executing. Article 67 provides that "[t]he Organization shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfillment of its objective and for the exercise of its functions." World Health Org. Const. art. 67(a). The very next article provides that "[s]uch ... privileges and immunities shall be defined in a separate agreement to be prepared by the Organization in consultation with the Secretary-General of the United Nations and concluded between the Members." *Id*. art. 68. Because Article 67 only generally refers to the immunities the World Health Organization enjoys and because Article 68 expressly contemplates a further agreement to specify those immunities, the United States could not have accepted the World Health Organization Constitution on the understanding that Article 67 would be effective of its own force.

Second, even if the immunity provision were self-executing, it does not provide for absolute immunity. Article 67 was modeled on the immunity provision of the United Nations Charter. *See* 2 *Official Records of the World Health Org.* 25 (1948), https://perma.cc/K7NA-FS3S. Article 105 of the United Nations Charter provides that the organization "shall enjoy ... such privileges and immunities as are necessary for the fulfillment of its purposes," and United Nations officials "shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." U.N. Charter art. 105, ¶¶ 1, 2. Like the World Health Organization Constitution, the United Nations Charter also contemplated a further agreement to specify the privileges and immunities referenced in Article 105. *See id*. art. 105, ¶ 3.

That subsequent agreement provided that the United Nations would enjoy absolute immunity from suit. U.N. Convention art. II, § 2 ("The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."). However, it provided that certain United Nations officials would enjoy immunity only from "legal process in respect of words spoken or written and all acts performed by them in their official capacity." *Id*. art. V, § 18(a). This post-ratification understanding thus demonstrates that

language such as that in United Nations Charter Article 105 and World Health Organization Constitution Article 67 is general enough to encompass immunity only for acts performed in an official capacity.

As the Organization notes (Br. 54), the United Nations General Assembly also adopted an additional convention governing the immunity of specialized agencies. *See* Specialized Agencies Convention. That convention provides for specialized agencies' absolute immunity from suit. *Id*. art. 3, § 4. Significantly, the United States has not joined that convention. The Organization nevertheless argues that the United States is committed to recognizing the absolute immunity of specialized agencies because it accepted the World Health Organization Constitution, which, through Article 68, contemplated a future agreement specifying the immunities the World Health Organization "shall" enjoy. Br. 45-46 (quotation marks omitted). That argument is erroneous.

Article 68 provides that the World Health Organization's "legal capacity, privileges and immunities shall be defined in a separate agreement to be prepared by the Organization in consultation with the Secretary-General of the United Nations and concluded between the Members." World Health Org. Const. art. 68. That provision "call[s] upon governments to take certain action" (*Medellín*, 552 U.S. at 508 (quotation marks omitted))--to conclude an international agreement that "shall" specify the World Health Organization's privileges and immunities. But it does not of its own force commit a state that accepted the World Health Organization Constitution to the privileges and immunities defined in the future agreement, regardless of whether the state joins the subsequent agreement. *Cf. Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314, 315 (1829) (holding that a treaty provision stating that " 'all ... grants of land ... shall be ratified and confirmed' " did not "act directly on the grants" but rather "pledge[d] the faith of the United States to pass acts which shall ratify and confirm them" (quotation marks omitted)). Moreover, Article 68's statement that the "separate agreement" would be "concluded between the Members" is a recognition that the usual rules of customary international law governing the formation of international agreements would apply. The United States has not joined the Specialized Agencies Convention and therefore has no obligations under it. *See* Third Restatement, pt. I, ch. 1, Introductory Note ("Particular agreements create binding obligations for the particular parties ....").

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Cross References

Crystallex v. Venezuela, **Ch. 5.A.1**
Promoting Security and Justice for Victims of Terrorism Act, **Ch. 5.A.3**
Alien Tort Statute and Torture Victim Protection Act, **Ch. 5.B**
Usoyan v. Republic of Turkey, **Ch. 5.C.2**
Investor-State dispute resolution (including expropriation), **Ch. 11.B**
Saint-Gobain v. Venezuela *case (Hague Service Convention)*, **Ch. 15.C.1**

CHAPTER 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Air Transport Agreements

An air transport agreement ("ATA") is a bilateral, or occasionally multilateral, agreement allowing, and setting the terms for, international commercial air transportation services between or among signing States. Under the longstanding U.S. Open Skies policy, the United States generally seeks to conclude ATAs that allow airlines to make commercial decisions based on market demand, without intervention from government regulators. Air carriers can provide more affordable, convenient, and efficient air services to consumers and shippers, thereby promoting travel and trade. Information on U.S. ATAs is available at https://www.state.gov/subjects/air-transport-agreements/. In 2021, U.S. air transport agreements with the United Kingdom and the Republic of Congo entered into force. In addition, an extension to the annex to an agreement with Ecuador was agreed and entered into force in 2021. A new agreement in accord with U.S. Open Skies policy was negotiated with Ecuador at the end of 2021.

a. United Kingdom

On March 25, 2021, the Governments of the United States and the United Kingdom of Great Britain and Northern Ireland completed an exchange of diplomatic notes to bring the U.S.-UK Air Transport Agreement ("the Agreement") into force. See March 26, 2021 media note, available at https://www.state.gov/entry-into-force-of-u-s-uk-civil-air-transport-agreement/. See also *Digest 2020* at 434-36 regarding the signing of the Agreement in November 2020 and application of the Agreement on the basis of comity and reciprocity pending its entry into force. The agreement is available at https://www.state.gov/united_kingdom-21-325. The March 26 media note further states:

> The Agreement serves as the basis of United States-United Kingdom air services relations. It includes all the essential elements of Open Skies, such as unrestricted capacity and frequency, open routes, code-sharing opportunities, a liberal charter regime, and market-determined pricing. The Agreement includes expanded "seventh-freedom" traffic rights for all-cargo services. It also includes the UK's overseas territories and crown dependencies under the terms of this new Agreement.

b. Republic of Congo

On April 19, 2021, the Air Transport Agreement between the Government of the United States of America and the Government of the Republic of the Congo entered into force. See April 19, 2021 State Department media note, available at https://www.state.gov/the-united-states-and-the-republic-of-the-congo-open-skies-air-transport-agreement-enters-into-force/.

c. Ecuador

On June 24, 2021, the extension of Annex I of the Agreement between the United States and Ecuador concerning aviation transport services entered into force, with effect from June 30, 2021. The extension agreement is available at https://www.state.gov/ecuador-21-624. The 2021 agreement to extend was effected by exchange of notes at Quito June 18 and 24, 2021. The protocol modifying the annexes of the agreement was done September 26, 1986 (https://www.state.gov/11-124). The Annexes were previously extended June 27, 2016 (https://www.state.gov/16-627), September 12, 2017 (https://www.state.gov/ecuador-17-912.1), and June 28, 2019 (https://www.state.gov/ecuador-19-628).

2. Forced Diversion of Ryanair Flight to Minsk

On May 26, 2021, the United States joined Estonia, France and Ireland (EU members of the Security Council at the time) Belgium and Germany (previous EU Council Members); along with Norway and the United Kingdom in issuing a joint statement on the forced diversion of Ryanair Flight FR4978 to Minsk. The statement is available at https://usun.usmission.gov/joint-statement-on-the-forced-diversion-of-ryanair-flight-fr4978-to-minsk/, and excerpted below. Prior to the joint statement, the Department of State issued a U.S. statement, available at https://www.state.gov/diversion-of-ryanair-flight-to-belarus-and-arrest-of-journalist/, which likewise strongly condemns the diversion of the flight and the arrest of journalist Raman Pratasevich. The G7 foreign ministers also issued a statement on the incident on May 27, 2021, which is available at https://www.gov.uk/government/news/belarus-g7-foreign-ministers-statement. See Chapter 16 for further discussion of sanctions relating to Belarus.

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[We] strongly condemn the forced landing of a Ryanair flight in Minsk, Belarus, on 23 May 2021, endangering aviation safety, and the detention by Belarusian authorities of journalist Raman Pratasevich and Sofia Sapega.

The airplane, owned by a European Union company, carrying more than 100 passengers from one EU Member State's capital to another, was forced to land based on false grounds by a Belarusian military aircraft. These acts are a blatant attack on international civilian aviation safety and on European security and show flagrant disregard for international law.

We call on the International Civil Aviation Organization to urgently investigate this unprecedented and unacceptable incident and for full accountability for those responsible. We demand the immediate release of Mr. Pratasevich, an independent journalist from Belarus, and Ms. Sapega, who were detained by the Belarusian authorities and prevented them from boarding the plane at the Minsk airport to its original destination.

On 24 May, the European Council decided on a set of measures in response to the incident, including to ban overflight of EU airspace by Belarusian airlines and to prevent access to EU airports of flights operated by such airlines, as well as further restrictive measures against Belarus. The UK has taken similar measures. We will enhance our efforts, including through the coordination of our sanctions policies, to ensure that the Belarusian authorities bear responsibility for their actions.

We fully condemn this as yet another blatant attempt by the Belarusian authorities to silence all opposition voices. We continue to stand firmly with the people of Belarus in their quest for a democratic future and for respect for human rights and fundamental freedoms. We stand united against the growing practice of authoritarian leaders reaching across their borders to target dissidents, journalists, and opposition leaders. This behavior threatens the rules-based international order and undermines our collective peace and security.

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On May 28, 2021, the White House issued a press statement outlining the U.S. response to the forced diversion, including suspension of the discretionary application of the U.S-Belarus Air Transport Agreement, which had been agreed to *ad referendum* in 2019. Other sanctions are discussed further in Chapter 16. The White House statement is excerpted below and available at Statement by Press Secretary Jen Psaki on the United States Response to Belarus's Forced Diversion of Ryanair Flight and Continuing Attack on Fundamental Freedoms | The White House. President Biden's May 24, 2021 statement on the diversion and arrest is available at Statement by President Joe Biden on Diversion of Ryanair Flight and Arrest of Journalist in Belarus | The White House.

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…In response to the events of May 23 and the Lukashenka regime's continuing attack on fundamental freedoms, the United States is taking the following actions:

- The United States has joined the public condemnation of the events of May 23 at the United Nations (UN), the Organization for Security and Cooperation in Europe (OSCE), the International Civil Aviation Organization (ICAO), the Group of Seven (G7), and the North Atlantic Treaty Organization (NATO). We will continue to advocate at these bodies for action against the Lukashenka regime for its affront to international norms and undermining of democracy and human rights.
- The Department of State has issued a Level 4 Do Not Travel warning to U.S. citizens urging them not to travel to Belarus. The Federal Aviation Administration has issued a Notice to Airmen warning U.S. passenger carriers to exercise extreme caution when considering flying in Belarusian airspace.
- On June 3, 2021, the United States will re-impose full blocking sanctions against nine Belarusian state-owned enterprises previously granted relief under a series of General Licenses by the Treasury Department. As a result of this measure, U.S. persons will be prohibited from engaging in transactions with these entities, their property, or their interests in property.
- The United States, in coordination with the EU and other partners and Allies, is developing a list of targeted sanctions against key members of the Lukashenka regime associated with ongoing abuses of human rights and corruption, the falsification of the 2020 election, and the events of May 23.
- The Treasury Department will develop for the President's review a new Executive Order that will provide the United States increased authorities to impose sanctions on elements of the Lukashenka regime, its support network, and those that support corruption, the abuse of human rights, and attacks on democracy.
- The Department of Justice, including the FBI, is working closely on this matter with our European counterparts.
- The United States will suspend its discretionary application of the 2019 U.S-Belarus Air Services Agreement.

We take these measures, together with our partners and Allies, to hold the regime accountable for its actions and to demonstrate our commitment to the aspirations of the people of Belarus. We call on Lukashenka to allow a credible international investigation into the events of May 23, immediately release all political prisoners, and enter into a comprehensive and genuine political dialogue with the leaders of the democratic opposition and civil society groups that leads to the conduct of free and fair Presidential elections under OSCE auspices and monitoring.

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3. ICAO Negotiation Conference

On December 10, 2021, the State Department issued a media note regarding the outcome of the thirteenth International Civil Aviation Organization ("ICAO") Air Services Negotiation Event ("ICAN 2021"). The media note is available at https://www.state.gov/strengthening-u-s-open-skies-civil-aviation-partnerships/ and

excerpted below. The media note refers to a new agreement with Ecuador, among other developments.

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ICAN 2021, which is taking place December 6-10 in Bogota, Colombia, is the year's largest gathering of civil aviation negotiators. The event, organized by ICAO, gathered attendees from more than 77 nations. Open Skies agreements establish legal frameworks for international air transport to facilitate growth of an efficient, market-based international civil aviation system.

The Agreement with the Republic of Ecuador is the first Open Skies Agreement negotiated with this country. Pending signature and entry into force, the Agreement is now being applied on the basis of comity and reciprocity, immediately creating new opportunities for U.S. and Ecuadorian air carriers and more choice for travelers. The bilateral Open Skies agreement will enable the expansion of passenger and cargo flights between Ecuador and the United States, thereby promoting increased travel and trade, and ultimately spurring high quality job opportunities and economic growth.

The U.S. delegation also met with a number of international counterparts, including host country Colombia, to ensure fair competition for U.S. carriers, explore possibilities for new Open Skies agreements, further modernize existing agreements with civil aviation partners, and to share best practices on global aviation recovery from the devastation of the COVID-19 pandemic. U.S. Department of State Acting Deputy Assistant Secretary for Transportation Affairs Richard Yoneoka led the U.S. delegation, which included representatives from the Departments of State, Transportation, and Commerce.

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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. The Permanent Court of Arbitration ("PCA") and the International Centre for Settlement of Investment Disputes ("ICSID") frequently administer the settlement of investor state disputes.

a. Legacy Vulcan, LLC v. Mexico

The United States made an Article 1128 submission in *Legacy Vulcan, LLC v. Mexico*, ICSID Case No. ARB/19/1, on June 7, 2021 regarding (1) Article 1105 (Minimum Standard of Treatment); (2) Article 1103 (Most-Favored-Nation Treatment); and (3) Limitations on Loss and Damage. The written submission is available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C7613/DS16902_En.pdf

. On July 26, 2021, the United States made an oral submission in *Legacy Vulcan*, which is excerpted below.

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1. Thank you, Mr. President and members of the Tribunal. My name is Nat Jedrey and I am an attorney adviser in the Office of International Claims and Investment Disputes within the Office of the Legal Adviser at the U.S. Department of State.

2. Pursuant to Article 1128 of the NAFTA, I will be making a brief oral submission on treaty interpretation issues arising from the Claimant's reply to the written submission made by the United States on June 7, 2021.

3. The United States does not take a position on how these treaty interpretation issues apply to the facts of this case. In addition, no inference should be drawn from the absence of comment on any issue not addressed in this submission.

4. In this oral submission, I will briefly address two topics. First, I will address the proper role of the NAFTA Parties' submissions in the interpretation of the NAFTA, consistent with the customary international law principles of treaty interpretation reflected in Articles 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties. Although the United States is not a party to the Vienna Convention, it considers that Article 31 of the Convention reflects customary international law on treaty interpretation. Second, I will explain the meaning of the phrase "for greater certainty" in U.S. treaty practice.

I. Weight Due Article 1128 Submissions

5. I turn now to my first topic. States are well placed to provide authentic interpretations of their treaties, including in proceedings before investor-State tribunals like this one. NAFTA Article 1128 ensures that the non-disputing NAFTA Parties have an opportunity to provide their views on the correct interpretation of the NAFTA. The NAFTA Parties consider non-disputing Party submissions to be an important tool in this respect and the United States consistently provides for such submissions in its investment agreements.

6. Article 31 of the Vienna Convention on the Law of Treaties recognizes the important role that the States parties play in the interpretation of their agreements. In particular, paragraph 3 states that, in interpreting a treaty, "[t]here shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and] (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . ."

7. Article 31 of the Vienna Convention is framed in mandatory terms. It is unequivocal that subsequent agreements between the Parties and subsequent practice of the Parties "shall be taken into account." Thus, if the Tribunal concludes that there is either a subsequent agreement between the Parties or subsequent practice that establishes such an agreement regarding the interpretation of a treaty provision, the Tribunal must take that into account in its interpretation of the provision.

8. Where the submissions by the three NAFTA Parties demonstrate that they agree on the proper interpretation of a given provision, the Tribunal must, in accordance with Article 31(3)(a), take this agreement into account.

9. In addition, the NAFTA Parties' concordant interpretations may also constitute subsequent practice under Article 31(3)(b). The International Law Commission has commented that subsequent practice may include "statements in the course of a legal dispute" . Accordingly, where the NAFTA Parties' submissions in an arbitration evidence a common understanding of a given provision, this constitutes subsequent practice that must be taken into account by the Tribunal under Article 31(3)(b).

10. Several tribunals have agreed that submissions by the NAFTA Parties in arbitrations under Chapter Eleven, including non-disputing Party submissions, may serve to form subsequent practice. For example, the *Mobil v. Canada* tribunal found that arbitral submissions by the NAFTA Parties constituted subsequent practice and observed that "the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight." I would point you in particular to paragraphs 103, 104 and 158 to 160 of the *Mobil v. Canada* Decision on Jurisdiction and Admissibility, dated July 13, 2018.

11. The tribunal in *Clayton/Bilcon v. Canada* reached a similar conclusion at paragraphs 376 to 379 of its January 10, 2019 Award on Damages, as did the tribunal in *Canadian Cattlemen for Fair Trade v. United States*, at paragraphs 188 to 189 of its January 28, 2008 Award on Jurisdiction.

12. Before concluding on this point, I would like to briefly address claimant's argument that non-disputing Party submissions cannot evidence a subsequent agreement or subsequent practice because NAFTA Chapter Eleven purportedly "designates the Free Trade Commission . . . as the primary means for the NAFTA Parties to memorialize their agreement on matters of treaty interpretation." This is a non-sequitur. NAFTA Article 1131(2), which concerns interpretations by the Free Trade Commission, and Article 1128, which concerns non-disputing Party submissions, merely establish separate mechanisms for the Parties to provide interpretations of their treaty.

13. Nothing in the NAFTA's text suggests that, in granting the Free Trade Commission the ability to issue binding, authoritative, interpretations of the NAFTA, the Parties intended to preclude themselves from issuing non-binding, but nevertheless authentic, means of interpretation of NAFTA provisions through their submissions to investor-State tribunals or to preclude a tribunal from giving such submissions the weight to which they would otherwise be entitled.

14. In sum, whether the Tribunal considers the interpretations the NAFTA Parties' have presented in Chapter Eleven cases as a subsequent agreement under Article 31(3)(a) of the Vienna Convention, or subsequent practice under Article 31(3)(b), or both, the outcome is the same. The Tribunal must take the NAFTA Parties' common understanding of the provisions of their Treaty into account.

II. "For Greater Certainty"

15. The second issue I would like to address is the use of the words "for greater certainty" in Article 14.D.13.3 of Annex 14-D to the United States-Mexico-Canada Agreement. The Claimant mentions this provision in paragraph 58 of its comments on the non-disputing Parties' submissions. Article 14.D.13.3 provides:

> For greater certainty, if an investor of an Annex Party submits a claim to arbitration under Article 14.D.3.1(a) (Submission of a Claim to Arbitration), it may recover only for loss or damage incurred in its capacity as an investor of an Annex Party.

16. As a general practice, the United States uses the words "for greater certainty" in its international trade investment agreements to introduce statements that confirm the meaning of the agreement. In U.S. practice, the phrase "for greater certainty" signals that the statements that follow reflect the understanding of the treaty parties regarding what the provisions of the agreement would mean even if the sentence were absent.

17. As a consequence, sentences that begin with "for greater certainty" also serve to spell out more explicitly the proper interpretation of similar provisions, mutatis mutandis, in other agreements or in the same agreement.

18. The United States has explained the meaning of the phrase "for greater certainty" in a number of past submissions. For example, the United States addressed the issue in Footnote 24 of its non-disputing party submission in the *Omega Engineering LLC v. Panama* case, which is ICSID Case Number ARB/16/42. We also made submissions on this point during the hearings in *Astrida Benita Carrizosa v. Colombia*, which is ICSID Case Number ARB/18/5, and *Alberto Carrizosa Gelzis v. Colombia*, which is PCA Case Number 2018-56. The United States made these oral submissions on November 13, 2020 and December 15, 2020, respectively.

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b. Tennant Energy v. Canada

On June 25, 2021, the United States made an Article 1128 submission in *Tennant Energy v. Canada*, PCA Case No. 2018-54. The submission, available at https://pcacases.com/web/sendAttach/28774, addresses (1) Article 1116(2) (Limitations Period); and (2) Article 1116(1) (Investor of a Party). The excerpts below (footnotes omitted) come from the discussion of Article 1116(1).

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10. Under Article 1116(1), an investor who wishes to pursue a claim must allege that "another Party" has breached specified obligations in the NAFTA and further that "*the* investor has incurred loss or damage by reason of, or arising out of, *that breach*." (Emphases added.) By using the words "the investor" and "that breach," Article 1116(1) requires that the investor bringing the claim be the same investor who suffered loss or damage as a result of the alleged breach. Article 1116(1) does not authorize a different investor to bring a claim on behalf of the investor who suffered the loss or damage as a result of the alleged breach.

11. Thus, a claimant (*i.e.*, the investor bringing the claim) must be the same investor who sought to make, was making, or made the investment at the time of the alleged breach, and incurred loss or damage thereby. There is no provision in Chapter Eleven which authorizes an investor to bring a claim for an alleged breach relating to a different investor.

12. Other provisions in Chapter Eleven serve as context for the interpretation of Article 1116, and further confirm that the investor bringing the claim must be the same "investor of a Party" that incurred loss or damage by reason of the alleged breach.

13. Article 1121(1)(b) requires that an investor bringing a claim under Article 1116 waive its "right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing

Party that is alleged to be a breach referred to in Article 1116, except 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."

14. This waiver provision ensures that a respondent need not litigate concurrent and overlapping proceedings in multiple forums (domestic or international), and minimizes not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)."

15. This provision could be rendered meaningless if the investor bringing the claim could be a different investor from the investor who had made the investment at the time of the alleged breach (the "original investor"), because only the claimant, and not the original investor, would be required by Article 1121(1)(b) to sign a waiver of other remedies. This would allow the original investor to bring, for example, an action for damages in a domestic court with respect to the same measure, potentially subjecting the respondent to two proceedings for the same alleged breach and defeating the purpose of Article 1121(1)(b).

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c. Alicia Grace v. Mexico

On August 24, 2021, the United States made an Article 1128 submission in *Alicia Grace and others v. Mexico*, ICSID Case No. UNCT/18/4. The submission addresses (1) standing to bring a claim and limitations on damages (Article 1116 and 1117); consent and waiver (Articles 1122(1) and 1121); expropriation and compensation (Article 1110); and minimum standard of treatment (Article 1105). The discussion of dual nationality is excerpted below. The submission is available at https://www.state.gov/alicia-grace-and-others-v-united-mexican-states-nafta-icsid-case-no-unct-18-4/.

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6. The dominant and effective nationality exception to the principle of non-responsibility only applies, however, to cases of "dual nationality" as understood under customary international law, *i.e.*, where a natural person has acquired the citizenship of two States.[3] Thus, the NAFTA and customary international law define "nationality" differently. While NAFTA Article 201 defines "national" to include permanent residents of a Party, enabling them to bring an investment claim against another Party, under customary international law, nationality is, in all respects relevant here, synonymous with citizenship and thus excludes mere permanent residents.[4] Furthermore, customary international

[3] *See* 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 65 (1967) ("A person who is claimed as a subject or citizen by two states is said to possess dual nationality.") [hereinafter "WHITEMAN"].

[4] *See* 1 L. ROBERT JENNINGS & ARTHUR WATTS OPPENHEIM'S INTERNATIONAL LAW 642-43 (8th ed. 1995) ("Nationality of an individual is his quality of being a subject of a certain State, and therefore its citizen.") [hereinafter "OPPENHEIM"]. *See also Marvin Feldman v. United Mexican States* NAFTA/ICSID Case No. ARB(AF)/99/1), Interim Decision on Preliminary Jurisdictional Issues ¶¶ 30-31 (December 6, 2000) ("[U]nder general international law, citizenship rather than residence or any other geographic affiliation is the main connecting factor between a state and an individual. Residence, even permanent or otherwise authorized or officially certified residence, only fulfills a subsidiary function which, as a matter of principle, does not amount to, or compete with,

law looks to a State's municipal law to define who may be considered a citizen in any given situation.[5] Thus, the NAFTA's choice of terminology does not mean that permanent residents of one Party are to be considered "nationals" of that Party for purposes of customary international law generally or, more specifically, with respect to cases of "dual nationality".

7. In this connection, the United States has long held the view that dual nationals are treated as having the nationality of their "dominant and effective" nationality for purposes of bringing a claim under Chapter Eleven of the NAFTA, and that permanent residents are not considered nationals under customary international law.[6]

8. In sum, under applicable rules of international law, a State Party to the NAFTA is not responsible for a claim asserted against it under Chapter Eleven by an investor of another Party who is a permanent resident of another Party but a citizen of the respondent State Party.

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d. Odyssey Marine Exploration, Inc. v. Mexico

Odyssey Marine Exploration, Inc. brought claims against Mexico under Article 1105 (fair and equitable treatment as well as full protection and security), Article 1110 (indirect expropriation), and Article 1102 (national treatment). *Odyssey Marine Exploration, Inc. v. Mexico*, ICSID Case No. UNCT/20/1. Information about the case, including the November 2, 2021 Article 1128 submission of the United States, can be found at https://www.state.gov/odyssey-marine-exploration-inc-v-united-mexican-states/. The section on environmental measures follows.

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Environmental Measures (Article 1114(1))

21. Article 1114(1) provides that:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

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citizenship. In particular, in matters of standing in international adjudication or arbitration or other form of diplomatic protection, citizenship rather than residence is considered to deliver, subject to specific rules, the relevant connection. Accordingly, dual nationality problems, including the search of the 'dominant or effective nationality', require the existence of a double citizenship, connecting the same individual to two states with the legal bond of citizenship in the generally accepted meaning of the term.").

[5] *See* WHITEMAN at 48; OPPENHEIM at 643; *see also* Article 1, Convention on Certain Questions Relating to the Conflict of Nationality Laws, done at The Hague, April 12, 1930, 179 L.N.T.S. 89 ("It is for each State to determine under its own law who are its nationals. This law shall be recognised by States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.").

[6] *Marvin Feldman v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Submission of the United States of American on Preliminary Issues ¶¶ 2-12 (Oct. 6, 2000). 4 4. The limitations

22. Article 1114(1) informs the interpretation of other provisions of NAFTA Chapter Eleven, including Articles 1105 and 1110, and shows that Chapter Eleven was not intended to undermine the ability of governments to take measures based upon environmental concerns, even when those measures may affect the value of an investment, if otherwise consistent with the Chapter.

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e. Carlos Sastre v. Mexico

On December 17, 2021, the United States submitted pursuant to Article 1128 in *Carlos Sastre and others v. Mexico*, ICSID Case No. UNCT/20/2. The Article 1128 submission is excerpted below and available at https://www.state.gov/wp-content/uploads/2022/02/Sastre-v.-Mexico-U.S.-Article-1128-Submission-FINAL.pdf.

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Article 1116 (Standing to Bring a Claim)

Continuous Nationality

5. 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.

6. 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: (i) the time of the purported breach, (ii) the submission of a claim to arbitration, and (iii) the resolution of the claim.

Time of the Purported Breach

7. As provided in Article 1116, in pertinent part, an investor of a Party may submit to arbitration a claim that "*another Party* has breached" an obligation under Chapter Eleven, Section A. Article 1101 (Scope and Coverage) clarifies that Chapter Eleven applies to measures adopted or maintained by a Party relating to, *inter alia*, "investors of *another Party*" and "investments of investors of *another Party* in the territory of the Party[.]"

8. Thus, because the substantive obligations of Section A apply to "investors of *another Party*," or "investments of investors of *another Party* in the territory of the Party," the investor must be "an investor of *another* Party," *i.e.*, a Party other than the respondent Party at the time of the purported breach. If the requisite difference in nationality does not exist, there can be no breach, as there was no obligation under Chapter Eleven, Section A, at the time of the purported breach. And, pursuant to Article 1116, what may be submitted to arbitration under Chapter Eleven, Section B, are claims that the respondent State "*has breached*" an obligation under Section A.

Submission of the Claim to Arbitration

9. Article 1116(1) permits an investor of a Party to "submit to arbitration under this Section [*i.e.*, Section B] a claim that another Party has breached an obligation" under Chapter Eleven, Section A. Accordingly, the investor must also be a national of a Party other than the respondent NAFTA Party at the time of submission of the claim to arbitration.

Date of the Resolution of the Claim

10. An investor must also be a national of a Party other than the respondent Party through the resolution of the claim. Article 1116 refers to submitting a claim under Chapter Eleven, Section B, which encompasses relevant dispute settlement procedures leading up to, during, and through the resolution of a claim. Multiple articles in Section B concerning aspects of the dispute settlement process subsequent to the submission of a claim refer to the "disputing investor" or the "disputing parties." For example, Article 1124 (Constitution of a Tribunal), Article 1125 (Agreement to Appointment of Arbitrators), Article 1126 (Consolidation), Article 1130 (Place of Arbitration), Article 1134 (Interim Measures of Protection), and Article 1136 (Finality and Enforcement of an Award), among other provisions, all refer to the "disputing investor" or the "disputing parties." Article 1139 clarifies that the "disputing parties" are "the disputing investor and the disputing [NAFTA] Party." A "disputing investor" is further defined under Article 1139 as an investor "that makes a claim under Section B," which, as discussed above, must be "an investor of *another Party*". This degree of textual specificity makes clear that an investor must remain a national of another Party throughout the resolution of the claim.

11. Further, Article 1136(5) provides that a "Party whose investor was a party to the arbitration" can invoke the procedures of NAFTA Chapter Twenty and seek a decision from a panel established by the Free Trade Commission enforcing the award against the "disputing Party." The procedure established by this provision contemplates a continuing connection between an investor of a Party other than the respondent Party and such non-disputing Party through the time of the award and allows the non-disputing Party to pursue a State-to-State arbitration to seek compliance with that award.

12. 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.

Dual Nationality

13. Articles 1116 and 1117 affirmatively grant the right to submit a claim to arbitration to an "investor of a Party" under the conditions specified in those articles, including that "another Party" has breached Section A of Chapter Eleven, Article 1503(2), or Article 1502(3)(a).

14. Article 1139 of the NAFTA defines the term "investor of a Party" to include a natural person who is "a national . . . of such Party, that seeks to make, is making or has made an investment." Article 201 of the NAFTA defines the term "national" as "a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1." Read together, and by their ordinary meaning, these express terms of the NAFTA provide that both citizens and permanent residents of a Party "may submit" a claim to arbitration on behalf of themselves (Article 1116) or an eligible enterprise of another Party (Article 1117) alleging such other Party breached a NAFTA obligation.

15. Notably, however, Article 1131(1) requires Tribunals constituted under Chapter Eleven to decide the issues "in dispute in accordance with [the NAFTA] and applicable rules of international law." One such rule of international law is the above-noted principle of "non-responsibility," *i.e.*, that no international claim may be asserted against a State on behalf of the State's own nationals, subject to the rule set forth in *United States ex rel. Mergé v. Italian Republic*, and adopted by *Iran v. United States*, Case No. A/18. That rule in effect states that a State is not responsible for a claim asserted against it by one of its own nationals, unless the claimant is a dual national whose dominant and effective nationality is that of another State.

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Article 1126 (Consolidation)

23. Article 1126 permits the consolidation of claims submitted to arbitration under Article 1120 where they "have a question of law or fact in common" and where consolidation serves "the interests of fair and efficient resolution of the claims." Article 1126 provides specific procedures for a disputing party to request consolidation (Article 1126(3)); for the establishment of a consolidation tribunal to assess such a request and, if granted in whole or in part, to oversee the consolidated proceeding (Article 1126(5)); and for disputing investors not identified in the initial consolidation application to make a separate request that their claims be consolidated as well (Article 1126(6)).

24. Except as provided for by Article 1126, the dispute settlement mechanism established in Chapter Eleven, Section B assumes a single investor as claimant and a single NAFTA Party as respondent. For example, Articles 1116 and 1117 pertain to claims by "[a]n investor" of one NAFTA Party against another NAFTA Party; Article 1119 obligates "[t]he disputing investor" to deliver a Notice of Intent to "the disputing Party"; and Article 1120 states that "a disputing investor may submit the claim to arbitration," "provided that six months have elapsed since the events giving rise to a claim." Each of these provisions is written in the singular: one investor making a claim against one NAFTA Party. This is further confirmed by Article 1139, which defines "disputing parties" as "the disputing investor and the disputing Party." This definition contemplates two parties: a *single* investor and a *single* NAFTA Party.

25. Apart from the procedures set out in Article 1126, the only way for multiple claimants to have their NAFTA claims heard and determined together is by separately obtaining the consent of the Respondent NAFTA Party to informal consolidation of the claims. Allowing multiple claimants to consolidate their claims unilaterally by, for example, submitting them together in a single Notice of Arbitration or Request for Arbitration without either invoking Article 1126 or obtaining the consent of the Respondent NAFTA Party would impermissibly ignore the limits that the NAFTA Parties have placed on their consent to the consolidation of proceedings.

26. Article 1126 does not permit consolidation of claims submitted to arbitration under the NAFTA with claims submitted to arbitration under a treaty other than the NAFTA. Article 1126 applies only to claims that "have been submitted to arbitration under [NAFTA] Article 1120." Accordingly, the NAFTA Parties did not consent in the NAFTA to the consolidation of NAFTA and non-NAFTA claims. Again, a NAFTA Party might choose to consent to the informal consolidation of NAFTA and non-NAFTA claims in specific cases but, in the absence of such express, case-specific consent, a tribunal has no jurisdiction to hear and determine NAFTA and non-NAFTA claims together.

27. Nor can provisions of the applicable arbitral rules overcome the absence of the Respondent NAFTA Party's consent. As one NAFTA tribunal observed with respect to Article 15(1) of the UNCITRAL Rules (1976):

> While the provision is plainly important, it is about the procedure to be followed by an arbitral tribunal in exercising the jurisdiction which the parties have conferred on it. It does not itself confer power to adjust that jurisdiction to widen the matter before it by adding as parties persons additional to those which have mutually agreed to its jurisdiction or by

including subject matter in its arbitration additional to what which the parties have agreed to confer.[35]

Article 1139 (Definition of Investment)

28. Article 1139 provides an exhaustive list of what constitutes an investment for purposes of NAFTA Chapter Eleven. While Article 1139 does not expressly provide that each type of investment must be made in accordance with applicable law, it is implicit that the protections in Chapter Eleven only apply to investments made in compliance with applicable law. As a general matter, however, trivial violations of the applicable law will not put an investment outside the scope of Article 1139.

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2. Non-Disputing Party Submissions under other Trade Agreements

a. U.S.-Korea FTA: Mason Capital

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 February 1, 2021, the United States made a submission pursuant to Article 11.20.4 in *Mason Capital, L.P. v. Republic of Korea*, PCA Case No. 2018-55. The submission is available at Mason v. Korea. The section discussing "Scope and Coverage" is excerpted below.

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Article 11.1 (Scope and Coverage)

2. Article 11.1.1 begins "[t]his Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of the other Party; (b) covered investments." In this connection, Article 1.4, which sets forth the general definitions of terms used in the KORUS, provides that "measure includes any law, regulation, procedure, requirement, or practice." Article 11.1.3 further provides:

> For purposes of this Chapter, **measures adopted or maintained by a Party** means measures adopted or maintained by:
> (a) central, regional, or local governments and authorities; and
> (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.

[35] *United Parcel Service of America Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae ¶ 39 (Oct. 17, 2001). *See also Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" ¶ 27 (Jan. 15, 2001) ("As a procedural provision, however, [Article 15(1)] cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party.").

"Measures Adopted or Maintained by a Party"

3. Article 11.1.3(a) confirms that measures adopted or maintained by any government or authority of a Party are attributable to that Party. The term "governments and authorities" means the organs of a Party, consistent with the principles of attribution under customary international law.[4] As the text of Article 11.1.3(a) makes clear, this rule of attribution applies to any State organ at the central, regional, or local level of government. The text of Article 11.1.3(a) does not draw distinctions based on the type of conduct at issue.[5]

4. Pursuant to Article 11.1.3(b), attribution of conduct of a non-governmental body to a Party requires that both (i) the conduct is governmental in nature and (ii) the measures adopted or maintained by the non-governmental body are undertaken "in the exercise of powers *delegated* by" the government or an authority of a Party.[6] (Emphasis added.) Article 16.9 of the KORUS defines "delegation," for purposes of the chapter on competition-related matters, as including, *inter alia*, "a legislative grant, and a government order, directive, or other act, transferring to the . . . state enterprise, or authorizing the exercise by the . . . state enterprise of, governmental authority." If the conduct of a non-governmental body falls outside the scope of the relevant delegation of authority, such conduct is not a "measure[] adopted or maintained by a Party" under Article 11.1.

5. A non-governmental body such as a state enterprise may exercise regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges. These examples illustrate circumstances in which a non-governmental body such as a state enterprise is exercising governmental authority delegated by a Party in its sovereign capacity.

"Relating to"

6. The "relating to" requirement of Article 11.1.1 cannot be satisfied by the mere, or incidental, effect that a challenged measure had on a claimant. Rather, there must have been a "legally significant connection" between the measure and the investor or its investment.[7] Otherwise, untold numbers of domestic measures that simply have an economic impact on a

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[4] *See, e.g.,* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, U.N. Doc. A/56/10, art. 4 (2001) [hereinafter ILC Draft Articles] ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.").

[5] *See* ILC Draft Articles, art. 4, cmt. 6 ("It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as *acta iure gestionis*.").

[6] *See* ILC Draft Articles, art. 5 ("The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.").

[7] *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, First Partial Award, ¶ 147 (Aug. 7, 2002) [hereinafter *Methanex* First Partial Award] (finding that "the phrase 'relating to'. . . signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them"); *see also Bayview Irrigation District, et al. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Award, ¶ 101 (June 9, 2007); *William Ralph Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Award, ¶ 240 (Mar. 17, 2015) [hereinafter *Bilcon* Award].

foreign investor or its investment would pass through the Article 11.1.1 threshold.[8] As the *Methanex* tribunal aptly observed with respect to the analogous NAFTA Article 1101(1), "[a] threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all."[9]

7. Whether a challenged measure bears a "legally significant connection" to a foreign investor or investment depends on the facts of a given case. Negative impact of a challenged measure on a claimant, without more, does not satisfy the standard. Rather, a "legally significant connection" requires a more direct connection between the challenged measure and the foreign investor or investment.

8. Thus, for example, the *S.D. Myers* tribunal found that "the requirement that the import ban be 'in relation' to SDMI and its investment in Canada is easily satisfied," given that the measure "was raised to address specifically the operations of SDMI and its investment." In *Bilcon*, the tribunal found a legally significant connection where the challenged measure was the rejection by the Nova Scotia and the Canadian federal governments of a quarry project that was to be developed and operated pursuant to an agreement between the claimants and their Canadian joint-venture partner. The tribunal in *Cargill, Inc. v. Mexico* found that the import permit requirement at issue "directly affected" and "constituted a legal impediment to carrying on the business of Cargill de Mexico in sourcing HFCS in the United States and re-selling it in Mexico."

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b. U.S.-Rwanda BIT: Bay View Group et al. v. Rwanda

Article 28.2 of the Treaty Between the United States of America and the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment ("U.S.-Rwanda BIT" or "Treaty"), like Article 1128 of NAFTA, allows for non-disputing Party submissions. On February 19, 2021, the United States made a submission in *Bay View Group, LLC and the Spalena Company, LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, which is excerpted below and available at https://www.state.gov/wp-content/uploads/2021/11/2021.02.19-Bay-View-Group-v.-Rwanda-508-V5.pdf.

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[8] NAFTA Chapter Eleven tribunals have consistently found that the mere effect of a challenged measure on a claimant, without more, does not satisfy the "relating to" requirement of Article 1101(1). *See, e.g., Apotex Holdings Inc. and Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Award, ¶ 6.13 (Aug. 25, 2014) (finding "something more than a mere 'effect' from the measure is required to overcome the jurisdictional threshold in NAFTA Article 1101(1)" and that the *Cargill* tribunal was not seeking to apply a different legal interpretation of NAFTA Article 1101(1) from the tribunals in *Methanex* and *Bayview*).

[9] *Methanex* First Partial Award, ¶ 137; *see also Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, ¶ 242 (Jan. 30, 2018) ("[A] measure which adversely affected the claimant in a tangential or merely consequential way will not suffice for this purpose.").

ARTICLE 1 (DEFINITION OF "INVESTMENT")

Licenses as "investments"

2. Article 1 defines "investment" as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." This definition encompasses "every asset" that an investor owns or controls, directly or indirectly, that has the characteristics of an investment. The "[f]orms that an investment may take include" the categories listed in the subparagraphs, which are illustrative and non-exhaustive. The enumeration of a type of an asset in Article 1, however, is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.[1]

3. Article 1 adds that the "[f]orms that an investment may take include: . . . (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law . . . ." Footnote 3 is appended to subparagraph (g), and states:

> Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

4. The footnote refers to licenses, authorizations, permits, and similar instruments that "do not create any rights protected under domestic law" as being "among" those that "do not have the characteristics of an investment." A license revocable at will by the State – which generally does not confer any protected rights – would exemplify the kind of license that is unlikely to constitute an investment.[3] The determination as to whether a particular instrument has the characteristics of an investment is a case-by-case inquiry, involving examination of the nature and extent of any rights conferred under the State's domestic law.

ARTICLE 2.3 (NON-RETROACTIVITY)

5. Article 2.3 states: "[f]or greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty." The phrase "for greater certainty" signals that the sentence it introduces reflects what the agreement would mean even if that sentence were absent.[5]

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[1] Lee M. Caplan & Jeremy K. Sharpe, Commentary on the 2012 U.S. Model BIT, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 755, 767-768 (Chester Brown ed., 2013).

[3] See KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 124 (2009) ("VANDEVELDE").

[5] Article 2.3 is consistent with Article 28 of the Vienna Convention on the Law of Treaties. See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1115 U.N.T.S. 331, Article 28 ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act

6. A host State's conduct prior to the entry into force of an obligation may be relevant in determining whether the State subsequently breached that obligation. Given the rule against retroactivity, however, there must exist "conduct of the State after that date which is itself a breach."[6] As the *Berkowitz* tribunal observed, "pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right. Pre-entry into force acts and facts cannot . . . constitute a cause of action." Further, "[t]he mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct."

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15. The U.S.-Rwanda BIT provides two jurisdictional bases for investors to bring claims against a Treaty Party: Articles 24.1(a) and 24.1(b). Articles 24.1(a) and 24.1(b) serve to address discrete and non-overlapping types of injury. Where the investor seeks to recover loss or damage that it incurred *directly*, it may bring a claim under Article 24.1(a). However, where the alleged loss or damage is to "an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly," the investor's injury is only *indirect*. Such derivative claims must be brought, if at all, under Article 24.1(b); and must comply with all jurisdictional requirements for bringing such a claim, including but not limited to, pursuant to Article 26.2(b)(ii), submission with the Notice of Arbitration of the enterprise's written waiver of its right to initiate any other proceeding with respect to the measures alleged to constitute a breach.

16. This distinction between Articles 24.1(a) and 24.1(b) was drafted purposefully in light of two existing principles of customary international law addressing the status of corporations. The first of these principles is that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. This is so because, as reaffirmed by the International Court of Justice in *Diallo*, "international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders." As the *Diallo* Court further reaffirmed, quoting *Barcelona Traction*: "a wrong done to the company frequently causes prejudice to its shareholders." Nonetheless, "whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed." Thus, only *direct* loss or damage suffered by shareholders is cognizable under customary international law.

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or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."). While the United States is not a party to the VCLT, it has recognized since at least 1971 that the Convention is the "authoritative guide" to treaty law and practice. See Letter from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties, October 18, 1971, reprinted in 65 DEP'T ST. BULL 684, 685 (1971). See *also Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 62 (Dec. 6, 2000) ("Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994.") ("Feldman Interim Decision").

[6] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award ¶ 70 (Oct. 11, 2002) ("Mondev Award"). As the *Mondev* tribunal also observed, "there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage." Id. ¶ 58. See also *Northern Cameroons* (Cameroon v. U.K.), 1963 I.C.J. 15, 129 (Dec. 2) (Separate Opinion of Judge Fitzmaurice) ("An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot ex post facto become one.").

17. How a claim for loss or damage is characterized is therefore not determinative of whether the injury is direct or indirect. Rather, as *Diallo* and *Barcelona Traction* have found, what is determinative is whether the right that has been infringed belongs to the shareholder or the corporation. Examples of claims that would allow a shareholding investor to seek direct loss or damage include where the investor alleges that it was denied its right to a declared dividend, to vote its shares, or to share in the residual assets of the enterprise upon dissolution. Another example of a direct loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders' ownership interests – whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole.

18. The second principle of customary international law against which Articles 24.1(a) and 24.1(b) were drafted is that no international claim may be asserted against a State on behalf of the State's own nationals. Article 24.1(b) therefore provides a right to present a claim not otherwise found in customary international law, where a claimant alleges injury to "an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly." Article 24.1(b) allows an investor of a Party that owns or controls that enterprise to submit a claim on behalf of the enterprise for loss or damage incurred by that enterprise.

19. In sum, Article 24.1(a) adheres to the principle of customary international law that shareholders may assert claims only for *direct* injuries to their rights. Where an investor suffers loss to its investment and that investment is not an enterprise or held by an enterprise, the *Barcelona Traction* rule does not apply and Article 24.1(a) of the U.S.-Rwanda BIT provides a remedy. By contrast, where the injury is to an enterprise or an asset held by that enterprise, the harm to the investor is generally derivative of that to the enterprise and *Barcelona Traction* precludes a claim for direct injuries to a shareholder's rights. Article 24.1(b), but not Article 24.1(a), is available to remedy any violation of the Treaty in such a case. Were shareholders to be permitted to claim under Article 24.1(a) for indirect injury, Article 24.1(b)'s narrow and limited derogation from customary international law would be superfluous.

20. Article 24.1(a) cannot be construed to reflect an intent to derogate from the rule that shareholders may assert claims only for injuries to their interests and not for injuries to the corporation. It is well-recognized that an international agreement should not be held to have tacitly dispensed with an important principle of international law "in the absence of words making clear an intention to do so."[31] Nothing in the text of Article 24.1(a) suggests an intent to derogate from customary international law restrictions on the assertion of claims on behalf of shareholders.

21. In addition, the distinct functions of Articles 24.1(a) and 24.1(b) ensure that there will be no double recovery. When an investor that owns or controls an enterprise submits a claim under Article 24.1(b) for loss or damage suffered by that enterprise, any award in the claimant investor's favor will make the enterprise whole and the value of the shares will be restored. A very different scenario arises if an investor that does not own or control an enterprise is permitted to bring a claim for loss or damage suffered by that enterprise under Article 24.1(a). In such a case, for example, nothing would prevent the enterprise from also seeking available remedies under domestic law for the same injury. A Treaty Party could then be forced to defend against such claims in separate,

[31] *Elettronica Sicula S.p.A. (ELSI) (United States. v. Italy)* 1989 I.C.J. 15, ¶ 50 (Judgment of July 20) ("Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with [by an international agreement], in the absence of any words making clear an intention to do so."); *Loewen Group, Inc. v. United States*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 160 (June 26, 2003) ("*Loewen* Award"); *see also id*. ¶ 162 ("It would be strange indeed if sub silentio the international rule were to be swept away.").

consecutive proceedings, risking duplicative awards for the same loss or damage arising from the same breach.

Meaning of "control"

22. Article 24.1(b) of the BIT authorizes an investor of a Party to bring a claim on behalf of an enterprise that the investor "owns or controls directly or indirectly." The BIT does not define "control." The omission of a definition for "control" accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.

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c. CAFTA-DR

Kappes v. Guatemala

Article 10.20.2 of the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR" or "Treaty") allows for non-disputing Party submissions. The United States made such a submission on February 19, 2021, regarding the claims brought by Daniel W. Kappes and Kappes, Cassiday & Associates, that the Republic of Guatemala violated Articles 10.3 (national treatment), 10.4 (most-favored-nation treatment), 10.5 (minimum standard of treatment), and 10.7 (expropriation) of the CAFTA-DR. ICSID Case No. ARB/18/43. The submission is available at Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala - United States Department of State.

Lopez-Goyne v. Nicaragua

The United States made a submission in another CAFTA-DR case, *Lopez-Goyne Family Trust et al. v. Nicaragua*, ICSID Case No. ARB/17/44, on September 28, 2021. Excerpts follow from the submission. The submission is available at https://www.state.gov/wp-content/uploads/2022/07/Lopez-Goyne-v.-Nicaragua-US-NDP.pdf.

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Article 10.28 (Definition of Investment)

2. Article 10.28 states, in pertinent part, that "investment" means "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." As the chapeau makes clear, this definition encompasses "every asset" that an investor owns or controls, directly or indirectly, that has the characteristics of an investment.

3. Article 10.28 further states that the "[f]orms that an investment may take include" the assets listed in the subparagraphs. Subparagraph (b) of the definition lists "shares, stock, and other forms of equity participation in an enterprise", and subparagraph (g) lists "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law[.]" The enumeration of a type of an

asset in Article 10.28, however, is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

4. Article 10.28's use of the word "including" in relation to "characteristics of an investment" indicates that the list of identified characteristics, i.e., "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk" is not an exhaustive list; additional characteristics may be relevant.

* * * *

6. … A license revocable at will by the State – which generally does not confer any protected rights – would exemplify the kind of license that is unlikely to constitute an investment. The determination as to whether a particular instrument has the characteristics of an investment is a case-by-case inquiry, involving an examination of the nature and extent of any rights conferred under the State's domestic law.

Article 10.7 (Expropriation and Compensation)

7. Article 10.7 of the Agreement provides that no Party may expropriate or nationalize a covered investment (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. Compensation must be "prompt," in that it must be "paid without delay"; "adequate," in that it must be made at the fair market value as of "the date of expropriation" and "not reflect any change in value occurring because the intended expropriation had become known earlier"; and "effective," in that it must be "fully realizable and freely transferable."

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Claims for Indirect Expropriation

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Article 10.5 (Minimum Standard of Treatment)

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Fair and Equitable Treatment

22. 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[.]"

23. As discussed below, the concepts of legitimate expectations, good faith, and transparency are not component elements of "fair and equitable treatment" under customary international law that give rise to independent host State obligations.

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Article 10.16.1 (Submission of a Claim to Arbitration and Limitations on Loss or Damages)

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34. In sum, Article 10.16.l(a) adheres to the principle of customary international law that shareholders may assert claims only for direct injuries to their rights. Where an investor suffers loss to its investment and that investment is not an enterprise or held by an enterprise, the *Barcelona Traction* rule does not apply, and Article 10.16.l(a) of CAFTA-DR provides a remedy. By contrast, where the injury is to an enterprise or an asset held by that enterprise, the harm to the investor is generally derivative of that to the enterprise and *Barcelona Traction* precludes a claim for direct injuries to a shareholder's rights. Article 10.16.l(b), but not Article 10.16.l(a), is available to remedy any violation of Chapter Ten in such a case. Article 10.16.1(b) may be applicable only where the breach causes loss to an "enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly." Were shareholders to be permitted to claim under Article 10.16.l(a) for indirect injury, Article 10.16.1(b)'s narrow and limited derogation from customary international law would be superfluous.

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40. Accordingly, any loss or damage cannot be based on an assessment of acts, events or circumstances not attributable to the alleged breach. Events that develop subsequent to the alleged breach may increase or decrease the amount of damages suffered by a claimant. At the same time, injuries that are not sufficiently "direct," "foreseeable," or "proximate" may not, consistent with applicable rules of international law, be considered when calculating a damage award.

Chapter Ten and Contract Breaches

41. Mere breaches of a contract are not *per se* violations of international law, or specifically of the State's obligations under Chapter Ten. Rather, as the United States has previously explained, a State may be responsible for a breach of contract in some circumstances, such as when a "repudiation of the contract is discriminatory or motivated by non-commercial considerations." Moreover, to breach the minimum standard of treatment, for example, "something more is required, such as a complete repudiation of the contract or a denial of justice in the execution of the contract."

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d. U.S.-Colombia TPA: Angel Samuel Seda

Article 10.20.2 of the United States-Colombia Trade Promotion Agreement ("U.S.-Colombia TPA" or "Agreement") authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement. On February 26, 2021, the United States made a written submission in *Angel Samuel Seda and others v. the Republic of Colombia*. ICSID Case No. ARB/19/6. The submission is available at Seda v. Colombia and excerpted below.

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Continuous Nationality—Submission of a Claim by an Investor on behalf of an Enterprise (Article 10.16.1(b))

14. Article 10.16(1)(b) provides, in pertinent part, that "the *claimant*, on behalf of an enterprise of the respondent that is a juridical person that the *claimant owns or controls* directly or indirectly, may submit to arbitration under this Section a claim (i) that the respondent has breached an (A) obligation under Section A [or other specified types of obligations] …." (Emphases added.) Article 10.28 defines "claimant" to "mean[] an *investor of a Party* that is a party to an investment dispute *with another Party*." (Emphases added.)

15. These provisions clarify that an investor seeking to be a claimant must not have the same nationality as the respondent State.[16] Further, for purposes of Article 10.16.1(b), an investor of a Party other than the respondent Party seeking to bring a claim on behalf of an enterprise must own or control directly or indirectly that enterprise continuously between three critical dates: (i) the time of the purported breach, (ii) the submission of a claim to arbitration, and (iii) the resolution of the claim.

Time of the Purported Breach

16. As provided in Article 10.16.1(b), in pertinent part, a claimant may submit to arbitration a claim that "*another Party… has breached*" an obligation under Section A. (Emphasis added.) Further, as noted above, Article 10.1 (Scope and Coverage) clarifies that Chapter Ten applies to measures adopted or maintained by a Party relating to, inter alia, "investors of *another Party*" and "covered investments[.]" "[A]n enterprise" is an 'investment'" as defined in Article 10.28, but it can only be a "covered investment" if it is an investment "*of an investor of another Party*" as provided under Article 1.3. Thus, because the substantive obligations of Section A apply to "investors of *another Party*," or investments "of an investor of *another Party*" in the territory of the first Party, an "investor of another Party," (*i.e.*, the Party that is not the respondent Party), must own or control directly or indirectly the investment [*i.e.*, the enterprise] at the time of the purported breach. If the requisite difference in nationality does not exist, there can be no breach, as there was no obligation under Chapter Ten, Section A at the time of the purported breach. …

17. A claimant (*i.e.*, an investor of a Party other than the respondent Party) must also own or control the enterprise directly or indirectly at the time of submission of the claim to arbitration. Article 10.16.1(b) provides that "the claimant, on behalf of an enterprise of the respondent that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim (i) that the other Party has breached (A) an obligation under [Chapter Ten] Section A…."

18. As the use of the present tense of "owns or controls" indicates, a claimant (*i.e.*, an investor of a Party other than the respondent Party), must own or control the enterprise directly or indirectly at the time of submission of the claim to arbitration. Indeed, the tribunal in *Loewen v. United States of America* held that it lacked jurisdiction over Raymond Loewen's NAFTA Article 1117 claim (premised on indirect ownership or control of a U.S. enterprise through the Loewen Group, Inc., or "TLGI") because he could not show the requisite ownership or control at the time the claim was submitted to arbitration.

Date of the Resolution of the Claim

[16] This conclusion is consistent with the customary international law principle of "non-responsibility," according to which an individual or entity cannot maintain an international claim against its own State. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXTS, AND COMMENTARIES 264–265 (2002)).

19. A claimant (*i.e.*, an investor of a Party other than the respondent Party) must also own or control the relevant enterprise directly or indirectly through the resolution of the claim. Article 10.16.1(b)'s reference to "this Section" is a reference to Section B, which encompasses relevant dispute settlement procedures leading up to, during, and through the resolution of a claim. In this connection, multiple articles concerned with aspects of the dispute settlement process subsequent to the submission of a claim refer to the "disputing party" or the "disputing parties." These terms are defined in Article 10.28 to mean "either the claimant or respondent" or both "the claimant and respondent," respectively. As noted above, "claimant" is further defined to "mean[] an investor of a Party that is party to an investment dispute with another Party."

20. Further, Article 10.26(8) provides that a "[i]f the respondent fails to abide by or comply with a final award, on delivery of a request by the Party of the claimant, a panel shall be established under Article 21.6 (Request for an Arbitral Panel)." The procedure established by this provision contemplates a continuing connection between an investor of a Party other than the respondent Party and such non-disputing Party through the time of the award and allows the non-disputing Party to pursue a State-to-State arbitration to seek compliance with that award.

21. 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.[24] As the United States has long maintained[25] 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."

* * * *

Full Protection and Security

43. In addition to the fair and equitable treatment rule, another rule included as part of the minimum standard of treatment is the obligation to provide full protection and security. The United States has long maintained that the customary international law obligation to accord "full protection and security" requires that each Party provide the level of police protection required under customary international law. Although as discussed above, arbitral decisions are not evidence of State practice, the vast majority of cases in which the customary international law obligation of full protection and security was found to have been breached are those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.[69]

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[24] See n.16, *supra*; U.S.-Colombia TPA art. 10.22.1 ("Governing Law") provides that a Chapter Ten tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.".

[25] See U.N. Int'l Law Commission, *Comments and Observations Received by Governments*, at 41-43, U.N. Doc. A/CN.4/561 (Jan. 27, Apr. 3 and 12, 2006) (comments of the United States of America on Draft Article 5 of the ILC Draft Articles on Diplomatic Protection) (urging that the ILC Draft Articles state that nationality must be continuously maintained from the date of injury to the date of the resolution of the claim); *accord Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Memorial of the United States of America on Matters of Jurisdiction and Competence Arising from the Restructuring of The Loewen Group, Inc., at 10-20 (Mar. 1, 2002).

[69] *See, e.g.*, *American Mfg. & Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1 (1997), *reprinted in* 36 I.L.M. 1531 (1997) (failure to prevent destruction and looting of property constituted violation of protection and security

44. The obligation to provide "full protection and security" does not, for example, require States to: (i) prevent economic injury inflicted by third parties; (ii) provide for legal security; (iii) provide for stability of a State's legal environment; or (iv) 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, as the United States has consistently maintained.

* * * *

e. U.S.-Morocco FTA: Carlyle

Article 10.19.2 of the United States-Morocco Free Trade Agreement ("U.S.-Morocco FTA" or "Treaty") allows submissions by non-disputing Parties on questions of interpretation of the Treaty. On January 15, 2021, the United States made the following oral submission to the tribunal in *Carlyle v. Morocco*, ICSID Case No. ARB/18/29.

* * * *

Thank you, Mr. President and members of the Tribunal, for this opportunity. My name is Nicole Thornton, and I am the Chief of Investment Arbitration in the Office of International Claims and Investment Disputes at the U.S. Department of State. The United States makes its submission on issues of treaty interpretation pursuant to Article 10.19.2 of the U.S.-Morocco Free Trade Agreement, or FTA. The United States does not take a position on how these treaty

obligation); *Asian Agric. Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3 (1990) *reprinted in* 30 I.L.M. 577 (1991) (destruction of claimant's property violated full protection and security obligation); *United States Diplomatic and Consular Staff in Tehran (United States v. Iran*), 1980 I.C.J. 3 (May 24) (failure to protect foreign nationals from being taken hostage violated most constant protection and security obligation); *Chapman v. United Mexican States (United States v. Mexico)*, 4 R.I.A.A. 632 (Mex.-U.S. Gen. Cl. Comm'n 1930) (lack of protection found where claimant was shot and seriously wounded); *H.G. Venable (United States. v. Mexico)*, 4 R.I.A.A. 219 (Mex.-U.S. Gen. Cl. Comm'n 1927) (bankruptcy court indirectly responsible for physical damage to attached property); *Biens Britanniques au Maroc Espagnol (Reclamation 53 de Melilla -Ziat, Ben Kiran) (Spain v. Great Britain)*, 2 R.I.A.A. 729 (1925) (reasonable police protection would not have prevented mob from destroying claimant's store). Other cases are in accord. *See, e.g., Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award ¶ 632 (Apr. 4, 2016) (holding that the "full protection and security" treaty standard "only extends to the duty of the host state to grant physical protection and security"); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability ¶ 173 (July 30, 2010) (holding that "the full protection and security standard primarily seeks to protect investment from physical harm"); *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, ¶ 484 (Mar. 17, 2006) ("[T]he 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."). *See also, e.g.*, Article 7(1) of the *Responsibility of the State for injuries caused in its territory to the person or property of aliens: Revised draft, reprinted in* F.V. GARCIA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 129, 130 (1974) ("The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.").

interpretation issues apply to the facts of this case. Moreover, as is the case with every statement we make as a non-disputing party in this case and all other cases, no inference should be drawn from the absence of comment on any issue not addressed in this submission.

We have listened to the disputing Parties' opening statements and would like to briefly address a few issues that were raised in addition to those addressed in our non-disputing Party submission of December 4, 2020. We would like to address three issues today, namely:

- the subsequent agreement or subsequent practice by the FTA Parties;
- the United States' interpretation of NAFTA Articles 1116 and 1117 which was characterized on Wednesday as "inconsistent" with its present position on the interpretation of FTA Article 10.15.1, paragraphs (a) and (b), and;
- the Decision on Preliminary Objections in *Kappes v. Guatemala* – a matter raised by the President on Wednesday.

The first issue we would like to address concerns the shared interpretations of the State Parties to the FTA as to its provisions and Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties. Although the United States is not a party to the Vienna Convention, we consider that Article 31 reflects customary international law on treaty interpretation.

States are well-placed to provide authentic interpretation of their treaties, including in proceedings before investor-State Tribunals like this one. FTA Article 10.19.2 ensures the Non-Disputing FTA Party has an opportunity to provide its views on the correct interpretation of the FTA, and the United States consistently includes provisions for such submissions in its Investment Agreements.

Article 31 of the Vienna Convention on the Law of Treaties recognizes the important role that the States Parties play in the interpretation of their Agreements. In particular, Paragraph 3 states that: "In interpreting a treaty, there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation of the Treaty or the application of its provisions and any subsequent practice in the application of the Treaty which establishes the agreement of the Parties regarding its interpretation." Article 31 of the Vienna Convention is framed in mandatory terms. Subsequent agreements between the parties regarding a treaty's interpretation and subsequent practice of the parties that establishes their agreement regarding a treaty's interpretation shall be taken into account.

Notably, several investment Tribunals constituted under the NAFTA have agreed that submissions by the NAFTA Parties in arbitrations under Chapter 11, including non-disputing party submissions, may serve to form subsequent practice. For example, the *Mobil v. Canada* Tribunal found that arbitral submissions by the NAFTA Parties constituted subsequent practice and observed that: "The subsequent practice of the parties to a treaty, if it establishes the Agreement of the parties regarding the interpretation of the Treaty, is entitled to be accorded considerable weight." I will point you to Paragraphs 103, 104, and 158-160 of the *Mobil v. Canada* Decision on Jurisdiction and Admissibility dated July 13, 2018. The Tribunal in *Bilcon v. Canada* reached a similar conclusion at Paragraphs 376-379 of its January 10, 2019 Award on Damages, as did the Tribunal in *Canadian Cattleman for Fair Trade v. United States* at Paragraphs 188-189 of its January 28, 2008, Award on Jurisdiction.

On Wednesday, we heard several arguments as to why the concordant interpretive positions of United States and the Kingdom of Morocco, particularly with respect to Articles 10.15.1(a) and (b), either should not be considered as subsequent agreement or subsequent practice or should be disregarded. We will very briefly address these in turn.

First, claimants suggested that positions taken in the context of litigation do not amount to a subsequent agreement or subsequent practice. The International Law Commission's commentaries to the recently adopted draft conclusions on subsequent agreements and subsequent practice address this point. In these commentaries, the ILC explained that subsequent practice may include "statements in the course of a legal dispute." That is from page 32, paragraph 18 of the commentary of draft conclusion 4, as adopted by the Commission in 2018.

Notably, Article 10.19.2 submissions can only be made in the context of ongoing litigation and the treaty parties clearly intended that such submissions would provide guidance for Tribunals in their interpretation of the FTA. To conclude otherwise would render Article 10.19.2 ineffective. Accordingly, where the FTA Parties' submissions in an arbitration evidence a common understanding of a given provision, this constitutes subsequent practice that must be taken into account by the Tribunal under Article 31(3)(b).

Second, claimants suggested that the FTA Parties' agreement regarding the interpretation of the FTA should be disregarded because the parties did not issue an interpretation by the Joint Committee under Article 10.21(3). Joint Committee interpretations are subsequent interpretive agreements with binding effect, but the fact that the FTA Parties provided for a special procedure for binding subsequent interpretive agreements does not preclude recourse to authoritative though not necessarily conclusive in character subsequent agreements or subsequent practice under VCLT Article 31(3) established through other means -- again including through non-disputing Party submissions pursuant to Article 10.19.2.

Third, the treaty Parties' agreement regarding the interpretation of the FTA should not be disregarded simply because it is the first time the FTA Parties' have addressed Articles 10.15.1.(a) and (b). A single statement or act by the FTA Parties can, depending on the circumstances, establish a subsequent agreement or practice between them. The ILC has addressed this point as well, observing that – and I paraphrase here -- while the formula "concordant, common and consistent" may be useful for determining the weight of subsequent practice in a particular case, the formula is not sufficiently well established to articulate a minimum threshold for the applicability of article 31, paragraph 3 (b), and carries the risk of being misconceived as overly prescriptive. Ultimately, the ILC finds that "The value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms. This implies that a one-time practice of the parties that establishes their agreement regarding the interpretation needs to be taken into account under article 31, paragraph 3 (b)." That is from page 73, paragraph 11 of the commentary to draft conclusion 9 on subsequent agreements and subsequent practice.

Finally, the United States offers a brief response to claimants' suggestion that the established agreement of the FTA Parties should be disregarded as retroactive or unfair. There is no element of retroactivity here. The United States is simply providing its views in the course of a dispute, as envisioned by Article 10.19.2. The fact that the FTA Parties have a concordant position on the proper interpretation of Article 10.15.1(a) and (b) does not change the text or meaning of those provisions, let alone do so retroactively. It is not an amendment – rather, it is evidence of the provisions' meaning. The interpretation set out in our non-disputing Party submission is fully consistent with the ordinary meaning of the text. Moreover, as I will explain, the U.S. position on this issue generally has been known for at least seventeen years since our 2003 submission in *GAMI Investments v. Mexico*, so there is no element of surprise at issue.

To sum up on this first issue, the concordant interpretations presented by the two FTA Parties in in this proceeding form either a subsequent agreement under 31(3)(a) or subsequent

practice under 31(3)(b), and the outcome under Article 31(3) of the VCLT is the same: The Tribunal must take the FTA Parties' common understanding of the provisions of their treaty, as evidenced by their submissions in this arbitration, into account.

Turning to the second issue, I would like to briefly address comments made on Wednesday that the United States historically took positions regarding NAFTA Article 1116 that are inconsistent with positions advanced in its non-disputing Party submission in this case. Specifically, reference was made to our non-disputing Party submissions in two early NAFTA cases, *Pope & Talbot* and *S.D. Myers* -- in particular, in paragraph 7 of the *SD Myers* non-disputing Party submission and paragraph 4 of the *Pope & Talbot* non-disputing Party submission, both paragraphs of which are identical.

Any suggestion that these submissions are inconsistent with the United States' position on FTA Article 10.1.5.1(a) is incorrect and based on a misreading of those submissions. The issue in those cases was whether a claimant was entitled to recover losses that were incurred in capacities other than as an investor—both cases involved cross-border trade. The distinction between article 1116 and 1117 was made in general terms. Two years after our submissions in those cases, when a case arose in which an investor was seeking to claim for the losses of its subsidiary, the United States further clarified and expounded on this interpretation in its 2003 submission in *GAMI Investments v Mexico*, and has maintained that position since then. I would point the Tribunal in particular to our second submission in 2017 in *Bilcon v. Canada*. We would be happy to provide both these submissions if helpful, and they are published on the State Department website.

On this issue I would just underscore again that how an investment or a claim for loss or damage is characterized is not determinative of whether the injury is direct or indirect – rather, as the International Court of Justice found in *Diallo* and *Barcelona Traction*, what is determinative is whether the right that has been infringed belongs to a corporation as a separate legal entity or to the shareholder of that entity. The United States has consistently maintained, including in its earliest NAFTA non-disputing Party submissions, as well as the one in this case, that nothing in the text of the relevant provisions derogates from the customary international law principles articulated in Barcelona Traction apart from the very narrow and limited manner as described in our submission.

Turning to the third and last issue, the *Kappes v. Guatemala* Decision on Respondent's Preliminary Objection, which was raised by the President on Wednesday. Here, the United States wishes only to say that while we frequently file non-disputing Party submissions, we do not do so in every case or on every issue that may be raised in every case. There are many reasons we may not file in a case, including in some instances lack of timely access to pleadings or resource constraints. Therefore no inference should be drawn from the fact that we do not file a non-disputing Party submission in a particular case or on a particular matter. This includes the decision of the *Kappes* majority on the analogous provisions of the CAFTA-DR, a decision we believe was wrongly decided.

This concludes my remarks, Mr. President, Members of the Tribunal. Thank you for your time and attention to our submission.

* * * *

On March 25, 2021, the United States made a further written submission to the tribunal in *Carlyle v. Morocco*, responding to questions the Tribunal invited the disputing

parties and the United States to answer. The body of the March 25, 2021 submission is excerpted below (with caption, signature, and some footnotes omitted).

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* * * *

On December 4, 2020, the United States submitted views to the Tribunal in the above-captioned arbitration pursuant to Article 10.19.2 of the United States-Morocco Free Trade Agreement ("U.S.-Morocco FTA" or "Treaty"). On March 4, 2021, the Tribunal invited the disputing parties and the United States to answer three sets of questions relevant to Articles 10.15.1(a) and 10.15.1(b) of the Treaty:

> *If loss or damage suffered by shareholders may be claimed under Article 10.15(1)(a), where the State expropriates the shareholders' ownership interests by expropriating the enterprise as a whole, is it correct that such loss or damage could also be claimed under Article 10.15(1)(b) by way of a claim on behalf of the enterprise for loss or damage incurred by that enterprise?*
>
> *If the above is correct, is it also correct that in certain cases a claim can be brought either under Article 10.15(1)(a) or Article 10.15(1)(b) (or indeed both)? If yes, is this anomalous and/or does this impact on the asserted policy rationale that losses incurred by controlled enterprises can only be claimed under Article 10.15(1)(b)?*
>
> *Is the possibility to claim under Article 10.15(1)(a) for the loss or damage suffered by the shareholder due to an expropriation of the enterprise as a whole, applicable when the protected investor owns the enterprise through one or more owned and/or controlled subsidiaries incorporated in third countries?*

2. Views of the United States are hereby submitted pursuant to Article 10.19.2 of the Treaty. The United States does not take a position on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

Question 1

3. No. In circumstances in which a shareholder may claim for loss or damage under U.S.-Morocco FTA Article 10.15.1(a) because the State expropriated an enterprise *as a whole*, it is not correct that such loss or damage (*i.e.*, the same, direct loss or damage) could also be claimed under Article 10.15.1(b).

4. As the United States has previously explained, an example of a direct loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders' ownership interests – whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole. A State expropriates an enterprise "as a whole," for example, when the State permanently takes over management and control of the business, completely destroying the beneficial and productive value of the shareholder's ownership of their

company, and leaving the shareholder with shares that have been rendered useless.[2] This is conceptually distinct from, for example, an expropriation of all of the assets of the enterprise. In the former situation, only the shareholder suffers the direct loss or damage – the shareholder's ownership interest in the enterprise – and so only the shareholder may bring a claim (pursuant to Article 10.15.1(a)). Conversely, a State's expropriation of a corporation's property that does not result in the expropriation of the enterprise does not implicate a shareholder's direct rights, even if it reduces the value of the shares to zero.[3]

5. As the United States has long maintained with respect to analogous provisions of the NAFTA, Article 10.15.1(b) allows a shareholding investor to bring a claim on behalf of an enterprise of the respondent State that it owns or controls directly or indirectly, if "the host State were to injure that enterprise in a manner that *does not directly injure* the investor/shareholders" (i.e., for indirect damage and loss).[4] In the scenario described in the question, where the enterprise is expropriated as a whole, the shareholders' ownership interest in their shares has been taken, they are injured directly and their loss is direct. Thus, such shareholding investors cannot also bring a claim for *any* loss on behalf of the wholly expropriated enterprise under Article 10.15.1(b).

6. This result is clear, moreover, when looking at other provisions of Chapter 10 of the U.S.-Morocco FTA. Article 10.17.2(b) provides that no claim may be submitted to arbitration under Article 10.15.1(b) unless it is accompanied by the claimant's and the enterprise's written waivers of any right to initiate or continue certain parallel legal actions; which waiver would be impossible as a practical matter to secure where the enterprise was expropriated as a whole. Additionally, Article 10.25 provides that where a claim is made under Article 10.15.1(b), any damages must be paid to the very enterprise which, in the scenario posited, the respondent State has expropriated as a whole.

Question 2

7. The view of the United States is that, respectfully, the premise of the first question is incorrect. A claim for direct loss by an investor shareholder as a result of the expropriation of an enterprise as a whole may not be brought alternatively under 10.15.1(b), or under both 10.15.1(a) and 10.15.1(b).

8. In some circumstances, it may be possible to bring a Chapter 10 claim under either Article 10.15.1(a), or 10.15.1(b), or both.[5] This outcome is not anomalous, however, because the losses claimed would be of a different nature. For example, if a Treaty Party violated Article

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[2] Supplemental Brief for the United States as Amicus Curiae at 1-2, *Helmerich & Payne International Drilling Co. and Helmerich & Payne de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, No. 13-7169, 2018 WL 2981075 (D.C. Ct. App. June 13, 2018).

[3] *Id.* at 10; *see Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, ¶¶ 48, 52 (Second Phase, Judgment of Feb. 5) (rejecting notion of state responsibility for derivative shareholder claims concerning state action that allegedly "emptied [shares] of all real economic content").

[4] *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Submission of the United States of America ¶ 11 (June 30, 2003) (emphasis added); *William Ralph Clayton et al. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶ 10 (Dec. 29, 2017) (emphasis added); *see also International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 4-9 (May 21, 2004).

[5] Indeed, Article 10.24 (Consolidation), allows for two or more claims brought separately under Article 10.15.1, subparagraph (a) or (b), with a common question of law or fact and arising out of the same circumstances, to be consolidated in accordance with the details of that Article.

10.7.1's requirement that it permit "all transfers relating to a covered investment to be made freely and without delay," the investor might be able to claim under Article 10.15.1(a) direct losses stemming from interference with its right to be paid corporate dividends. If the investor owns or controls the enterprise, it might also be able to claim under Article 10.15.1(b) indirect losses relating to its enterprise's inability to make payments necessary for the day-to-day conduct of the enterprise's operations. A minority or non-controlling shareholder under such a scenario, however, could submit only a claim for direct losses – the loss of dividends – under Article 10.15.1(a).

Question 3

9. The U.S.-Morocco FTA does not expressly address the situation where an investor "owns the enterprise through one or more owned and/or controlled subsidiaries incorporated in third countries." As explained above, direct losses suffered in circumstances where the enterprise of
the respondent State is expropriated as a whole are suffered by the shareholders of that enterprise (whether such shareholders are natural or juridical persons). In unusual circumstances, whether a particular claimant has suffered such a loss may require a fact-based and case-specific inquiry.

* * * *

f. U.S.-Peru TPA

Amorrortu

Article 10.20.2 of the United States-Peru Trade Promotion Agreement ("U.S.-Peru TPA" or "Agreement") allows submissions by non-disputing Parties on questions of interpretation of the Agreement. On July 13, 2021, the United States made the following submission to the tribunal in *Amorrortu v. Peru*, PCA Case No. 2020-11. The submission is excerpted below and available at https://www.state.gov/wp-content/uploads/2022/02/2021.07.13-Amorrortu-v.-Republic-of-Peru-US-NDP-submission.pdf.

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* * * *

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 a manner that allows for efficient resolution, including with respect to objections that a claim must fail "as a matter of law."

* * * *

10. In sum, paragraph 4 [of Article 10.20] was intended to supplement, not limit, the tribunal's authority under the available arbitration rules to decide preliminary objections, such as competence objections, separately from the merits. Thus, if a respondent makes a preliminary objection under paragraph 4, the tribunal also retains the authority under the applicable arbitration rules to hear any preliminary objections to competence. Indeed, reasons of economy and efficiency will often weigh in favor of competence objections being decided preliminarily and at the same time as objections made under paragraph 4. This is consistent with the Agreement's text, context, and object and purpose.

* * * *

Latam Hydro

On November 19, 2021, the United States made the following submission to the tribunal in *Latam Hydro LLC, CH Mamacocha S.R.L. v. Peru*, ICSID Case No. ARB/19/28. The submission is excerpted below and available at https://www.state.gov/wp-content/uploads/2022/02/Latam-Hydro-v.-Peru_US-10.20.2-NDP-Submission.pdf.

* * * *

Article 10.22.1 (Burden of Proof)

2. Article 10.22.1 provides in relevant part that when a claim is submitted under Article 10.16.1(a)(i)(A), "the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

3. 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.[2]

4. In the context of an objection to jurisdiction, the burden is on the claimant to prove the necessary and relevant facts to establish that a tribunal has jurisdiction to hear its claim. Further, it is well-established that where "jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage."[3]3 As the tribunal in *Bridgestone v. Panama* stated when

[2] BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS 334 (2006) ("[T]he general principle [is] that the burden of proof falls upon the claimant[.]"); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award, ¶ 177 (Dec. 16, 2002) (*"Feldman"*) ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence." (quoting Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 14, WT/DS33/AB/R (May 23, 1997)).

[3] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 61 (Apr. 15, 2009); *Vito G. Gallo v. Canada*, NAFTA/UNCITRAL PCA Case No. 55798, Award, ¶ 277 (Sept. 15, 2011) (citation omitted) ("Both parties submit, and the Tribunal concurs, that the maxim 'who asserts must prove,' or *actori incumbit probatio*,

assessing Panama's jurisdictional objections regarding a claimant's purported investments under the U.S.-Panama Trade Promotion Agreement, "[b]ecause the Tribunal is making a final finding on this issue, the burden of proof lies fairly and squarely on [the claimant] to demonstrate that it owns or controls a qualifying investment."

Article 10.18.2(b) (Waiver Requirement)

5. Article 10.18.2(b) requires that claimants waive "any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a beach referred to in Article 10.16."

6. The purpose of the waiver provision is to avoid the need for a respondent to litigate concurrent and overlapping proceedings in multiple forums with respect to the same measure, and to minimize not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)." "[t]he consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure."); *see also Waste Management Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/98/2, Award, § 27 (June 2, 2000) ("*Waste Management I*") (finding that, under Article 1121, which is similar to Article 10.18 of the U.S.-Peru TPA, "when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the *double benefit* in its claim for damages") (emphasis added).

7. As the tribunal stated in the Partial Award in *Renco v. Peru*, the waiver provision in the TPA requires an investor to "definitively and irrevocably" waive all rights to pursue claims in another forum once claims are submitted to arbitration with respect to a measure alleged to have breached the Agreement. The waiver provision is thus "intended to operate as a 'once and for all' renunciation of all rights to initiate claims in a domestic forum, whatever the outcome of the arbitration (whether the claim is dismissed on jurisdictional or admissibility grounds or on the merits)." That is, the waiver requirement seeks to give the respondent certainty, from the very start of arbitration under the treaty, that the claimant is not pursuing and will not pursue proceedings in another forum with respect to the measures challenged in the arbitration.

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applies also in the jurisdictional phase of this investment arbitration: a claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional phase[.]"); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, ¶ 2.8 (June 1, 2012) (finding "that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant's CAFTA claims on the basis of an assumed fact (i.e., alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that 'prima facie' or other like standard is limited to testing the merits of a claimant's case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal's jurisdiction directly depends, such as the Abuse of Process, Ratione Temporis and Denial of Benefits issues in this case."); *see also Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, ¶ 118 (Dec. 13, 2017) ("*Bridgestone Licensing Services*") (stating that "[w]here an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits, the Tribunal must definitively determine those issues on the evidence and give a final decision on jurisdiction."); *see also Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, ¶ 250 (Oct. 22, 2018) (finding that "[t]he Claimants bear the onus of establishing jurisdiction under the BIT and under the ICSID Convention. The onus includes proof of the facts on which jurisdiction depends.").

8. By the ordinary meaning of the terms, Article 10.18.2(b) is concerned with parallel proceedings before administrative tribunals or courts under the law of any Party (*i.e.*, any administrative tribunal or court constituted under the laws of either Peru or the United States), or under any *other* binding dispute settlement procedure, and is not implicated when multiple Article 10.16.1 claims are submitted in a single Chapter Ten proceeding.

9. Textual context further supports this interpretation. Article 10.25 (Consolidation) provides for a process to consolidate two or more claims brought under Article 10.16.1 separately where they have a question of law or fact in common and arise out of the same events or circumstances. Additionally, Article 10.18.4(a)(ii) provides that no claim may be submitted to arbitration "for a breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C)" if the claimant or enterprise has "*previously* submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any *other* binding dispute settlement procedure." (Emphasis added.) These provisions do not suggest that a claimant is barred from bringing multiple, related claims under Article 10.16.1 in one proceeding before a Chapter Ten tribunal.

10. The waiver provision thus does not preclude the concurrent submission of treaty and contract claims under Article 10.16.1 before one tribunal, provided that issues such as potential double-recovery and inconsistent findings are otherwise addressed.

Article 10.16.2 (Notice and Cooling Off Requirement)

11. A State's consent to arbitration is paramount. Indeed, given that consent is the "cornerstone" of jurisdiction in investor-State arbitration, it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent to arbitrate. The Parties to the U.S.-Peru TPA consented to arbitration pursuant to Article 10.17, which provides in relevant part that "[e]ach Party consents to the submission of a claim to arbitration under this Section *in accordance with this Agreement*." (Emphasis added.)

12. Pursuant to Article 10.17, the Parties to the Agreement did not provide unconditional consent to arbitration under any and all circumstances. Rather, the States Parties have only consented to arbitrate investor-State disputes under Section B where an investor submits a "claim to arbitration under this Section in accordance with this Agreement."

13. Article 10.16 authorizes a claimant to submit a claim to arbitration either on its own behalf or on behalf of an enterprise. Article 10.16.2 requires, however, that "[a]t least 90 days before submitting any claim to arbitration under this Section, a claimant *shall* deliver to the respondent a written notice of its intention to submit the claim to arbitration ('notice of intent')." …

14. A disputing investor that does not deliver a valid Notice of Intent ninety (90) days before it submits a Notice of Arbitration or Request for Arbitration fails to satisfy the procedural requirement under Article 10.16.2, and so fails to engage the respondent's consent to arbitrate. Under such circumstances, a tribunal will lack jurisdiction *ab initio*. A respondent's consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration.

15. The procedural requirements in Article 10.16.2 are explicit and mandatory, as reflected in the way the requirements are phrased (*i.e.*, "shall deliver"; "shall specify"). These requirements serve important functions, including to provide a Party time to identify and assess potential disputes, to coordinate among relevant national and subnational officials, and to consider, if they so choose, amicable settlement or other courses of action prior to arbitration. Such courses of action may include preservation of evidence or the preparation of a defense. …

16. For all of the foregoing reasons, a tribunal cannot simply overlook an investor's failure to comply with the requirements of Article 10.16.2. …

* * * *

Article 10.4 (Most Favored Nation Treatment)

38. Article 10.4 requires each Party to accord to investors of another Party and their investments "treatment no less favorable than that it accords, in like circumstances, to" investors, or investments of investors, "of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

39. To establish a breach of the obligation to provide most-favored-nation ("MFN") treatment under Article 10.4, a claimant has the burden of proving that it or its investments: (1) were accorded "treatment"; (2) were in "like circumstances" with identified investors or investments of a non-Party or another Party; and (3) received treatment "less favorable" than that accorded to those identified investors or investments.

40. Thus, if a claimant does not identify investors or investments of a non-Party or another Party as allegedly being "in like circumstances" with the claimant or its investment, no violation of Article 10.4 can be established. The MFN clause of the U.S.-Peru TPA expressly requires a claimant to demonstrate that investors or investments of another Party or a non-Party "in like circumstances" were afforded more favorable treatment. Ignoring the "in like circumstances" requirement would serve impermissibly to excise key words from the Agreement.

41. With respect to the third component of an MFN claim, a claimant must also establish that the alleged non-conforming measures that constituted "less favorable" treatment are not subject to the exceptions contained in Annex II of the U.S.-Peru TPA. In particular, both Parties reserve the "right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement."

42. If the claimant does not identify treatment that is actually being accorded with respect to an investor or investment of a non-Party or another Party in like circumstances, no violation of Article 10.4 can be established. In other words, the claimant must identify a measure adopted or maintained by a Party through which that Party accorded more favorable treatment, as opposed to speculation as to how a hypothetical measure might have applied to investors of a non-Party or another Party. Moreover, a Party does not accord treatment through the mere existence of provisions in its other international agreements such as umbrella clauses or clauses that impose autonomous fair and equitable treatment standards. Treatment accorded by a Party could include, however, measures adopted or maintained by a Party in connection with carrying out its obligations under such provisions.

* * * *

C. WORLD TRADE ORGANIZATION

The following discussion of developments in 2021 in select WTO dispute settlement proceedings involving the United States is drawn from Chapter II.D, "WTO and FTA Enforcement," of the Annual Report of the President of the United States on the Trade Agreements Program ("Annual Report"), released in March 2022 and available at

https://ustr.gov/sites/default/files/2022%20Trade%20Policy%20Agenda%20and%202021%20Annual%20Report%20(1).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. European Communities and certain Member States – Measures affecting trade in large civil aircraft (DS316)

The United States reached understandings with the EU and the UK in June 2021 to address the long-running large civil aircraft disputes (brought both by and against the United States and the EU), as indicated in the Annual Report at page 65:

> On June 15 and June 17, 2021, the United States reached understandings on cooperative frameworks with the EU and the UK, respectively, on the parallel aircraft disputes (DS316 and DS353). In accordance with the understandings, each side intends not to impose the WTO-authorized countermeasures for a period of five years starting from July 4, 2021. Each side also intends to provide any financing to its large civil aircraft producer (LCA producer) for the production or development of large civil aircraft on market terms. Additionally, each side intends to provide any funding for research and development (R&D) for large civil aircraft to its LCA producer through an open and transparent process while making the results of fully government funded R&D widely available. A working group is also established under each framework to analyze and overcome any disagreements in the sector, including on any existing support measures. The working group will also collaborate on jointly analyzing and addressing non-market practices of third parties that may harm their respective large civil aircraft industries.

b. European Union – Additional Duties on Certain Products from the United States (DS559)

The United States initiated consultations in this dispute in 2018 after the EU retaliated against the United States for imposing measures under Section 232 of the Trade Expansion Act of 1962, as amended, on steel and aluminum products that threaten to impair U.S. national security. The United States and EU announced arrangements resolving the matter in 2021, as discussed in the Annual Report at page 65:

> In November 2021, the United States and EU announced arrangements on steel and aluminum cooperation, and the EU announced that it would suspend its additional duties. The United States requested that the Panel suspend its work. The EU informed the Panel that it did not object to that request, and the Panel

granted it. The United States and the EU mutually agreed to resort to arbitration regarding the matter pending before the Panel in this dispute. Upon composition of the arbitrator, the arbitration is immediately and indefinitely suspended and the dispute before this Panel is terminated.

2. Disputes brought against the United States

a. Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (EU) (DS353)

See discussion in section C.1.a., *supra*, and page 79 of the annual report for the summary of the understandings reached in these disputes between the United States and the EU.

b. Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available (Korea) (DS539)

In 2021, the panel established for this dispute circulated its report, as discussed in the Annual Report at page 94:

> In February 2018, Korea requested WTO dispute settlement consultations regarding Commerce's use of facts available in certain antidumping and countervailing duty measures against Korea, and certain laws, regulations, and other measures maintained by the United States with respect to the use of facts available in antidumping and countervailing duty proceedings. …
>
> The Panel circulated its report on January 21, 2021. The Panel found that Commerce acted inconsistently with the Antidumping Agreement or SCM Agreement in either resorting to facts available or selecting the replacement facts in the eight instances challenged by Korea. With respect to the "as such" claim against an alleged unwritten measure, the panel found that Korea failed to establish that such an unwritten rule even existed. This obviated the panel's need to evaluate whether such a rule (if it did exist) would breach the Antidumping Agreement or SCM Agreement.

On March 19, 2021, the United States notified the DSB of its decision to appeal. In a communication to the DSB, on March 25, 2021, Korea reserved its right to file an appeal.

c. Certain Measures on Steel and Aluminum Products (EU) (DS548)

In 2021, this dispute that arose after the EU requested consultations terminated. As described in the Annual Report at 96:

> On June 1, 2018, the EU requested consultations concerning certain duties that the United States had imposed under Section 232 of the Trade Expansion Act of 1962, as amended, on imports of steel and aluminum products that threaten to impair U.S. national security. …
>
> At the EU's request, the WTO established a panel on November 21, 2018. …
>
> In November 2021, the United States and the EU announced arrangements on steel and aluminum, including U.S. TRQs for EU steel and aluminum products free of duties under Section 232. The EU requested that the Panel suspend its work. The United States informed the Panel that it did not object to that request, and the Panel granted it. The United States and the EU mutually agreed to resort to arbitration regarding the matter pending before the Panel in this dispute. Upon composition of the arbitrator, the arbitration was immediately and indefinitely suspended and the dispute before the Panel was terminated.

d. Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products (China) (DS562)

As discussed in the Annual Report at 97, the panel constituted for this dispute rejected all of China's claims in its September 2, 2021 report. China claimed that the U.S. safeguard measure on crystalline silicon photovoltaic ("solar") products was inconsistent with the Agreement on Safeguards and certain provisions of the GATT. On September 16, 2021, China notified the DSB of its decision to appeal.

e. Anti-Dumping and Countervailing Duties on Ripe Olives from Spain (EU) (DS577)

The panel established for this dispute circulated its report on November 19, 2021. As discussed in the Annual Report at 98:

> The Panel found that the United States acted inconsistently with the SCM Agreement and GATT 1994 in calculating the final subsidy rate of one respondent, and in relying upon a provision of the Tariff Act of 1930 to attribute benefits to downstream agricultural processors. The Panel also found that certain factual findings related to Commerce's specificity determination were inconsistent with the SCM Agreement. The Panel rejected the EU's other claims concerning specificity and rejected all of the EU's claims concerning the USITC's injury determination.
>
> On December 20, 2021, the DSB adopted the Panel report.

D. INVESTMENT TREATIES, TRADE AGREEMENTS, AND TRADE-RELATED ISSUES

1. Africa Growth and Opportunity Act

On November 2, 2021, the President of the United States sent a message to the U.S. Congress providing notice of the termination of the designation of Ethiopia, Guinea, and Mali as beneficiary sub-Saharan African countries under the African Growth and Opportunity Act ("AGOA"). The statement is available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/02/a-message-to-the-congress-on-the-termination-of-the-designation-of-the-federal-democratic-republic-of-ethiopia-ethiopia-the-republic-of-guinea-guinea-and-the-republic-of-mali-mali-as-beneficia/, and below.

_____

* * * *

In accordance with section 506A(a)(3)(B) of the Trade Act of 1974, as amended (19 U.S.C. 2466a (a)(3)(B)), I am providing advance notification of my intent to terminate the designation of the Federal Democratic Republic of Ethiopia (Ethiopia), the Republic of Guinea (Guinea), and the Republic of Mali (Mali) as beneficiary sub-Saharan African countries under the African Growth and Opportunity Act (AGOA).

I am taking this step as Ethiopia, Guinea, and Mali are not in compliance with the eligibility requirements of section 104 of the AGOA — in Ethiopia, for gross violations of internationally recognized human rights; in Guinea, for not having established, or not making continual progress toward establishing, the protection of the rule of law and of political pluralism; and in Mali, for not having established, or not making continual progress toward establishing, the protection of the rule of law, political pluralism, and internationally recognized worker rights, and for not addressing gross violations of internationally recognized human rights.

Despite intensive engagement between the United States and the Governments of Ethiopia, Guinea, and Mali, these governments have failed to address United States concerns about their non-compliance with the AGOA eligibility criteria.

Accordingly, I intend to terminate the designation of Ethiopia, Guinea, and Mali as beneficiary sub-Saharan African countries under the AGOA as of January 1, 2022. I will continue to assess whether the Governments of Ethiopia, Guinea, and Mali are making continual progress toward meeting the AGOA eligibility requirements.

* * * *

2. United States-Mexico-Canada Agreement ("USMCA")

As discussed on the website of the U.S. Department of Labor at https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca-cases, the USMCA includes a Rapid Response Labor Mechanism ("RRM") that permits the U.S. Government "to take expedited enforcement actions against individual factories that

appear to be denying workers the right of freedom of association and collective bargaining under Mexican law." The U.S. Government engaged in two such actions in 2021. The following summary of the Tridonex case comes from the Department of Labor USMCA Cases webpage:

> On August 10, 2021, the United States and Tridonex, a subsidiary of Cardone Industries, announced an agreement to address allegations that workers at its auto parts facility in Matamoros, State of Tamaulipas, are being denied the rights of free association and collective bargaining. The allegations were filed by the AFL-CIO and other unions in the United States, Public Citizen and the National Independent Union of Industry and Service Workers (SNITIS) in Mexico. This agreement is the second time the U.S. government successfully used the USMCA's Rapid Response Labor Mechanism (RRM) to hold our trade partners accountable for their labor obligations under the USMCA and to protect workers ability to freely exercise their freedom of association and collective bargaining rights. Notably, Tridonex commits to pay severance and backpay, express neutrality in any union representation election, and protect workers from intimidation and harassment in such election. Additionally, the Government of Mexico has agreed to facilitate workers' rights training for employees, monitor any union representation election at the facility, and investigate any claims by employees of workers' rights violations.

The second case, GM Silao, is summarized as follows:

> On July 8, 2021, the U.S. and Mexico announced a first-of-its-kind comprehensive plan to remediate a past denial of the rights of freedom of association and collective bargaining rights for the workers at the General Motors' facility in Silao, Mexico. A result of the first self-initiated petition under USMCA's Rapid Response Mechanism, the plan lays out steps to ensure that the more than 6,000 workers at the facility will be able to participate in a vote on their collective bargaining agreement free of interference. This effort is the latest example of the productive collaboration with the Mexican Ministry of Labor (STPS). In August 2021, workers rejected the collective bargaining agreement in a free and fair vote.

3. U.S.-EU Trade and Technology Council ("TTC")

At the United States-European Union ("EU") Summit in June, President Biden, European Commission President von der Leyen, and European Council President Charles Michel announced the formation of the U.S.-EU Trade and Technology Council ("TTC"). The June 15, 2021 U.S.-EU summit statement is excerpted below and available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/15/u-s-eu-summit-statement/.

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* * * *

The United States and the European Union represent 780 million people who share democratic values and the largest economic relationship in the world. We have a chance and a responsibility to help people make a living and keep them safe and secure, fight climate change, and stand up for democracy and human rights. We laid the foundations of the world economy and the rules-based international order after World War II based on openness, fair competition, transparency, and accountability. Some of the rules need an update: to protect our health, our climate and planet, to ensure democracy delivers and technology improves our lives.

We, the leaders of the European Union and the United States, met today to renew our Transatlantic partnership, set a Joint Transatlantic Agenda for the post-pandemic era, and commit to regular dialogue to take stock of progress.

Together, we intend to: (i) end the COVID-19 pandemic, prepare for future global health challenges, and drive forward a sustainable global recovery; (ii) protect our planet and foster green growth; (iii) strengthen trade, investment, and technological cooperation; and (iv) build a more democratic, peaceful, and secure world. We are committed to uphold the rules-based international order with the United Nations at its core, reinvigorate and reform multilateral institutions where needed, and cooperate with all those who share these objectives.

* * * *

III. Strengthen trade, investment, and technological cooperation

We commit to grow the U.S.-EU trade and investment relationship as well as to uphold and reform the rules-based multilateral trading system. We intend to use trade to help fight climate change, protect the environment, promote workers' rights, expand resilient and sustainable supply chains, continue to cooperate in emerging technologies, and create decent jobs. We resolve to stand together to protect our businesses and workers from unfair trade practices, in particular those posed by non-market economies that are undermining the world trading system.

We resolve to drive digital transformation that spurs trade and investment, strengthens our technological and industrial leadership, boosts innovation, and protects and promotes critical and emerging technologies and infrastructure. We plan to cooperate on the development and deployment of new technologies based on our shared democratic values, including respect for human rights, and that encourages compatible standards and regulations.

To kick-start this positive agenda and to provide an effective platform for cooperation, we establish a high-level U.S.-EU Trade and Technology Council (TTC). The major goals of the TTC will be to grow the bilateral trade and investment relationship; to avoid new unnecessary technical barriers to trade; to coordinate, seek common ground, and strengthen global cooperation on technology, digital issues, and supply chains; to support collaborative research and exchanges; to cooperate on compatible and international standards development; to facilitate regulatory policy and enforcement cooperation and, where possible, convergence; to promote innovation and leadership by U.S. and European firms; and to strengthen other areas of cooperation. The cooperation and exchanges of the TTC will be without prejudice to the regulatory autonomy of the United States and the European Union and will respect the different

legal systems in both jurisdictions. Cooperation within the TTC will also feed into coordination in multilateral bodies and wider efforts with like-minded partners, with the aim of promoting a democratic model of digital governance.

The TTC will initially include working groups with agendas focused on technology standards cooperation (including on AI, Internet of Things, among other emerging technologies), climate and green tech, ICT security and competitiveness, data governance and technology platforms, the misuse of technology threatening security and human rights, export controls, investment screening, promoting SMEs access to, and use of, digital technologies, and global trade challenges. It will also include a working group on reviewing and strengthening our most critical supply chains. Notably, we commit to building a U.S.-EU partnership on the rebalancing of global supply chains in semiconductors with a view to enhancing U.S. and EU respective security of supply as well as capacity to design and produce the most powerful and resource efficient semiconductors.

In parallel with the TTC, we intend to establish a U.S.-EU Joint Technology Competition Policy Dialogue that would focus on approaches to competition policy and enforcement, and increased cooperation in the tech sector. To support collaborative research and innovation exchanges, we promote a staff exchange program between our research funding agencies, and we intend to explore the possibility of developing a new research initiative on biotechnology and genomics, with a view to setting common standards. A new implementing arrangement between the EU Joint Research Centre and the U.S. National Institute of Standards and Technologies aims to expand cooperation to new areas. We also resolve to deepen cooperation on cybersecurity information sharing and situational awareness, as well as cybersecurity certification of products and software.

We commit to work together to ensure safe, secure, and trusted cross-border data flows that protect consumers and enhance privacy protections, while enabling Transatlantic commerce. To this end, we plan to continue to work together to strengthen legal certainty in Transatlantic flows of personal data. We also commit to continue cooperation on consumer protection and access to electronic evidence in criminal matters.

We salute having reached an Understanding on a Cooperative Framework for Large Civil Aircraft, reflecting a new transatlantic relationship in this area. We are committed to make this framework work to promote a level playing field, overcome long-standing differences, avoid future litigation, and more effectively address the challenge posed by non-market economies. We will engage in discussions to allow the resolution of existing differences on measures regarding steel and aluminum before the end of the year. In this regard, we are determined to work together to resolve tensions arising from the U.S. application of tariffs on imports from the EU under U.S. Section 232, and will work towards allowing trade to recover from its 2020 lows and ending the WTO disputes. We commit to ensure the long-term viability of our steel and aluminum industries, and to address excess capacity. We are determined to foster a fair, sustainable, and modern international tax system and cooperate to reach a global consensus on the question of taxation of multinational companies through the G20/OECD Inclusive Framework and look forward to reaching an agreement at the July meeting of G20 Finance Ministers and Central Bank Governors.

We intend to work cooperatively on efforts to achieve meaningful World Trade Organization (WTO) reform and help promote outcomes that benefit our workers and companies. We commit to work together to advance the proper functioning of the WTO's negotiating function and dispute settlement system, which requires addressing long-standing

issues. Plurilateral mechanisms can provide a means for addressing new trade concerns when multilateral solutions are not possible. We plan to continue to cooperate on special and differential treatment, and on our joint transparency proposal. We intend to seek to update the WTO rulebook with more effective disciplines on industrial subsidies, unfair behavior of state-owned enterprises, and other trade and market distorting practices. We intend to work closely together, and with the wider support of the Membership of the WTO, to conclude a meaningful agreement on fisheries subsidies, and to a trade policy response to the COVID-19 pandemic that facilitates expansion of production and equitable access to vaccines, and to work towards a WTO Ministerial later this year that contributes to a more effective and modernized rules-based trading system.

We commit to strengthen our cooperation on space by building on the Galileo – GPS Agreement. This could include making progress on access to Galileo's Public Regulated Service signal, engaging on space-based Earth observation to support climate policies, for instance by monitoring CO2 levels and emergency services, as well as exchanging on our respective approaches on space traffic management.

* * * *

Further information about the TTC is available at the State Department's TTC page, https://www.state.gov/u-s-eu-trade-and-technology-council-ttc/ and the USTR TTC page at https://ustr.gov/useuttc. The TTC is led by three U.S. co-chairs: Secretary Blinken, USTR Katherine Tai, and Secretary of Commerce Gina Raimondo. The TTC will have ten working groups with the following areas of focus:

- tech standards,
- climate and green tech,
- secure supply chains,
- information and communications technology and services (ICTS) security and competitiveness,
- data governance and tech platform regulation,
- misuse of technology threatening security and human rights,
- export controls,
- investment screening,
- promoting SME access to and use of digital technologies, and
- global trade challenges

The TTC held its first ministerial meeting on September 29, 2021, in Pittsburg, Pennsylvania. A fact sheet on the common principles established at the first ministerial is available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/september/fact-sheet-us-eu-establish-common-principles-update-rules-21st-century-economy-inaugural-trade-and. The U.S.-EU TTC inaugural joint statement is available at https://ustr.gov/about-us/policy-offices/press-office/press-

releases/2021/september/us-eu-trade-and-technology-council-inaugural-joint-statement.

E. INTELLECTUAL PROPERTY AND SECTION 301 OF THE TRADE ACT

1. Special 301 Report and Notorious Markets 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 2021 Special 301 Report in April 2021. The Report is available at https://ustr.gov/issue-areas/intellectual-property/special-301/2021-special-301-review. The 2021 Report lists nine countries on the Priority Watch List: Argentina, Chile, China, India, Indonesia, Russia, Saudi Arabia, Ukraine, and Venezuela — are on the Priority Watch List. It lists the following on the Watch List: Algeria, Barbados, Bolivia, Brazil, Canada, Colombia, Dominican Republic, Ecuador, Egypt, Guatemala, Kuwait, Lebanon, Mexico, Pakistan, Paraguay, Peru, Romania, Thailand, Trinidad & Tobago, Turkey, Turkmenistan, Uzbekistan, and Vietnam. See *Digest 2007* at 605-8 and the *2021 Special 301 Report* at 4-8 and Annex 1 for additional background on the watch lists.

USTR released its "Review of Notorious Markets for Counterfeiting and Piracy," for 2021, which is available at https://ustr.gov/sites/default/files/IssueAreas/IP/2021%20Notorious%20Markets%20List.pdf. The 2021 Notorious Markets List identifies 42 online markets and 35 physical markets that are reported to engage in or facilitate substantial trademark counterfeiting or copyright piracy. This includes identifying for the first time AliExpress and the WeChat e-commerce ecosystem, two significant China-based online markets that reportedly facilitate substantial trademark counterfeiting. Also, China-based online markets Baidu Wangpan, DHGate, Pinduoduo, and Taobao were listed again, as well as nine physical markets located within China that are known for the manufacture, distribution, and sale of counterfeit goods. See February 17, 2022 USTR press release, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/february/ustr-releases-2021-review-notorious-markets-counterfeiting-and-piracy.

2. Investigation of Digital Services Taxes

As discussed in *Digest 2019* at 408, and *Digest 2020* at 461, USTR previously investigated digital services taxes ("DST") under consideration by several governments. On January 12, 2021, the U.S. Trade Representative ("USTR") published the determinations that Italy's and Turkey's DSTs are unreasonable or discriminatory and burden or restrict U.S. commerce and thus are actionable under Section 301. 86 Fed. Reg. 2477 (Jan. 12, 2021); *id*. at 2480. Also on January 12, 2021, USTR announced modification to the action taken in the investigation into France's DST, suspending until further notice the additional

duties on products of France scheduled to take effect January 6, 2021. 86 Fed. Reg. 2479 (Jan. 12, 2021). On January 21, 2021, USTR published the determinations that Austria's and Spain's DSTs are actionable under Section 301. 86 Fed. Reg. 6406 (Jan. 21, 2021); *id*. at 6407. Determinations were also made with regard to several other countries' DSTs.

On March 31, 2021, USTR announced that it was terminating the investigations with regard to Brazil, the Czech Republic, the European Union, and Indonesia because none of them had implemented DSTs. 86 Fed. Reg. 16,828 (Mar. 31, 2021).

On June 7, 2021, USTR provided notice of both its action in the form of additional duties of 25 percent on the products of the United Kingdom and its determination to suspend application of the additional duties for a period of up to 180 days. 86 Fed. Reg. 30,364 (June 7, 2021). Likewise, USTR determined to suspend application of additional duties on Austria after determining its DST was actionable. 86 Fed. Reg. 30,361 (June 7, 2021). Also on June 7, 2021, USTR announced both action in the form of additional duties of 25 percent on specified products of Italy and the suspension of application of the additional duties for a period of up to 180 days. 86 Fed. Reg. 30,350 (June 7, 2021). USTR took the same action with regard to India, 86 Fed. Reg. 30,356 (June 7, 2021), and Turkey, 86 Fed. Reg. 30,353 (June 7, 2021).

USTR determined to terminate the section 301 actions taken in the investigations of various DSTs after the United States and 134 other jurisdictions participating in the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting issued a statement on October 8, 2021, setting forth a two-pillar solution to address tax challenges arising from the digitalization of the world economy. See Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, available at https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm. USTR's determination also relied on related joint statements issued by the United States with Austria, France, Italy, Spain, the United Kingdom, Turkey, and India regarding a transitional approach to existing DSTs and other similar unilateral measures during the interim period before Pillar 1 of the two-pillar solution is in effect. See, *e.g.*, October 21, 2021 Joint Statement from the United States, Austria, France, Italy, Spain, and the United Kingdom, available at https://home.treasury.gov/news/press-releases/jy0419. The determination to terminate the section 301 actions were published in the Federal Register. See, *e.g.*, the notice with regard to India, 86 Fed. Reg. 68,526 (Dec. 2, 2021). See also notice terminating action for Turkey, 86 Fed. Reg. 68,295 (Dec. 1, 2021).

F. OTHER ISSUES

1. Actions related to U.S. investors and Chinese companies

See *Digest 2020* at 462-64 for discussion of U.S. actions to protect investors from risk associated with Chinese companies. There were several further developments in this area in early 2021, including the issuance of Executive Order ("E.O.") 13974 (Jan. 13, 2021), amending E.O. 13959; the issuance by Treasury of several general licenses and

additional FAQs by Treasury throughout January 2021; the release of an additional list of designated companies by DoD on January 14, 2021; and the release by the State Department on January 15, 2021 of a "fact sheet" listing many subsidiaries of designated companies. E.O. 13959 was superseded by E.O. 14032, 86 Fed. Reg. 30,145 (June 7, 2021), "On Addressing the Threat from Securities Investments that Finance Certain Companies of the People's Republic of China." See Chapter 16 for further discussion of E.O. 14032.

2. Global Minimum Tax

On November 3, 2021, a senior State Department official from the Bureau of Economic and Business Affairs, Matt Murray, held a teleconference on the G20 leaders' summit, international economic cooperation on supply chains and the global minimum tax. The transcript of the teleconference is available at https://www.state.gov/bureau-of-economic-and-business-affairs-senior-bureau-official-matt-murray-on-the-g20-leaders-summit-and-international-economic-cooperation-on-supply-chains-and-the-global-mini/ and excerpted below.

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It's a pleasure to be with you today to talk about the G20 summit in Rome, which, as you know, took place on October 30th and 31st. And as you also are aware, the G20 is a meeting of the world's largest economies, representing approximately 80 percent of world GDP and 75 percent of global trade, working together to make progress towards tackling some of our most pressing global challenges.

At the G20 summit, President Biden coordinated with fellow leaders in advancing shared interests, including on the climate crisis, global health and pandemic preparedness, and the global economic recovery, using the power of diplomacy to address key issues that matter to the American people.

It's important from the outset to stress that the G20 is just one more example – an important one, to be sure – of the U.S. commitment to high-level engagement with our allies and partners. Several of the extraordinary achievements at the summit… built on months of intensive face-to-face diplomacy that took place in the run-up to the G20 Leaders' Summit.

So at its core, the G20 summit is another key instance of ongoing American diplomatic leadership with our allies on issues that will have a positive impact on the lives of Americans and people around the globe. As President Biden said, we made dramatic progress at this historic summit, and I'd like to focus today on two of those achievements which the Bureau of Economic and Business Affairs here at State have been deeply engaged and which will help underpin a strong and sustainable economic recovery.

First, at the G20, leaders endorsed the establishment of a historic global minimum tax of 15 percent. This represents a once-in-a-generation accomplishment for economic diplomacy that will lead to increased prosperity in America and around the world, and as you've heard Secretary Blinken say, end the race to the bottom on corporate taxation. It's a win for families, which will benefit from the revenues this deal raises for investment in their communities; it's a win for American businesses, who will no longer have to compete on an international playing field tilted

against them; and it's a win for the international business community, which will enjoy a more stable and certain investment environment with fewer tax and trade disputes.

… In June, the President rallied G7 leaders to endorse a strong global minimum tax. In early October, more than 130 countries joined consensus on the heels of Secretary Blinken's hosting of the OECD ministerial in Paris. And now, leaders of countries representing more than 80 percent of the world's GDP have formally endorsed the deal.

A second important milestone on the margins of the G20 summit that will strengthen our economic recovery was fostering greater international cooperation on supply chain resiliency. This effort is intended to both tackle the immediate supply chain challenges that arose during the pandemic and build long-term supply chain resilience for the future.

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The State Department, including the Bureau of Economic and Business Affairs, as well as our economic officers in posts around the world, are proud to have played a significant role in these efforts as we continue to seek to utilize diplomacy to advance U.S. economic prosperity and recovery and to deliver positive outcomes for the American people through like-minded engagement with partners and allies.

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3. Telecommunications

On March 31, 2021, the State Department issued a press statement by Secretary Blinken regarding U.S. support for the candidacy of Doreen Bogdan-Martin to become the next Secretary General of the International Telecommunication Union ("ITU"). The press statement is excerpted below and available at https://www.state.gov/u-s-support-for-itu-secretary-general-candidacy-of-doreen-bogdan-martin/.

> Ms. Bogdan-Martin is a deeply experienced and widely admired expert on global communications issues. She has served at the ITU for 28 years, including in senior leadership positions since 2008. She is currently the Director of ITU's Telecommunication Development Bureau, where she is leading efforts to transform the global digital landscape to improve connectivity, close gaps in infrastructure, elevate youth voices, and make the digital future more inclusive and sustainable for all.
>
> If elected, Ms. Bogdan-Martin would be the first woman to lead the ITU, an organization critical for the future of information and communication technologies and to closing digital divides. With origins dating to the telegraph era, the ITU exists to foster the connectivity and interoperability of the world's telecommunications networks. It does important work in support of radio spectrum management, telecommunications standards, and critical development initiatives to close the digital divide. Responsible, forward-looking, and transparent leadership of the ITU is vital to the U.S. telecommunications industry, as well as U.S. defense, intelligence, and aeronautics agencies.

Doreen Bogdan-Martin is the right leader at the right time for the ITU, and I am proud to endorse her candidacy on behalf of the United States.

4. 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.

On January 8, 2021, the Department of State published updates to the list of "Participants" eligible for trade in rough diamonds under the Clean Diamond Trade Act of 2003, Public Law 108–19 (the "Act"), revising the previously published list of July 5, 2019, to reflect the addition of the United Kingdom as an independent Participant, among other changes. 86 Fed. Reg. 1560 (Jan. 8, 2021).

On November 17, 2021, the State Department issued a media note on the conclusion of the annual Kimberley Process Plenary, which was held in a hybrid virtual and in-person format in Moscow, from November 8–12. The media note, available at https://www.state.gov/conclusion-of-the-2021-kimberley-process-plenary/, is excerpted below.

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The United States regrets that, despite genuine willingness from many Kimberley Process participants and observers, the Kimberley Process Plenary did not reach consensus on an expanded conflict diamond definition that would better reflect … pressing concerns. 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 Kimberley Process that reflect these endorsements.

The United States remains gravely concerned about the situation in the Central African Republic (CAR) and the impact on its rough diamond exports. CAR remains the only country in the world where conflict diamonds as defined by the Kimberley Process are being produced, and the United States continues to work tirelessly to balance the need for legitimate CAR exports with the Kimberley Process mandate to prevent conflict diamonds from entering the commercial supply chain. The United States is pleased that over the past two years, despite COVID-19

related challenges, CAR's rough diamond exports from Kimberley Process-compliant zones have increased.

The United States is deeply concerned by reports of human rights abuses by elements of the Wagner Group, Russia's proxy force, as well as members of the CAR security services, including in connection to diamond production. We call on the CAR and Russian governments to investigate these allegations thoroughly and hold perpetrators accountable, where appropriate.

We commend the Government of Botswana for its willingness to host the to-be-created Kimberley Process Permanent Secretariat (KPPS). We reiterate the need for any KPPS to have a sustainable and equitable funding mechanism that can support streamlined and efficient operational procedures once created.

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b. Intergovernmental Forum on Mining

On June 7, 2021, Secretary Blinken signed a letter for the United States to join the Intergovernmental Forum on Mining, Minerals, Metals, and Sustainable Development ("IGF"). The State Department media note regarding the U.S. decision to join the IGF is excerpted below and available at https://www.state.gov/united-states-joins-intergovernmental-forum-on-mining/.

> The IGF is a voluntary partnership that includes more than 75 member nations from six continents. Its members share a commitment to ensure mining contributes to sustainable development and that negative impacts are limited, and financial benefits shared.
>
> By joining the IGF, the United States strengthens its dedication to mining that seeks poverty reduction, inclusive growth, social development, and environmental stewardship. The United States will continue to forge a path to improve resource governance and decision making by governments involved in mining, as it has done with the Energy Resource Governance Initiative (ERGI), which was launched in 2019. IGF and ERGI efforts will dovetail to foster the adoption of responsible mining practices with strong environmental and ecological standards internationally and work to strengthen mineral supply chains through engagement with governments, industry, and civil society.

c. *Business and Human Rights*

See Chapter 6.

5. Presidential Permits

Keystone XL pipeline

On his first day in office, President Biden revoked the Keystone XL permit. See Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle

the Climate Crisis, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/. For previous developments regarding the Keystone XL permit, see *Digest 2019* at 416, *Digest 2018* at 478-85, *Digest 2017* at 518-19, *Digest 2016* at 509-11, and *Digest 2015* at 502.

Cross References

UN 3C general statement on trade, **Ch. 6.A.4.a**
Business and human rights, **Ch. 6.H**
Universal Postal Union, **Ch. 7.A.4**
Servotronics, Inc. v. Rolls-Royce (international arbitration), **Ch. 15.C.2**
Sanctions relating to investments that finance Chinese military companies, **Ch. 16.A.2.d**
Sanctions relating to Nord Stream 2 pipeline, **Ch. 16.A.3.c**
Belarus sanctions, **Ch. 16.A.4**
E.O. 14032, "Securities Investments That Finance Certain Companies of the PRC," **Ch. 16.A.10.a**

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. UN General Assembly

On December 7, 2021, Tom Carnahan delivered the U.S. statement at the 76th session of the UN General Assembly and the 47th plenary meeting on oceans and the law of the sea. The U.S. statement is excerpted below and available at https://usun.usmission.gov/remarks-at-the-76th-session-of-the-un-general-assembly-and-the-47th-plenary-meeting-on-agenda-item-78-oceans-and-law-of-the-sea/. See Chapter 13 for portions of the statement regarding fisheries.

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The United States 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. All maritime claims must be in accordance with international law as reflected in the provisions of the Convention.

Faced with 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.

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 international order. States are entitled to develop and manage the natural resources subject to their sovereign rights without interference.

Our position is simple: the rights and interests of all nations – regardless of size, political power, and military capability – must be respected.

As Secretary of State Blinken stated at an August meeting of the UN Security Council, we have seen dangerous encounters between vessels at sea and provocative actions to advance

unlawful maritime claims in the South China Sea. The United States has made clear its concerns regarding actions that intimidate other states from lawfully accessing their maritime resources. The United States, along with other countries including South China Sea claimants, have protested such aggressive behavior and unlawful maritime claims in the South China Sea.

As Secretary Blinken noted, five years ago an arbitral tribunal constituted under the 1982 Law of the Sea Convention delivered a unanimous and legally binding decision to the parties before it firmly rejecting unlawful, expansive South China Sea maritime claims as being inconsistent with international law.

The United States has consistently called for all countries to conform their maritime claims to the international law of the sea as reflected in the 1982 Convention. This is in keeping with the peaceful resolution of disputes and the sovereign equality of member-states, which are core principles enshrined in the United Nations Charter. Efforts to resolve maritime disputes through threat or use of force flout these principles.

It is the business and, even more, the responsibility of every Member State to defend the rules that we have all agreed to follow and peacefully resolve maritime disputes. Conflict in the South China Sea or in any ocean would have serious global consequences for security and for commerce. Furthermore, when a state faces no consequences for ignoring these rules, it fuels greater impunity and instability everywhere.

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. We call on all states to ensure effective implementation of international law applicable to combating piracy, and to unite in the deterrence, prevention, and prosecution of transnational criminal organizations and those engaging in transnational crime at sea.

The United States values the platform that the General Assembly provides to elevate important ocean issues. The annual oceans and the 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.

So many of the issues we tackle together through the oceans and the law of the sea resolution are interconnected, and perhaps no issue is more cross-cutting than climate change. As President Biden has said, climate change is the existential threat of our time.

Greenhouse gas emissions are having devastating effects on our ocean, with a cascade of devastating effect on communities and livelihoods around the world. We must apply every lever available, including the wealth of ocean-based solutions at our disposal, to bend down the emissions curve and to improve our resilience. For example, we must dramatically reduce emissions from the international shipping sector. We must work to scale up offshore renewable energy. And we must protect and restore coastal ecosystems that store carbon and protect our coastlines from climate impacts.

The United States is proud of the outcomes we achieved together with our partners at COP26 in Glasgow. COP26 was successful in creating a "home" for ocean issues under the UNFCCC, establishing a yearly dialogue for the Parties to advance ocean-based climate solutions. In addition, the United States was pleased to co-launch the Declaration on Zero Emission Shipping by 2050 and to be signatory to the Clydebank Declaration to promote the establishment of green shipping corridors.

The United States was also pleased to announce at COP26 that we will be joining the High Level Panel for a Sustainable Ocean Economy. The Ocean Panel understands better than anyone what ocean-based solutions can bring to the table when it comes to keeping the goal of limiting warming to 1.5 degrees within reach, and we are looking forward to working with our partners on the Ocean Panel and beyond to protect our ocean, our climate, our people, and our planet. As a member of the Panel, the United States will be developing a Sustainable Ocean Plan to sustainably manage our ocean area under national jurisdiction.

One of the potential climate impacts that we should collectively work to confront is sea-level rise, which can pose substantial threats to coastal communities and island nations around the world. We will work together with others to address the climate crisis, including the threat of sea-level rise. This includes exploring ways to promote our common goal of appropriately protecting maritime zones from challenge and doing so in a manner that we can all support as consistent with international law.

The United States continues to support efforts by states to delineate and publish their baselines and the limits of their maritime zones in accordance with international law as reflected in the Convention. Such a practice provides useful context and clarifies the maritime claims of states, including in relation to future sea-level rise, 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.

Another important global issue the oceans and the law of the sea resolution addresses is ocean plastic pollution. More than 8 million tons of plastic pollution enter the ocean every year, an amount that is expected to increase unless immediate action is taken to reverse this global trend. Plastic pollution affects environmental and food security, maritime transportation, tourism, economic stability, resource management, and potentially human health. Plastic production, use, and disposal account for roughly 4 percent of greenhouse gas emissions, which are projected to continue to grow in the future absent action. We must make progress on this issue and increase our efforts as soon as possible.

The United States is committed to global action to combat ocean plastic pollution, including through support for launching negotiations on a global legal instrument that is innovative and accounts for differing national circumstances. We must also ensure that a global legal instrument to combat plastic pollution helps countries most in need with the financial resources to implement the agreement. We are fortunate to have strong interest from a diverse set of stakeholders because combatting plastic pollution will require collaborative efforts from all of us.

The United States also recognizes the efforts underway to make 2022 a "super year" for the ocean. We look most immediately to the next Our Ocean conference, which the United States is extremely grateful to be cohosting with President Whipps of Palau in Koror (kohr-or) on February 16 and 17 of 2022.

The Our Ocean conferences – six to date – have proven to be important catalysts for significant international action to protect the ocean and its resources, resulting in over $91 billion dollars worth of new commitments.

The 2022 conference, entitled Our Ocean, Our People, Our Prosperity, will build on the momentum of previous conferences to mobilize ambitious new announcements to protect our ocean, people, and planet. We call on the international community to ramp up its action with significant and compelling new commitments on the six thematic areas of the conference, which include climate change, sustainable fisheries, sustainable blue economies, marine protectedareas,

maritime security, and marine pollution. We look forward to a successful conference in Palau in 2022 and the 2023 conference in Panama.

The United States also looks forward to working with delegations on another critical ongoing process here at the UN – the negotiation of the new international legally binding instrument under the Law of the Sea Convention on the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction – the so-called BBNJ agreement.

The United States understands the critical importance of high seas marine biodiversity, and we believe the new BBNJ agreement will provide an unprecedented opportunity to coordinate the conservation and sustainable use of high seas biodiversity across management regimes, including to establish high seas marine protected areas. The BBNJ agreement will result in meaningful, science-based conservation and sustainable use of BBNJ while protecting high seas freedoms and promoting marine scientific research.

We thank and commend the BBNJ Intergovernmental Conference President Ms. Rena Lee of Singapore for her continued leadership in helping us keep momentum going during the intersessional period, and we appreciate the constructive cooperation of BBNJ delegations, especially in light of pandemic challenges. The United States is committed to playing a leadership role in these vital negotiations, and we look forward to the next negotiating session.

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b. Fifth anniversary of the arbitral ruling on the South China Sea

On July 11, 2021, the State Department issued a press statement from Secretary of State Antony J. Blinken regarding the fifth anniversary of the arbitral tribunal ruling on the South China Sea. The press statement, available at https://www.state.gov/fifth-anniversary-of-the-arbitral-tribunal-ruling-on-the-south-china-sea/, is excerpted below.

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Freedom of the seas is an enduring interest of all nations and is vital to global peace and prosperity. The international community has long benefited from the rules-based maritime order, where international law, as reflected in the UN Law of the Sea Convention, sets out the legal framework for all activities in the oceans and seas. This body of international law forms the basis for national, regional, and global action and cooperation in the maritime sector and is vital to ensuring the free flow of global commerce.

Nowhere is the rules-based maritime order under greater threat than in the South China Sea. The People's Republic of China (PRC) continues to coerce and intimidate Southeast Asian coastal states, threatening freedom of navigation in this critical global throughway.

Five years ago, an Arbitral Tribunal constituted under the 1982 Law of the Sea Convention delivered a unanimous and enduring decision firmly rejecting the PRC's expansive South China Sea maritime claims as having no basis in international law. The Tribunal stated that the PRC has no lawful claim to the area determined by the Arbitral Tribunal to be part of the Philippines' exclusive economic zone and continental shelf. The PRC and the Philippines,

pursuant to their treaty obligations under the Law of the Sea Convention, are legally bound to comply with this decision.

The United States reaffirms its **July 13, 2020 policy** regarding maritime claims in the South China Sea. We also reaffirm that an armed attack on Philippine armed forces, public vessels, or aircraft in the South China Sea would invoke U.S. mutual defense commitments under Article IV of the 1951 U.S.-Philippines Mutual Defense Treaty.

We call on the PRC to abide by its obligations under international law, cease its provocative behavior, and take steps to reassure the international community that it is committed to the rules-based maritime order that respects the rights of all countries, big and small.

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c. UN Security Council on maritime security

On August 9, 2021, Secretary Blinken delivered remarks at the United Nations Security Council meeting on maintenance of international peace and security regarding maritime security. His remarks are available at https://www.state.gov/secretary-antony-j-blinken-at-the-united-nations-security-council-meeting-on-maintenance-of-international-peace-and-security-maritime-security/ and excerpted below. Secretary Blinken's remarks were delivered at a meeting where the Security Council issued the first ever presidential statement on maritime security. U.N. Doc. No. S/PRST/2021/15 (Aug. 9, 2021).

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SECRETARY BLINKEN: Well, thank you very much, Foreign Minister Jaishankar. It's wonderful to be with you and please convey our thanks to Prime Minister Modi for bringing us together for this critically important discussion and for India's leadership on these issues, especially in championing a free and open Indo-Pacific.

When I last had the chance to address the Council back in May, it was to underscore the importance of defending, upholding, and revitalizing the rules-based international order grounded in the United Nations Charter. Few issues are more crucial to that endeavor than the future of our ocean. The ocean not only covers 70 percent of Earth and accounts for 97 percent of its water, but it is crucial to the livelihood of our people and the sustainability of our planet. Maritime safety and security are enduring interests of all nations and are vital natural (inaudible).

(Interruption.)

Thank you. Freedom of navigation and overflight and the unimpeded flow of lawful maritime commerce are also critical to the security and prosperity of nations and to global stability. The international community has long benefited from a rules-based maritime order where international law, as reflected in the 1982 United Nations Convention on the Law of the Sea, sets out the legal framework for all activities in the ocean and seas.

But despite having a clear body of international law that we've all committed to abide by and uphold, despite all the ways that freedom of the seas, open waterways, and the unimpeded

flow of lawful maritime commerce have delivered for nations and people around the world, and despite the indispensable role this maritime order has played in fostering economic activity, security cooperation, scientific innovation, environmental sustainability – despite all of that, the order is under serious threat.

That's why I'm grateful for India's leadership in bringing us together today and calling on all nations to recommit to defending and strengthening the maritime rules and principles that we forged together and committed to uphold.

Let me just speak, if I could, specifically to some of the critical areas where we see maritime rules and principles under threat.

In the South China Sea, we have seen dangerous encounters between vessels at sea and provocative actions to advance unlawful maritime claims. The United States has made clear its concerns regarding actions that intimidate and bully other states from lawfully accessing their maritime resources. And we and other countries, including South China Sea claimants, have protested such behavior and unlawful maritime claims in the South China Sea.

Five years ago, an arbitral tribunal constituted under the 1982 Law of the Sea Convention delivered a unanimous and legally binding decision to the parties before it firmly rejecting unlawful, expansive South China Sea maritime claims as being inconsistent with international law. The United States has consistently called for all countries to conform their maritime claims to the International Law of the Sea as reflected in the 1982 convention.

This is in keeping with the peaceful resolution of disputes and the sovereign equality of member-states, which are core principles enshrined in the United Nations Charter. Efforts to resolve maritime disputes through threat or use of force flout these principles.

Some may assert that resolving the dispute in the South China Sea is not the business of the United States or any other country that is not a claimant to the islands and waters. But it is the business and, even more, the responsibility of every member-state to defend the rules that we've all agreed to follow and peacefully resolve maritime disputes. Conflict in the South China Sea or in any ocean would have serious global consequences for security and for commerce. What's more, when a state faces no consequences for ignoring these rules, it fuels greater impunity and instability everywhere.

States are also provocatively and unlawfully advancing their interests in the Persian Gulf and the Black Sea. On July 29th, the *Mercer Street*, a commercial ship that was peacefully transiting international waters in the North Arabian Sea, was attacked using explosive unmanned aerial vehicles, resulting in the death of two people. Upon review of the available information, we are confident that Iran conducted this unjustified attack, which is part of a pattern of attacks and other provocative behavior. These actions threaten freedom of navigation through this crucial waterway, international shipping and commerce, and the lives of people on the vessels involved.

On behalf of the United States, I reiterate my condolences to the families of the victims and to the United Kingdom and Romania. It is on all of our nations to hold accountable those responsible. Failing to do so will only fuel their sense of impunity and embolden others inclined to disregard the maritime order.

In the Black Sea, the Kerch Strait, the Sea of Azov, we see continued aggressive actions against Ukraine with dangerous incursions on the sea and in the air and the harassment of vessels, which are disrupting commerce and energy access. We reaffirm our support for Ukraine's sovereignty and territorial integrity within its internationally recognized borders, extending to its territorial waters. Crimea is Ukraine.

When nations ignore or purport to redraw the borders of other nations, whether by land or by sea, they undermine the sovereign equality of member-states, a guiding principle of the United Nations.

Non-state actors also pose serious risk to maritime safety and security, from pirates and illicit maritime traffickers in the Gulf of Aden and the Indian Ocean, to pirates and armed robbers in the Gulf of Guinea, to drug traffickers in the Caribbean Sea and the Eastern Pacific. Yet our collective response to these actors shows how effective we can be when we work together to defend maritime order and hold those accountable who violate it.

We see that in the Africa-led Yaounde Architecture for Maritime Safety and Security, which was supported by Friends of the Gulf of Guinea, and in the Nigerian-led Deep Blue Project and Maritime Collaborative Forum. We see it in India's Maritime Fusion Center, which has enhanced cooperation among Indian Ocean partners, and in the widespread ratification by countries of the Caribbean Basin of the Treaty of San Jose.

We see it in the Contact Group on Piracy off the Coast of Somalia, which has demonstrated significant success in building an effective regional response, most notably in law enforcement. The United States led the creation of this group and we remain active in its work and in coordinating naval operations to prevent a resurgence of piracy in the area. We're grateful to fellow Security Council members for supporting annual resolutions to help coordinate and strengthen these efforts.

We must bring the same coordinated and comprehensive responses to other threats to maritime safety and security. This includes illegal, unreported, and unregulated fishing, which undermines the sustainability of fish stocks, circumvents agreed conservation and management measures, and violate the sovereign rights of coastal states, and often goes hand in hand with the use of forced labor and other illicit activities. And it also includes responding to environmental disasters, like the cooperation between Sri Lanka, the United States, and other countries to mitigate the impact of the *MV X-Press Pearl* catastrophe.

All of these activities require that we share information and coordinate our responses, that we help build the capacity of our maritime partners, that we engage with affected communities, industry, nongovernmental organizations, which are critically important allies in this effort.

Together, our nations have spent decades building this maritime order and the broader rules-based international system that it is a part of. We've done so out of a shared recognition that it benefits all our nations and all our people when governments accept certain constraints on their actions rather than living in a world where the strong do what they can and where those who are less powerful feel coerced and threatened.

That's never been more true than it is today, and that makes the collective effort to defend, to strengthen, and build upon this order more urgent than ever. Thanks very much.

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2. Freedom of Navigation, Overflight, and Maritime Claims

a. Freedom of Navigation

On March 16, 2021, the State Department issued a media note on the release of the annual freedom of navigation ("FON") report by the Department of Defense for fiscal

year 2020. The media note is excerpted below and available at https://www.state.gov/freedom-of-navigation-report-annual-release/.

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The Department of Defense (DoD) released its annual Freedom of Navigation (FON) Report for Fiscal Year 2020 on March 10, 2021. Each year, DoD releases an unclassified FON Report identifying the broad range of excessive maritime claims that are challenged by the U.S. government. This year, with historic coastal state efforts to undermine the international law of the sea, U.S. forces challenged 28 different excessive maritime claims made by 19 different claimants throughout the world. The FON Report is made public to transparently signal the U.S. rejection of these maritime claims.

DoD's operational challenges, also known as "FON operations," and "FONOPs," are designed to challenge coastal state maritime claims that unlawfully restrict navigation and overflight rights and freedoms and other internationally lawful uses of the sea related to these freedoms guaranteed in international law as reflected in the 1982 Law of the Sea Convention. FONOPs demonstrate the United States will fly, sail, and operate wherever international law allows.

The comprehensive, regular, and routine execution of these operations complements U.S. Department of State efforts to abide by and uphold international law. These efforts include U.S. foreign assistance to strengthen international maritime law and U.S. diplomatic engagements to call on coastal states to bring unlawful maritime claims into conformance with international law. The Department of State's efforts are reflected in the Legal Adviser's Annual Digest of United States Practice in International Law, which provides a historical record of the views and practice of the U.S. government in international law, including with respect to unlawful maritime claims. The mutually supporting lines of effort by DoD and the Department of State comprise the U.S. Freedom of Navigation Program which, since 1979, has advanced the longstanding U.S. national interest in freedom of the seas worldwide. The United States will uphold the rights, freedoms, and lawful uses of the sea for the benefit of all nations and will stand with like-minded partners doing the same.

For more information, the DoD FON Reports may be accessed here: **http://policy.defense.gov/OUSDPOffices/FON.aspx** . …

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b. Russia's intention to restrict navigation in the Black Sea

On April 19, 2021, the State Department issued a press statement regarding Russia's intention to restrict navigation in parts of the Black Sea. The statement is excerpted below and available at https://www.state.gov/russias-intention-to-restrict-navigation-in-parts-of-the-black-sea/.

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The United States expresses its deep concern over Russia's plans to block foreign naval ships and state vessels in parts of the Black Sea, including near occupied Crimea and the Kerch Strait. Russia has a history of taking aggressive actions against Ukrainian vessels and impeding access to Ukraine's ports in the Sea of Azov, impacting Ukraine's international commerce. This represents yet another unprovoked escalation in Moscow's ongoing campaign to undermine and destabilize Ukraine. This development is particularly troubling amid credible reports of Russian troop buildup in occupied Crimea and around Ukraine's borders, now at levels not seen since Russia's invasion in 2014, and other provocative actions by Russia-led forces at the Line of Contact.

The United States reaffirms its unwavering support for Ukraine's sovereignty and territorial integrity within its internationally recognized borders, extending to its territorial waters. The United States does not, and will never, recognize Russia's purported annexation of Crimea.

We commend Ukraine for its continued restraint in the face of Russian provocations, and call on Russia to cease its harassment of vessels in the region and reverse its build-up of forces along Ukraine's border and in occupied Crimea.

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c. India's excessive straight baselines

On September 27, 2021, the U.S. Embassy in New Delhi delivered a diplomatic note to Indian's Ministry of External Affairs communicating the U.S. objection to India's straight baselines. The diplomatic note is excerpted below.

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The Embassy of the United States of America presents its compliments to the Government of India and has the honor to refer the Notification of the Ministry of External Affairs of 11 May 2009 (Notification) concerning the baseline system of India. This Notification promulgated baselines from which the breadth of India's territorial sea and other maritime zones is measured.

The United States recalls that, as recognized in customary international law and as reflected in Part II of the 1982 United Nations Convention on the Law of the Sea (LOS Convention), unless specific geographic circumstances exist, the baseline is the low-water line along the coast as marked on a State's official large-scale charts. As reflected in Article 7 of the LOS Convention, straight baselines may only be employed in localities where the coastline is deeply indented and cut into, or where there is a fringe of islands along the coast in its immediate vicinity. Additionally, Article 7 provides that baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters. The United States further recalls that the LOS Convention provides baseline rules that cover *all*

geographic circumstances, with Article 5 providing for use of the normal baseline "*[e]xcept where otherwise provided in this Convention.*"

The Government of the United States observes that India's Notification sets forth straight baselines pertaining to India's mainland (west and east) coasts, Lakshadweep, and the Andaman and Nicobar Islands. With respect to India's mainland coasts, the United States notes that the coastline of India is generally smooth and not indented, with only a few exceptions. Furthermore, islands that lie off the mainland coast of India do not generally constitute "a fringe of islands along the coast in its immediate vicinity." Baseline points 36 and 42, for instance, are each individual islands that are connected to the mainland by straight baseline segments. Additionally, some of the straight baseline segments are exceptionally long and are drawn seaward of gentle coastal concavities that do not meet the requirement in Article 7(1) of the Convention that the coastline be "deeply indented and cut into." For instance, this is the case for segments 79-80 and 80-81, which have lengths of approximately 80 and 68 nautical miles, respectively. These and other baselines pertaining to India's mainland that are set forth in the Notification are inconsistent with international law.

With respect to Lakshadweep, the United States notes that India has established a single straight baseline system around the entirety of this geographically dispersed island group. Although reef closing lines could be used in some areas within Lakshadweep (per Article 6 of the Convention), the locations where India has used straight baselines do not meet the requirements in Article 7 of the Convention. In particular, the baselines drawn by India depart from the general direction of the coast and enclose sea areas that are not closely linked to the land domain such that they may be subject to the regime of internal waters. Indeed, there are no coastlines at all in most areas inside of India's straight baselines pertaining to Lakshadweep, as these baselines connect geographically distant islands and reefs using extraordinarily long segments that, in some instances, exceed 100 nautical miles in length. There is no legal basis for such baselines under international law.

With respect to the Andaman and Nicobar Islands, the United States observes that India has established straight baselines along the western side of this island group and that India indicated in November 2009 that additional baselines would be "notified separately." (The United States is not aware of any additional baselines promulgated by India with respect to the Andaman and Nicobar Islands.) In terms of the baselines that have been established, the main islands of North Andaman, Middle Andaman, and South Andaman are separated from one another by narrow channels and parts of their coastlines meet the requirements of Article 7 such that straight baselines could be employed. Most other coastlines, however, do not meet the geographic requirements in Article 7 of the Convention for the use of straight baselines. For instance, Little Andaman (point 102) and Car Nicobar Island (point 103), which India has connected with a straight baseline, are islands separated by about 85 nautical miles. As with Lakshadweep, there is no legal basis under international law for the use of such straight baselines in these geographic circumstances.

Accordingly, with regard to the Ministry's Notification and baselines set forth therein, the United States is obliged to reserve its rights and those of its nationals. These baselines, as asserted, impinge on the rights, freedoms, and lawful uses of the sea by all nations by expanding the seaward limit of maritime zones and enclosing maritime areas that cannot be regarded as India's internal waters under international law.

The United States invites the Government of India to review its practice on baselines and make appropriate modifications to its baselines to bring them into conformity with international law, as reflected in the LOS Convention.

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d. South China Sea

On January 14, 2021, Secretary of State Michael R. Pompeo issued a press statement on protecting and preserving a free and open South China Sea. His statement is available at https://2017-2021.state.gov/protecting-and-preserving-a-free-and-open-south-china-sea/index.html and excerpted below.

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The United States and all law-abiding nations share a deep interest in the preservation of a free and open South China Sea. All nations, regardless of military and economic power, should be free to enjoy the rights and freedoms guaranteed to them under international law, as reflected in the 1982 Law of the Sea Convention, without fear of coercion.

Today, the United States is taking additional actions to defend these rights and freedoms. Pursuant to Section 212(a)(3)(C) of the Immigration and Nationality Act, the Department of State is imposing visa restrictions on People's Republic of China (PRC) individuals, including executives of state-owned enterprises and officials of the Chinese Communist Party and People's Liberation Army (PLA) Navy, responsible for, or complicit in, either the large-scale reclamation, construction, or militarization of disputed outposts in the South China Sea, or the PRC's use of coercion against Southeast Asian claimants to inhibit their access to offshore resources in the South China Sea. Immediate family members may be subject to these visa restrictions as well.

In addition, the Department of Commerce has added China National Offshore Oil Corporation (CNOOC) Limited to the Entity List in light of its role in the PRC's campaign of coercion against other claimants of an estimated $2.5 trillion in South China Sea oil and gas resources. The Chinese Communist Party has used CNOOC and other state enterprises as weapons to attempt to enforce Beijing's unlawful "Nine Dashed Line." CNOOC used its mammoth survey rig HD-981 off the Paracel islands in 2014 in an attempt to intimidate Vietnam. CNOOC's then-chief executive touted that oil rig as "mobile national territory."

Beijing continues to send fishing fleets and energy survey vessels, along with military escorts, to operate in waters claimed by Southeast Asian nations and to harass claimant state oil and gas development in areas where it has failed to put forth a coherent, lawful maritime claim.

In a unanimous decision on July 12, 2016, an Arbitral Tribunal constituted under the 1982 Law of the Sea Convention – to which the PRC is a state party – rejected the PRC's South China Sea maritime claims as having no basis in international law. Last July, the United States aligned our position on the PRC's maritime claims in the South China Sea with key aspects of the Tribunal's decision and affirmed once again that we reject the PRC's unlawful maritime claims in the South China Sea. We welcome the unprecedented number of countries that have formally protested these claims at the United Nations.

The United States stands with Southeast Asian claimant states seeking to defend their sovereign rights and interests, consistent with international law. We will continue to act until we see Beijing cease its coercive behavior in the South China Sea.

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On February 17, 2021, the USS Russell conducted a freedom of navigation operation in the South China Sea, challenging unlawful restrictions on innocent passage imposed by China, Vietnam, and Taiwan in the Spratly Islands. The following is excerpted from the U.S. Navy release on the operation, available at https://www.c7f.navy.mil/Media/News/Display/Article/2505035/7th-fleet-destroyer-conducts-freedom-of-navigation-operation-in-south-china-sea/.

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[The USS Russell] asserted navigational rights and freedoms in the Spratly Islands, consistent with international law. This freedom of navigation operation ("FONOP") upheld the rights, freedoms and lawful uses of the sea recognized in international law by challenging unlawful restrictions on innocent passage imposed by China, Vietnam and Taiwan.

Unlawful and sweeping maritime claims in the South China Sea pose a serious threat to the freedom of the sea, including freedoms of navigation and overflight, free trade and unimpeded commerce, and freedom of economic opportunity for South China Sea littoral nations.

The United States challenges excessive maritime claims around the world regardless of the identity of the claimant. The international law of the sea as reflected in the 1982 Law of the Sea Convention provides for certain rights and freedoms and other lawful uses of the sea to all nations. The international community has an enduring role in preserving the freedom of the seas, which is critical to global security, stability, and prosperity.

The United States upholds freedom of navigation as a principle. As long as some countries continue to assert maritime claims that are inconsistent with international law as reflected in the 1982 Law of the Sea Convention and that purport to restrict unlawfully the rights and freedoms guaranteed to all States, the United States will continue to defend those rights and freedoms. No member of the international community should be intimidated or coerced into giving up their rights and freedoms.

China, Vietnam, Taiwan, Malaysia, Brunei and the Philippines each claim sovereignty over some or all of the Spratly Islands. China, Vietnam, and Taiwan require either permission or advance notification before a foreign military vessel engages in "innocent passage" through the territorial sea. Under international law as reflected in the Law of the Sea Convention, the ships of all States –including their warships –enjoy the right of innocent passage through the territorial sea. The unilateral imposition of any authorization or advance-notification requirement for innocent passage is not permitted by international law. By engaging in innocent passage without giving prior notification to or asking permission from any of the claimants, the United States challenged these unlawful restrictions imposed by China, Taiwan, and Vietnam. The United States demonstrated that innocent passage may not be subject to such restrictions.

U.S. forces operate in the South China Sea on a daily basis, as they have for more than a century. They routinely operate in close coordination with like-minded allies and partners who share our commitment to uphold a free and open international order that promotes security and prosperity. All of our operations are designed to be conducted professionally and in accordance with international law and demonstrate that the United States will fly, sail, and operate wherever international law allows –regardless of the location of excessive maritime claims and regardless of current events.

Summaries of U.S. freedom of navigation assertions are released publicly in the annual "DoD Freedom of Navigation Report." Past reports are available online at https://policy.defense.gov/OUSDP-Offices/FON/

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Additional freedom of navigation operations were conducted in the South China Sea on several other occasions in 2021, including: May 20, 2021 (relating to the Paracels, challenging innocent passage and straight baselines, see release, available at https://www.c7f.navy.mil/Media/News/Display/Article/2624571/7th-fleet-conducts-freedom-of-navigation-operation/); July 12, 2021 (also relating to the Paracels and challenging innocent passage and straight baselines, see release available at https://www.c7f.navy.mil/Media/News/Display/Article/2690119/7th-fleet-conducts-freedom-of-navigation-operation/); and September 8,2021 (relating to the Spratly Islands, challenge of low tide elevation, see release available at https://www.c7f.navy.mil/Media/News/Display/Article/2766757/7th-fleet-conducts-freedom-of-navigation-operation/). Excerpts follow from the news release regarding the May 20, 2021 operation.

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The United States also challenged China's 1996 declaration of straight baselines encompassing the Paracel Islands. Regardless of which claimant has sovereignty over the islands in the Paracel Islands, straight baselines cannot lawfully be drawn around the Paracel Islands in their entirety. International law as reflected in the Law of Sea Convention is both clear and comprehensive regarding the circumstances under which States can depart from "normal" baselines. Straight baselines cannot be lawfully drawn in the Paracels under the international law of the sea as reflected in Article 7 of the Law of Sea Convention. Furthermore, international law does not permit continental States, like China, to establish baselines around entire dispersed island groups. With these baselines, China has attempted to claim more internal waters, territorial sea, exclusive economic zone, and continental shelf than it is entitled to under international law. By conducting this operation, the United States demonstrated that these waters are beyond what China can lawfully claim as its territorial sea, and that China's claimed straight baselines around the Paracel Islands are inconsistent with international law.

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On February 19, 2021, the State Department spokesperson addressed China's newly-enacted coast guard law in the Department press briefing. The transcript of the briefing is available at https://www.state.gov/briefings/department-press-briefing-february-19-2021/. Comments on China follow.

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Now moving on to China, the United States joins the Philippines, Vietnam, Indonesia, Japan, and other countries in expressing concern with China's recently enacted Coast Guard law, which may escalate ongoing territorial and maritime disputes.

We are specifically concerned by language in the law that expressly ties the potential use of force, including armed force by the China Coast Guard, to the enforcement of China's claims in ongoing territorial and maritime disputes in the East and South China Seas.

Language in that law, including text allowing the coast guard to destroy other countries' economic structures and to use force in defending China's maritime claims in disputed areas, strongly implies this law could be used to intimidate the PRC's maritime neighbors.

We remind the PRC and all whose force operates – whose forces operate in the South China Sea that responsible maritime forces act with professionalism and restraint in the exercise of their authorities.

We are further concerned that China may invoke this new law to assert its unlawful maritime claims in the South China Sea, which were thoroughly repudiated by the 2016 Arbitral Trib[un]al ruling. In this regard, the United States reaffirms its statement of July 13th, 2020 regarding maritime claims in the South China Sea.

The United States reminds China of its obligations under the United Nations Charter to refrain from the threat or use of force, and to conform its maritime claims to the International Law of the Sea, as reflected in the 1982 Law of the Sea Convention. We stand firm in our respective alliance commitments to Japan and the Philippines.

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On July 11, 2021, Secretary of State Anthony Blinken issued a statement on the fifth anniversary of the arbitral ruling rejecting the PRC's expansive South China Sea maritime claims as having no basis in international law. His statement is available at https://www.state.gov/fifth-anniversary-of-the-arbitral-tribunal-ruling-on-the-south-china-sea/ and excerpted below.

* * * *

Freedom of the seas is an enduring interest of all nations and is vital to global peace and prosperity. The international community has long benefited from the rules-based maritime order, where international law, as reflected in the UN Law of the Sea Convention, sets out the legal framework for all activities in the oceans and seas. This body of international law forms the basis for national, regional, and global action and cooperation in the maritime sector and is vital to ensuring the free flow of global commerce.

Nowhere is the rules-based maritime order under greater threat than in the South China Sea. The People's Republic of China (PRC) continues to coerce and intimidate Southeast Asian coastal states, threatening freedom of navigation in this critical global throughway.

Five years ago, an Arbitral Tribunal constituted under the 1982 Law of the Sea Convention delivered a unanimous and enduring decision firmly rejecting the PRC's expansive South China Sea maritime claims as having no basis in international law. The Tribunal stated that the PRC has no lawful claim to the area determined by the Arbitral Tribunal to be part of the Philippines' exclusive economic zone and continental shelf. The PRC and the Philippines, pursuant to their treaty obligations under the Law of the Sea Convention, are legally bound to comply with this decision.

The United States reaffirms its July 13, 2020 policy regarding maritime claims in the South China Sea. We also reaffirm that an armed attack on Philippine armed forces, public vessels, or aircraft in the South China Sea would invoke U.S. mutual defense commitments under Article IV of the 1951 U.S.-Philippines Mutual Defense Treaty.

We call on the PRC to abide by its obligations under international law, cease its provocative behavior, and take steps to reassure the international community that it is committed to the rules-based maritime order that respects the rights of all countries, big and small.

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e. G7 Foreign Ministers' Statement on the MV Mercer Street Attack

On August 6, 2021, the foreign ministers of the G7 (Canada, France, Germany, Italy, Japan, the United Kingdom and the United States of America and the High Representative of the European Union) released a joint statement on an attack on a merchant vessel off the coast of Oman on July 29, 2021. The joint statement follows and is available as a State Department media note at https://www.state.gov/g7-foreign-ministers-statement-on-the-mv-mercer-street-attack/.

> We, the G7 Foreign Ministers of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States of America and the High Representative of the European Union stand united in our commitment to maritime security and the protection of commercial shipping. We condemn the unlawful attack committed on a merchant vessel off the coast of Oman on 29 July, which killed a British and a Romanian national. This was a deliberate and targeted attack, and a clear violation of international law. All available evidence clearly points to Iran. There is no justification for this attack.
>
> Vessels must be allowed to navigate freely in accordance with international law. We will continue to do our utmost to protect all shipping, upon which the global economy depends, so that it is able to operate freely and without being threatened by irresponsible and violent acts.
>
> Iran's behaviour, alongside its support to proxy forces and non-state armed actors, threatens international peace and security. We call on Iran to stop all activities inconsistent with relevant UN Security Council resolutions, and call on all parties to play a constructive role in fostering regional stability and peace.

3. Maritime Boundaries

As discussed in *Digest 2020* at 481-82, the Governments of Israel and Lebanon began discussions on their maritime boundary with the United States serving as a mediator and facilitator. On April 30, 2021, the State Department issued a media note reporting that the U.S. team mediating the maritime boundary negotiations was traveling to Lebanon to resume the talks. The media note is available at https://www.state.gov/u-s-mediation-team-travel-to-lebanon/.

4. Marine Scientific Research and Extended Continental Shelf

As discussed in *Digest 2020* at 482-84, Presidential Proclamation 10071, signed on September 9, 2020, revised U.S. marine scientific research ("MSR") policy, such that the United States "will exercise its right to regulate, authorize, and conduct marine scientific research, with a specific requirement to authorize, in advance, all instances of foreign marine scientific research, in the United States [exclusive economic zone, or EEZ] and on its continental shelf to the extent permitted under international law." In furtherance of this policy, the Department of State provided updated guidance to MSR applicants on the Department's website, which is available at https://www.state.gov/research-application-tracking-system/. The guidance states that the United States is in the process of establishing the outer limits of its continental shelf in areas beyond 200 nautical miles and that, until those outer limits are published, applicants should contact the Department for additional guidance. The guidance includes the following general description of areas where the U.S. continental shelf extends beyond 200 nautical miles from the coast.

> **Guidance to Applicants Seeking U.S. Consent**
> The advance consent of the United States is required for MSR conducted within the U.S. territorial sea, within the U.S. EEZ, and on the U.S. continental shelf. With respect to the U.S. territorial sea and U.S. EEZ, applicants may identify these maritime areas using U.S. Maritime Limits and Boundaries, an information system created by [the National Oceanic and Atmospheric Administration's] Office of Coast Survey. With respect to the U.S. continental shelf, its seaward extent may extend beyond 200 nautical miles from the territorial sea baseline, in accordance with Article 76 of the Law of the Sea Convention. The United States is in the process of establishing the outer limits of its continental shelf in areas beyond 200 nautical miles. Until those outer limits are published, applicants should direct questions to [the Department's Office of Ocean and Polar Affairs] at MarineScience@state.gov, particularly with respect to any MSR conducted on the U.S. continental shelf beyond 200 nautical miles from the territorial sea baselines in the following areas:

-- In the Arctic Ocean, on the U.S. side of the U.S.-Russia maritime boundary in the following areas: the Chukchi Shelf, Chukchi Borderland, Canada Basin, and Nautilus Basin;
-- In the Atlantic Ocean, within 350 nautical miles of the U.S. territorial sea baselines;
-- In the Bering Sea, on the U.S. side of the U.S.-Russia maritime boundary;
-- In the Gulf of Mexico, on the U.S. side of the U.S-Mexico and U.S.-Cuba maritime boundaries

5. Maritime Law Enforcement

***a. Maritime Drug Law Enforcement Act litigation:* Aybar-Ulloa**

As discussed in *Digest 2020* at 484-92, the United States filed a brief in the U.S Court of Appeals for the First Circuit in *United States v. Aybar-Ulloa*, No. 15-2377, related to the U.S. exercise of jurisdiction over persons on stateless vessels found to be engaged in drug trafficking. The First Circuit Court of Appeals issued its en banc decision on January 25, 2021, affirming the conviction of Aybar-Ulloa. *United States v. Aybar-Ulloa*, 987 F.3d 1 (1st Cir. 2021). Aybar was charged with drug trafficking aboard a vessel subject to the jurisdiction of the United States, in violation of the Maritime Drug Law Enforcement Act ("MDLEA"). In the district court, Aybar argued that the MDLEA exceeded Congress's powers under the Define and Punish Clause of the Constitution, Art. I, sec. 10, cl. 8. The district court denied that motion, and Aybar pleaded guilty. On appeal, a divided panel of the First Circuit rejected Aybar's as-applied challenge to the constitutionality of the MDLEA but vacated his sentence. The full court then granted rehearing en banc and ordered the parties to brief several issues touching on constitutional and international law. The en banc court's opinion, excerpted below, likewise affirmed Aybar's conviction, but remanded for resentencing. The opinion analyzes why Aybar's prosecution conforms with the limits under international law on the power of Congress under the Define and Punish Clause.

* * * *

United States law enforcement authorities apprehended Johvanny Aybar-Ulloa ("Aybar") on a stateless vessel in international waters carrying packages of cocaine in violation of the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §§ 70501–70508. In appealing his subsequent conviction, Aybar makes a two-step argument. First, he contends that Congress's authority to criminalize and punish conduct on the high seas under Article I, Section 8, Clause 10 of the United States Constitution ("the Define and Punish Clause") must be cabined by the limitations of international law on a nation's power to criminally prosecute conduct on the high seas. Second, he argues that the United States exceeded those limitations of international law by prosecuting him in this case.

In a divided opinion, a panel of this court trained its attention exclusively on the second part of Aybar's argument. See *United States v. Aybar-Ulloa*, 913 F.3d 47, 53-56 (1st Cir. 2019). Relying on prior circuit precedent, the panel majority rejected that necessary part of Aybar's argument for two reasons: First, we previously held in *United States v. Victoria*, 876 F.2d 1009 (1st Cir. 1989) (Breyer, J.), that international law does indeed "give[] the United States . . . authority to treat stateless vessels as if they were its own." *Id*. at 1010 (second alteration in original) (quoting *United States v. Smith*, 680 F.2d 255, 258 (1st Cir. 1982)). Second, our prior opinion in *United States v. Cardales*, 168 F.3d 548 (1st Cir. 1999), included certain statements construing international law as allowing a nation to define trafficking in controlled substances aboard vessels as a threat sufficient to justify an assertion of jurisdiction under the "protective principle." *Id*. at 553.

As both the panel majority and the panel dissent observed, our prior opinion in *Victoria* "did not fully spell out" its reasoning. *Aybar-Ulloa*, 913 F.3d at 54; see also *id*. at 61 (Torruella, J., dissenting in part). *Cardales*, in turn, can be read as applying only to the circumstance where a foreign flag nation consents to the application of United States law to persons found on that nation's flagged vessel. *Id*. at 55-56 (citing *Cardales*, 168 F.3d at 552-53). And the question of the United States' jurisdiction over persons on vessels on the high seas recurs in this circuit. For those reasons, we granted Aybar's petition to rehear this appeal en banc.

Following that rehearing, we now affirm Aybar's conviction. In doing so, we find that his prosecution in the United States for drug trafficking on a stateless vessel stopped and boarded by the United States in waters subject to the rights of navigation on the high seas violates no recognized principle of international law. To the contrary, international law accepts the criminal prosecution by the United States of persons like Aybar, who was seized by the United States while trafficking cocaine on a stateless vessel on the high seas, just as if they were trafficking on a United States-flagged ship. We therefore need not and do not reach the question of whether the application of MDLEA to Aybar would be constitutional were international law otherwise. We also need not and do not rely on the protective principle, leaving its potential application for another day. Finally, for the reasons agreed upon by the full panel, we vacate Aybar's sentence and remand for resentencing under the Sentencing Commission's clarified guidance reflected in Amendment 794. See *id*. at 56-57.

I.

A.

As Aybar urges, we take the facts as "[p]er the affidavit [filed by the government] in support of the complaint." On August 9, 2013, the HMS Lancaster, a foreign warship, launched a helicopter while on patrol in the Central Caribbean. Operators aboard the helicopter spotted a thirty-foot go-fast vessel dead in the water at 15-03N, 067-01W, an area approximately 160 nautical miles south of Puerto Rico constituting international waters. The vessel bore no indicia of nationality and was carrying numerous packages in plain view.

A Law Enforcement Detachment Team of the United States Coast Guard was embarked on the HMS Lancaster at the time of the incident. Members of this team launched a small boat to conduct a right-of-visit approach. Coast Guard personnel identified defendant Aybar and two others aboard the go-fast vessel. Aybar and another member of the vessel claimed to be citizens of the Dominican Republic, while the master of the vessel claimed Venezuelan citizenship. In response to inquiry from the Coast Guard personnel, the master of the vessel made no claim of nationality for the vessel. The Coast Guard personnel suspected contraband.

Concluding that the vessel was without nationality, the Coast Guard personnel then boarded and searched the vessel. Following the search, the Coast Guard proceeded to take all three men and the packages found on board back to the HMS Lancaster, where the packages' contents tested positive for cocaine. The three men were then transferred to a United States Coast Guard vessel and taken to Ponce, Puerto Rico, where they were held in custody.

B.

Shortly thereafter, a federal grand jury issued an indictment against Aybar …

MDLEA provides that "[w]hile on board a covered vessel, an individual may not knowingly or intentionally . . . manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance." 46 U.S.C. § 70503(a)(1). As relevant here, a "covered vessel" includes "a vessel subject to the jurisdiction of the United States," *id*. § 70503(e)(1), which is defined to include "a vessel without nationality," *id*. § 70502(c)(1)(A). "[A] vessel without nationality," in turn, includes "a vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel." 46 U.S.C. § 70502(d)(1)(B).

Aybar moved to dismiss the indictment for lack of jurisdiction, arguing that Congress's power under Article I "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10, did not reach his conduct. After the district court denied his motion, Aybar proceeded to plead guilty. Aybar's plea accepted the facts substantiating the charges against him under MDLEA. Those facts, in turn, make clear that the vessel on which he was found was "a vessel without nationality" as defined in section 70502(d)(1)(B) because, while on board the vessel, the master made no claim of nationality when requested to do so by a United States officer authorized to enforce the United States drug laws. Despite his guilty plea and concessions, Aybar adequately preserved his challenge to Congress's constitutional power to criminalize his conduct pursuant to its Article I powers. See *Class v. United States*, 138 S. Ct. 798, 804-05 (2018). On January 9, 2019, a divided panel rejected that challenge, affirming his conviction. For unrelated reasons, the panel also vacated the district court's sentence and remanded for further proceedings.

II.

Our analysis proceeds in five parts summarized as follows: First, the "go-fast" ship upon which Aybar travelled was rendered "stateless" when its master on board failed upon request to make a valid claim of nationality for it, flouting, among other things, the important requirement of international law that every vessel on the high seas sail under the flag of a nation state. Second, as a stateless vessel, the ship was susceptible to the exercise of jurisdiction by any nation intercepting the vessel on the high seas, just as if the vessel were one of that nation's own. Third, the exercise of jurisdiction over Aybar's ship just as if it were a United States vessel included jurisdiction over drug trafficking on the vessel just as if it were drug trafficking on a United States vessel, which is considered to be the territory of the United States. Fourth, the application of that territorial jurisdiction to prosecute Aybar in a United States court for illegally trafficking cocaine is compatible with, and welcomed by, any relevant specific rules and undertakings governing the assertion of domestic power on the high seas. Fifth, we offer several important caveats.

A.

Under international law governing the seas, every vessel must sail under the flag of one, and only one, state. United Nations Convention on the Law of the Sea ("UNCLOS") art. 92, Dec.

10, 1982, S. Treaty Doc. No. 103-39, 1833 U.N.T.S. 397. In turn, every state maintains an obligation to "fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag," *id*. art. 91(1), and to "issue to ships to which it has granted the right to fly its flag documents to that effect," *id*. art. 91(2). While the type of registration papers may differ from state to state depending on domestic laws, every state must keep a register of "the names of all private vessels sailing under its flag," and ensure "that every vessel may be identified from a distance." 1 L.F.L. Oppenheim, International Law §§ 290 (Jennings et al. eds., 9th ed. 2008). "Without a flag or papers, a vessel may also traditionally make an oral claim of nationality when a proper demand is made." *United States v. Matos-Luchi*, 627 F.3d 1, 5 (1st Cir. 2010).

This "flag-state" system -- by which all vessels are required to fly the flag of a state, and states are in turn required to approve the conditions for granting rights to fly their flag -- serves several purposes. First, by subjecting vessels to the exclusive jurisdiction of the flag state, the flag-state system guarantees freedom of navigation in international waters, as states generally may not interfere with the passage on the high seas of ships lawfully flying the flag of another state. See Richard A. Barnes, "Flag States," in *The Oxford Handbook on the Law of the Sea* 313 (Rothwell et al. eds. 2015); cf. UNCLOS arts. 87, 90. Second, the flag-state system provides clear guidance as to which state bears the primary obligation to regulate conduct occurring on vessels on the seas. See R.R. Churchill & A.V. Lowe, *The Law of the Sea* 205 (1988); cf. UNCLOS art. 94. Third, the flag-state system indicates which state may bear responsibility for the conduct of a ship on the seas. See Churchill & Lowe, *supra*, at 205. Thus, the flag-state system is "[o]ne of the most important means by which public order is maintained at sea." *Id*.

Aybar concedes that the ship upon which he was found plainly did not comply with this system. It flew no flag, its master claimed no nationality, and no other indicia of registration or nationality were present when authorized United States officials stopped and boarded the ship. Presumably for these reasons, Aybar does not dispute that his vessel may be treated as "stateless" under international law. See, *e.g.*, *Matos-Luchi*, 627 F.3d at 6 (stating that a vessel "may be deemed 'stateless' . . . if it fails to display or carry insignia of nationality and seeks to avoid national identification").

B.

International law plainly provides that a nation's warship (or law enforcement ship) may stop and board a stateless vessel on the high seas. See UNCLOS art. 110(1)(d); Restatement (Third) of the Foreign Relations Law of the United States § 522(2)(b) (1987) [hereinafter "Restatement (Third)"] ("[A] warship or clearly-marked law enforcement ship of any state may board [a nongovernmental ship] . . . if there is reason to suspect that the ship . . . is without nationality . . . ."); see also *Brownlie's Principles of Public International Law* 285, 292 (Crawford ed., 9th ed. 2019) [hereinafter "Brownlie's Principles"]; Malcolm Shaw, *International Law* 457 (8th ed. 2017) ("A ship that is stateless, and does not fly a flag, may be boarded and seized on the high seas."); Myres S. McDougal & William T. Burke, *The Maintenance of Public Order at Sea and the Nationality of Ships*, 54 Am. J. Int'l L. 25, 76-77 (1960) ("So great a premium is placed upon the certain identification of vessels for purposes of maintaining minimal order upon the high seas . . . that extraordinary deprivational measures are permitted with respect to stateless ships."). In short, "[b]ecause stateless vessels do not fall within the veil of another sovereign's territorial protection," the vessel is afforded no right of free navigation. *United States v. Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003) (quoting *United States v. Caicedo*, 47 F.3d 370, 373 (9th Cir. 1995)); see also *United States v. Rubies*, 612 F.2d 397, 402-03 (9th Cir. 1979) ("A

foreign flag[ged] vessel is thereby protected by her country of registration. . . . An unregistered, or 'stateless,' vessel, however, does not have these rights or protections.").

To say that international law grants to any state the authority to interdict and exercise physical control over a stateless vessel is to say that international law renders stateless vessels "susceptible to the jurisdiction of any State," Barnes, *supra*, at 314, including the United States. See Smith, 680 F.2d at 258 (recognizing that "[i]nternational law . . . allows any state to extend its authority over a stateless ship") (citing United Nations Convention on the High Seas, 13 U.S.T. 2313, T.I.A.S. No. 5200 (1958)); see also *United States v. Juda*, 46 F.3d 961, 967 (9th Cir. 1995); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1055 (3d Cir. 1993); *Victoria*, 876 F.2d at 1010 (recognizing that international law "gives the United States . . . authority to treat stateless vessels as if they were its own"); *United States v. Alvarez-Mena*, 765 F.2d 1259, 1265 (5th Cir. 1985) ("[I]nternational law does not preclude any nation from exercising jurisdiction over stateless vessels on the high seas."); *United States v. Pinto-Mejia*, 720 F.2d 248, 260-61 (2d Cir. 1983); *United States v. Marino-Garcia*, 679 F.2d 1373, 1383 (11th Cir. 1982) ("[I]nternational law permits any nation to subject stateless vessels on the high seas to its jurisdiction."); *United States v. Howard-Arias*, 679 F.2d 363, 371 (4th Cir. 1982); Malcolm D. Evans, "The Law of the Sea," in *International Law* 651, 656-60 (Malcolm D. Evans ed., 3d ed. 2010) ("[I]f a ship is stateless, or flies more than one flag so that its true State of registry is not clear, then any state can exercise jurisdiction over it.") (cited with approval in Restatement (Fourth) of the Foreign Relations Law of the United States § 408 n.3 (2018) [hereinafter "Restatement (Fourth)"]).

In sum, there is no doubt that the United States could exercise jurisdiction over the stateless vessel upon which Aybar was found.

C.

Offering no persuasive reason why the United States could not exercise jurisdiction over the stateless vessel upon which he was found, Aybar narrows his focus to his prosecution. While it may be clear that international law allows any state to exercise jurisdiction over a flagless vessel, even to the point of stopping, boarding and seizing it should they wish to do so, he asserts that the prosecution of those on board the vessel under the laws of the seizing country is a different matter altogether.

With respect to United States-flagged vessels, the law does not distinguish between jurisdiction over the vessel itself and jurisdiction over the people on the vessel and their conduct on board. It is well settled that the United States has jurisdiction over conduct occurring on United States-flagged vessels because: (1) "[t]he deck of a private American vessel . . . is considered . . . constructively as territory of the United States," *Ross v. McIntyre*, 140 U.S. 453, 464 (1891); and (2) a state's jurisdiction over conduct on its territory is one of "the most commonly recognized bases of jurisdiction," Restatement (Fourth) § 407 cmt. c; see also *id.* § 408 cmt. a ("A state may exercise prescriptive jurisdiction with respect to persons, property, and conduct within its territory."); Smith, 680 F.2d at 257 (similar). Cf. Restatement (Third) § 502 cmt. d (explaining that a flag state has jurisdiction over "the conduct of a ship" as well as "any activity aboard the ship").

Two centuries of case law strongly suggest that the same territorial principles apply to conduct aboard a stateless vessel. Shortly after our nation's founding, the United States Supreme Court issued a series of opinions addressing the scope of the United States' jurisdiction over conduct committed on board non-United States vessels. The Court rejected the assertion of jurisdiction in domestic courts over murders committed by and against foreigners on foreign

vessels. See *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 196–98 (1820); see also *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 151 (1820). Murders committed by and against foreigners on stateless vessels, though, could be prosecuted in the United States. See *Klintock*, 18 U.S. at 151–52; *United States v. Holmes*, 18 U.S. (5 Wheat.) 412, 417– 18; see also *Furlong*, 18 U.S. at 194–95 (stating that murder is "equally punishable" in the courts of the United States when committed on an American ship or on a stateless pirate ship, as opposed to on a foreign ship, which presented "a question of more difficulty").

While those cases dealt with vessels that were deemed stateless because of piratical conduct, the Court did not hold that piracy was the only means by which a vessel could be deemed stateless so as to justify United States prosecutorial jurisdiction. On that point, Holmes conveyed the opposite, signaling that conduct of persons on board a stateless vessel could be prosecuted whether the vessel was piratical or not:

> The said Circuit Court had jurisdiction of the offen[s]e charged in the indictment, if the vessel, on board of which it was committed, had, at the time of the commission thereof, no real national character but was possessed and held by pirates, or by persons not lawfully sailing under the flag, or entitled to the protection of any government whatsoever.

18 U.S. at 419.

These founding-era cases also did not hold that a foreign national may be prosecuted in the United States for his conduct on the high seas only if he personally renounces his nationality by engaging in piracy. True, the Court certainly approved the prosecution of "those who acknowledge the authority of no State." *Klintock*, 18 U.S. at 152. But the Court also repeatedly emphasized the statelessness of the ship, rather than the nationality of the persons on board, in upholding the United States' exercise of jurisdiction over those persons. For example, in *Klintock*, the Court held that "persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, . . . are proper objects for the penal code of all nations." *Id*. To the extent that there is any ambiguity as to whether the phrase "acknowledging obedience to no government whatever" was intended to modify the "persons" or the "vessel" at issue, the Court clarified in Holmes that the status of the vessel was determinative:

> In Klintock's case, it was laid down, that to exclude the jurisdiction of the Courts of the United States, in cases of murder or robbery committed on the high seas, the vessel in which the offender is, or to which he belongs, must be, at the time, . . . the property of a subject of a foreign State, and . . . subject, at that time, to [its] control. But if the offen[s]e be committed in a vessel, not at the time belonging to subjects of a foreign State, but in possession of persons acknowledging obedience to no government or flag, and acting in defiance of all law, it is [punishable in the courts of the United States]. It follows, therefore, that murder or robbery committed on the high seas, may be an offen[s]e cognizable by the Courts of the United States, although it was committed on board of a vessel not belonging to citizens of the United States, [] if she had no national character, but was possessed and held by pirates, or persons not lawfully sailing under the flag of any foreign nation.

18 U.S. at 416–17. Because the Court in *Holmes* held that the existence of jurisdiction depended on whether or not the vessel at issue was under the control of a foreign nation, "it made no difference, as to the point of jurisdiction, whether the [offenders] were citizens of the United States" or citizens of foreign nations. *Id.* at 419–20. As we have described, this approach comports with the overall system of flag-state jurisdiction. See *Furlong*, 18 U.S. at 198 (explaining that the distinction between foreign vessels and stateless vessels serves to avoid "offensive interference with the governments of other nations").

Our concurring colleague well develops the case for treating *Holmes* as binding authority dictating our holding in this case. This is certainly a defensible view. If murder, a crime over which there is no universal jurisdiction, can be prosecuted by the United States when committed by a foreigner upon a foreigner on a vessel that has no national character, why can the United States not also prosecute drug trafficking committed by a foreigner on such a vessel? Nevertheless, the sometimes challenging syntax in *Holmes*, *Furlong*, and *Klintock*, plus the possibility that international law itself now differs materially from international law as understood 200 years ago, counsel against resting our conclusion solely on those cases if we do not need to do so. And we do not.

No other circuit has held that conduct aboard a stateless vessel seized by the United States on the high seas may not be prosecuted as conduct committed on United States territory. See *United States v. Moreno-Morillo*, 334 F.3d 819, 828 (9th Cir. 2003) (noting that "a showing of statelessness effectively moots the nexus requirement because those aboard stateless vessels effectively have waived their right to object to the exercise of jurisdiction over them by United States courts"); see also *Marino-Garcia*, 679 F.2d at 1383 (concluding that stateless status "makes the vessel subject to action by all nations proscribing certain activities aboard stateless vessels and subjects those on board to prosecution for violating th[ose] proscriptions"); *Juda*, 46 F.3d at 967 (recognizing no distinction between the right to seize stateless vessels and the right to prosecute persons on board them); *Alvarez-Mena*, 765 F.2d at 1266-67 (same).

While there is no unanimity among scholars on this point, see Douglas Guilfoyle, "The High Seas," in *The Oxford Handbook on the Law of the Sea* 218 (Rothwell et al. eds. 2015), the longstanding unanimity among United States courts is especially significant, as "the state practice of the United States contributes to the development of customary international law when followed out of a sense of international legal right or obligation." Restatement (Fourth) § 402 cmt. b; see also *id.* n.2.

Treating conduct on stateless vessels in this manner furthers a basic aim of international law to achieve order on the high seas by disincentivizing the use of stateless vessels. *Marino-Garcia*, 679 F.2d at 1382-83. This approach also yields significant practical benefits, such as reducing complications when, for example, officials of the seizing nation are needed as witnesses in a subsequent prosecution of offenses committed on the vessel. Moreover, those who set out in stateless vessels cannot be said to possess the same reasonable expectation of sanctuary from foreign jurisdiction under international law as those on a flagged vessel would. See *Caicedo*, 47 F.3d at 372 (distinguishing properly flagged vessels, which have a "legitimate expectation" of being subject only to the laws of the flag state, from stateless vessels, which "subject themselves to the jurisdiction of all nations" such that a state's exercise of jurisdiction over them cannot, categorically, be said to be "arbitrary or fundamentally unfair"); see also *Moreno-Morillo*, 334 F.3d at 828; *Marino-Garcia*, 679 F.2d at 1382 (describing stateless vessels as "international pariahs" having "no internationally recognized right to navigate freely on the high seas" and

finding no categorical limits to the exercise of jurisdiction over stateless vessels under international law). Simply put, if a person intent on drug trafficking on the high seas wants to be prosecuted in his own country should he be caught, he should sail under that country's flag.

D.

Aybar contends that, notwithstanding the foregoing, his prosecution was prohibited by other, more specific rules and undertakings governing jurisdiction and the high seas. As we will explain, we find that the relevant and more specific rules and undertakings are entirely consistent with our conclusion that Aybar was properly subject to prosecution in the United States for his conduct on board the stateless vessel.

1.

Aybar first points to the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("UN Drug Trafficking Convention"), U.N.T.S. 27627 (1988), which was adopted to give effect to UNCLOS's call on states to "cooperate in the suppression of illicit traffic in narcotic drugs" on the high seas, UNCLOS art. 108. Specifically, he points out that the UN Drug Trafficking Convention does not explicitly address the possibility of states exercising jurisdiction over persons found engaging in drug trafficking on stateless vessels on the high seas. See UN Drug Trafficking Convention art. 17. But it does not rule out such prosecutions either. To the contrary, at least one United Nations body has suggested that states may exercise jurisdiction under the convention over persons found engaging in illegal activities on stateless vessels, in combination with domestic sources of authority. See Commission on Crime Prevention and Criminal Justice, Outcome of the Expert Group Meeting on Transnational Organized Crime at Sea, held in Vienna, Austria, on 5-6 April 2016, U.N. Doc. E/CN.15/2016/CRP.3, ¶ 18 (May 19, 2016) (recognizing debate over enforcement activity against perpetrators found on stateless vessels but observing that "if a State is party to the [UN Drug Trafficking Convention], it should exercise jurisdiction over vessels without nationality").

To implement the UN Drug Trafficking Convention, several European states adopted the 1995 Council of Europe Convention on Illicit Traffic by Sea. That convention provides further support for the proposition that international law welcomes prosecutions by the seizing nation of those found engaged in drug trafficking on stateless vessels: It not only allows but requires parties to prosecute persons found trafficking drugs on stateless vessels. See Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3, C.E.T.S. 156 (1995) (mandating that "each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offen[s]es committed on board a vessel which is without nationality, or which is assimilated to a vessel without nationality under international law").

Several other international law instruments similarly leave open the possibility of states taking law enforcement action against persons found on stateless vessels. Such instruments typically use language indicating that states may take action "in accordance with relevant domestic and international law" after searching a stateless vessel on the high seas. See *Brownlie's Principles*, *supra*, at 291 (explaining that this language "perpetuates the ambiguity regarding the exercise of prescriptive jurisdiction and enforcement over stateless vessels"). For example, the 2000 Migrant Smuggling Protocol indicates with respect to vessels without nationality that "[i]f evidence confirming the suspicion [of smuggling] is found," the boarding State "shall take appropriate measures *in accordance with relevant domestic and international law*." See Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the

United Nations Convention Against Transnational Organized Crime art. 8(7), U.N.T.S. 2241 (2000) (emphasis added).

Likewise, the United Nations Straddling Fish Stocks Agreement suggests that states may take enforcement action against stateless fishing vessels for illegal fishing "in accordance with international law," but does not specify what such action might entail. See Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Seas of 10 December 1982 Relating to the Conservation and Management of Straddling Stocks and Highly Migratory Fish Stocks art. 21(17), Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, 6th Sess., U.N. Doc. A/CONF.164/37 (Sept. 8, 1995); see also Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* 108 (2009) (observing that this language "accommodat[es] divergent views as to prescriptive and enforcement jurisdiction over stateless vessels at general international law"). Moreover, various regional fisheries organizations have encouraged states to take legal action where evidence is found of illegal fishing on stateless vessels. See Guilfoyle, *Shipping Interdiction and the Law of the Sea*, *supra*, at 129 (explaining that the Northeast Atlantic Fisheries Commission Scheme "appears to directly encourage the adoption of national laws permitting extraterritorial enforcement action against stateless vessels," even if, like the UN Drug Trafficking Convention, it does not itself provide for such enforcement measures); Rosemary Rayfuse, Non-Flag State Enforcement in High Seas Fisheries 330-31 (2004).

Moreover, certain bilateral instruments to which the United States is a party explicitly leave open the possibility of states taking enforcement action against persons found on board stateless vessels where the evidence so warrants. See, *e.g.*, Agreement between the Government of the United States of America and the Government of the Dominican Republic Concerning Maritime Counter-Drug Operations, U.S.-Dom. Rep., Mar. 23, 1995, T.I.A.S. No. 12620 (providing that counter-drug operations pursuant to the agreement may be carried out against vessels "without nationality," but also noting under the protocol to the agreement that law enforcement personnel are to act in accordance with international law when engaging in boardings and searches); Agreement between the United States of America and Cyprus Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Cyp., July 25, 2005, T.I.A.S. 06-112 (including stateless vessels among the vessels against which operations may be undertaken under the agreement); Agreement between the United States of America and Belize Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Blz., Oct. 29, 2005, T.I.A.S. 05-1019 (same); see also *United States v. Bravo*, 489 F.3d 1, 4 (1st Cir. 2007) (recounting that the claimed flag state could not confirm registry of the vessel and authorized the United States to proceed with law enforcement action under "international law").

2.

Aybar insists that UNCLOS nevertheless prohibits his prosecution. He relies on Article 110, which provides a right to visit ships suspected of being without nationality and to search those ships if suspicion of statelessness remains after checking the ship's documents. See also *Aybar-Ulloa*, 913 F.3d at 62-63 (Torruella, J., dissenting in part) (arguing that the unilateral extension of domestic jurisdiction over a stateless vessel on the high seas without a nexus violates UNCLOS). But in recognizing a right to visit certain ships, including a ship "without nationality," Article 110 does not prohibit the prosecution of those on board. It simply remains silent as to whether and when the visiting nation may prosecute persons found on the ship.

Aybar argues that we should draw a negative inference from that silence because other articles of UNCLOS do contain express grants of authority to penalize persons found on certain vessels. For example, Article 105 authorizes the arrest and punishment of persons found on pirate ships. Similarly, Articles 99 and 109 expressly grant the power to penalize persons for engaging in slavery and unauthorized broadcasting, respectively. We reject the negative inference Aybar would have us draw for two reasons.

First, and most simply, there are obvious differences between the examples given and that of a stateless vessel, undercutting any negative inference that could be drawn from the presence of express grants in some articles but not others. For starters, a ship engaged in piracy may retain its nationality. UNCLOS art. 104. So there was a reason for Article 105 to expressly confirm that any state can exercise universal jurisdiction to seize and prosecute individuals on such a ship -- otherwise, it might have been possible to argue that only the ship's flag state would be able to seize and prosecute those individuals. Under this reading, Article 105 grants no new authority. Similarly, because vessels that engage in unauthorized broadcasting can retain their nationality, an exception was needed to overcome the presumption of exclusive flag-state jurisdiction where it was desirable for impacted states to have the possibility of arresting "person[s] or ship[s] engaged in" this activity. See *id*. art. 109(4) (providing that states receiving transmissions or suffering from interference may exercise their jurisdiction to prosecute unauthorized broadcasting). Further, because slave ships also generally retain their nationality, Article 99 had to expressly impinge on flag-state jurisdiction in order to declare that enslaved persons found on any ship are ipso facto free. Without these provisions -- which codify limitations on the rights of flag states where their ships engage in conduct of severe concern to the international community -- other states may have presumed that their hands were tied.

Not so in the case of the stateless vessel. The presumption of flag-state jurisdiction, which arguably made the express grants of authority in Articles 99, 105, and 109 necessary, simply does not apply where the vessel at issue is stateless. Rather, as we have explained, stateless vessels are treated as subject to the exercise of authority by any nation. Accordingly, the absence of an express grant of authority to seize and prosecute persons on board a stateless vessel in Article 110 does not, on its own, establish that Aybar's seizure and prosecution are prohibited by UNCLOS.

Second, Aybar's argument cannot be squared with the approach taken in the international instruments and undertakings we have described. If a categorical rule against the extension of domestic jurisdiction over stateless vessels could be found in UNCLOS Article 110, it is unlikely that subsequent instruments mentioning stateless vessels could avoid it or that their drafters would have been unaware of it. Instead, it appears that in the decades since UNCLOS was concluded, the relevant international organizations and actors have resolved to leave the issue to the judgment of states. See Guilfoyle, "The High Seas," *supra*, at 218 (explaining that "[t]reaty law is silent" on the extension of national jurisdiction over stateless vessels without a nexus and "sometimes deliberately ambiguous" such that existing treaty language "covers divergent national (and academic) interpretations").

Our reading of international law does not render the United States an outlier. Other nations have also adopted laws and regulations permitting exercises of domestic jurisdiction over stateless vessels and persons found on board them. See United Nations Food and Agriculture Organization, Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing 15 (2002) (discussing laws adopted by Canada and Norway to extend jurisdiction over stateless vessels); see also *Fisheries Jurisdiction Case (Spain*

v. Canada), Jurisdiction, Judgment, 1998 I.C.J. Rep. 432, ¶¶ 19, 61 64, 75 (Dec. 4) (describing Canada's seizure of a vessel under its Coastal Fisheries Protection Act, adopted to cover high seas areas governed by the Northwest Atlantic Fisheries Organization, and the subsequent arrest and prosecution of its master for illegal fishing under that law, as well as Spain's response that such law enforcement actions were permissible only if the vessel were stateless); *Molvan v. Attorney-General for Palestine*, A.C. 351 (1948); Guilfoyle, "The High Seas," *supra*, at 218 (noting that the United States and United Kingdom have historically taken the view that no nexus is required to extend national jurisdiction over a stateless vessel).

That there is not even more evidence of similar state practices engenders no surprise, given the practical difficulties of seizing ships on the high seas. "[W]hile international law may allow states to arrest stateless vessels, states may not yet have appropriated that right unto themselves." Rayfuse, *supra*, at 330 (explaining that the absence of a widespread practice of arresting and prosecuting stateless fishing vessels may "reflect[] . . . the reality that few states have the physical capability to arrest these vessels on the high seas" and that "states may lack a basis in their domestic legal framework permitting their authorities to take such action").

E.

We add, finally, several caveats.

First, our holding makes no attempt to assert universal jurisdiction over drug trafficking offenses. The holding does not apply at all to the large majority of vessels sailing on the high seas. Rather, it applies only to vessels flouting order and custom on the high seas by eschewing the responsibilities and protections of the flag-state system.

Second, we do not suggest that international law does not apply to the seizure of the vessel or that persons on board such vessels fall outside of the protection of international law. See Rayfuse, *supra*, at 57 (explaining that "a ship without nationality[] is not necessarily a ship without law[,] . . . [b]ut it is a ship without protection" (quoting D.P. O'Connell, 2 *The International Law of the Sea* 755 (1984))). Fundamental principles of customary international human rights law, and requirements of due process under United States law, may well still apply in circumstances not present in this appeal. See *Brownlie's Principles*, *supra*, at 285 (noting that stateless ships "are not outside the law altogether," as "their occupants are protected by elementary considerations of humanity"); Maarten Den Heijer, *Europe and Extraterritorial Asylum* 238 (2012) (recognizing that the "taking of coercive measures" against stateless vessels "is likely to come within the ambit of human rights law"); see also *United States v. Ballestas*, 795 F.3d 138, 148 (D.C. Cir. 2015); *United States v. Yousef*, 327 F.3d 56, 111-12 (2d Cir. 2003) (citing *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990)); *Cardales*, 168 F.3d at 553.

While the fundamental "arbitrariness or unfairness" of a prosecution may depend in some part on notions of "fair warning" under either domestic or international law, see *United States v. Van Der End*, 943 F.3d 98, 106 (2d Cir. 2019), such "fair warning" has certainly been given in the case of drug trafficking. Although not a crime that gives rise to universal jurisdiction, see Restatement (Fourth) § 413 n.1 (explaining that "universal jurisdiction is limited to the most serious offenses about which a consensus has arisen for the existence of universal jurisdiction"); *United States v. Cardales-Luna*, 632 F.3d 731, 740-41 (Torruella, J., dissenting), drug trafficking has long been regarded as a serious crime by nearly all nations. See United Nations Treaty Depositary, Status of the United Nations Convention against Illicit Traffic in Narcotics (accessed August 9, 2020) (indicating that 191 states are party to the UN Drug Trafficking Convention); see also 46 U.S.C. § 70501(1) (recognizing that "trafficking in controlled substances aboard vessels is a serious international problem" that "is universally condemned").

Third, we opt not to decide one way or the other whether the United States may prosecute a foreign citizen engaged in drug trafficking on a stateless vessel where the United States never boarded and seized the vessel. Nor do we reach the question of whether the MDLEA by its own terms reaches such a situation. In this case the law has been applied to a person apprehended on board the stateless vessel when stopped and boarded by United States Coast Guard officers. Although the government seeks a broader ruling in its supplemental briefing, it does not abandon its argument that "MDLEA was not unconstitutional as applied to this case because Aybar's stateless vessel was intercepted on the high seas" by the United States. And resolving this "as applied" argument is all that is necessary to dispose of this appeal.

Finally, nothing in our reasoning forecloses a successful claim of diplomatic protection by a foreign state, should a foreign state make such a petition on behalf of its national. See Barnes, supra, at 315; Churchill & Lowe, *supra*, at 172. What we hold, instead, is that international law does not generally prohibit the United States from prosecuting drug traffickers found on a stateless vessel stopped and boarded by the United States on the high seas as if they had been found on a United States vessel subject to the territorial jurisdiction of the United States. Therefore, even if Congress's power under the Define and Punish Clause is cabined by international law, Aybar's prosecution under MDLEA would not exceed any such limitation.

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b. Maritime Security and Terrorist Travel Initiative

In October 2021, the Global Counterterrorism Forum ("GCTF") endorsed the Addendum to the GCTF New York Memorandum on Good Practices for Interdicting Terrorist Travel at its Eleventh Ministerial Plenary Meeting. See Maritime Security and Terrorist Travel Initiative webpage, https://www.thegctf.org/Who-we-are/Structure/Initiatives/Initiative-on-Maritime-Security-and-Terrorist-Travel. The United States leads the Initiative on Maritime Security and Terrorist Travel, which developed the Addendum after the initiative was established in 2019 to address potential vulnerabilities of the maritime sector and make recommendations to prevent and interdict terrorist movement or associated smuggling or trafficking. The Addendum, available at https://www.thegctf.org/Portals/1/Documents/Links/Meetings/2021/19CC11MM/Maritime%20Addendum/MaritimeAdden_ENG.pdf?ver=7G6QvM5C938CoWsWc4uVgQ%3D%3D, recommends good practices for government and private sector partners to address and prevent potential terrorist misuse of the maritime sector.

c. Maritime Law Enforcement Agreement with Seychelles

On July 27, 2021, the United States and Seychelles signed an agreement concerning "Counter Illicit Transnational Maritime Activity Operations." The law enforcement and "shiprider" agreement with Seychelles also entered into force on July 27, 2021 and is available at https://www.state.gov/seychelles-21-727.

d. Addendum for Venezuela

On April 8, 2021, the Embassy of the Bolivarian Republic of Venezuela provided authorization via diplomatic note for the United States to act when encountering vessels flying the Venezuelan flag or claiming to be registered in Venezuela, in accordance with the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("1988 Convention") and the Agreement to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea done at Caracas on November 8, 1991, as amended (the "Agreement"). The diplomatic note establishes supplemental procedures for U.S. law enforcement to employ, even while the United States recognizes Interim President Juan Guaido and joins governments around the world in condemning the actions of the Maduro regime. Excerpts follow from the diplomatic note.

* * * *

1. Whenever U.S. law enforcement officials encounter a suspect vessel flying the Venezuelan flag or claiming to be registered in Venezuela, located seaward of any State's territorial sea, the Government of the Bolivarian Republic of Venezuela authorizes the boarding and search of the suspect vessel and the persons found on board by such officials.

2. The U.S. Competent National Authority under Article 17 of the 1988 Convention should notify the Embassy of the Bolivarian Republic of Venezuela, by electronic mail, within three [3] hours, or as soon as operationally feasible, of the commencement of boarding of the suspect vessel. Each notification should contain the following information:

a. Suspect vessel identification: name, length, type of vessel, registration number, claimed nationality, and homeport;

b. Basis for claim of nationality;

c. Last port of call and next port of call, and dates for each;

d. Total number of persons on board and nationalities;

e. Master's name, date of birth, and nationality;

f. Course and speed of the suspect vessel at time of detection;

g. Geographic position [latitude/longitude] and geographic reference to closest point of land of the suspect vessel;

h. Date and time of commencement of boarding the suspect vessel (in Zulu time); and

i. The basis for reasonable grounds to suspect the vessel is engaged in illicit trafficking.

3. The U.S. Competent National Authority under Article 17 of the 1988 Convention should promptly provide results of boarding to the Embassy of the Bolivarian Republic of Venezuela by electronic mail. The results of boarding should include the following information:

a. Case Summary;

b. The status of the vessel, crew, and its cargo;

c. Date and time of the conclusion of boarding the suspect vessel (in Zulu time); and

d. Any amplifying or updates to information provided in the United States' initial boarding notification.

4. All use of force conducted by U.S. law enforcement officials should be in strict accordance with applicable laws and policies. In all cases, use of force should be the minimum force reasonably necessary under the circumstances and consistent with international law.

5. If evidence of illicit trafficking is found, U.S. law enforcement officials may detain the vessel and persons on board pending expeditious disposition instructions from the Government of the Bolivarian Republic of Venezuela.

6. This authorization constitutes an arrangement within the meaning of Article 17(9) of the Convention. This authorization is additional to those authorizations and provisions in the Agreement.

7. All other activities under the 1988 Convention between the Government of the Bolivarian Republic of Venezuela and the Government of the United States are to be handled in accordance with the applicable rules of international law.

8. This authorization is valid until cancelled in writing by the Bolivarian Republic of Venezuela.

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B. OUTER SPACE

1. Artemis Accords

As discussed in *Digest 2020* at 492-94, several countries have signed the Artemis Accords, which establish a practical set of principles to guide space exploration cooperation among signatory nations. Further information about the Artemis Accords is available at https://www.nasa.gov/specials/artemis/. On June 15, 2021, the State Department announced in a media note, available at https://www.state.gov/brazil-signs-artemis-accords/, that Brazil had signed the Artemis Accords. Brazil was the first South American country to sign. Also on June 15, 2021, Secretary Blinken delivered video remarks on Brazil's signing of the Artemis Accords, which are available at https://www.state.gov/brazils-signing-of-the-artemis-accords/ and excerpted below. Other countries that signed the Artemis Accords in 2021 include Mexico, New Zealand, Poland, and the Republic of Korea.

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Brazil and the United States have a long history of cooperation in scientific discovery – including the exploration of outer space for peaceful uses.

Now we will carry that partnership into a new era of space exploration working together.

Building upon the legacy of the Apollo space program, the Artemis program – named after Apollo's twin sister in Greek mythology – will land the first woman and the first person of color on the surface of the Moon.

Together with international and commercial partners, it will establish the sustainable human exploration of the solar system.

And it will allow us to develop the technology and experience necessary to mount a historic human mission to Mars.

While the Artemis program will be led by NASA, it will be a truly international effort.

And Brazil will be an important part of it.

The Artemis Accords were written to be inclusive.

It's our intention to invest in space exploration and development in a manner that promotes our fundamental belief in democracy, the rule of law, science, transparency, human rights, and the economic value of fair trade and private enterprise.

The Artemis program will also include public-private sector partnerships, ranging from delivering cargo to the lunar-orbiting Gateway station to producing the spacecraft that will land on the Moon's surface.

And while the Accords are a non-binding government-to-government commitment, we hope these principles will create an environment in space that's conducive to robust commercial investment, development, and operations – to create a vibrant space economy producing the jobs and careers of the future.

So on behalf of the U.S. government, let me say how pleased we are to welcome Brazil to the Artemis Accords.

You join our existing partners from across the globe, as well as new signatories New Zealand and the Republic of Korea – all working to advance international cooperation for peaceful and responsible space exploration and activities.

We hope that other space-faring nations will follow Brazil's example and consider making their own commitment to the Artemis Accords and its principles.

This is an exciting time – for our countries, for science, and for all of us who ever looked up at the night sky and wondered when the mysteries of space would be unlocked.

Thank you for being on this journey with us, and congratulations.

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2. Gateway Partnership

As discussed in *Digest 2020* at 494-95, the United States and Canada (through the Canadian Space Agency of "CSA") signed an agreement relating to cooperation in constructing the Gateway station in orbit around the Moon. The European Space Agency also signed a Gateway memorandum of understanding ("MOU") in 2020. Further information about the Gateway program is available at https://nasa.gov/gateway.

The United States signed an agreement with Japan for its cooperation on the Gateway program at the end of December 2020. See press release, available at https://www.nasa.gov/press-release/nasa-government-of-japan-formalize-gateway-partnership-for-artemis-program. The MOU between the United States and Japan is available at https://www.state.gov/wp-content/uploads/2021/08/20-1231.4-Japan-Space-12.28.2020-12.31.2020-TIMS-62749.pdf.

3. Weapons in Outer Space

Secretary Blinken's press statement on November 15, 2021, available at https://www.state.gov/russia-conducts-destructive-anti-satellite-missile-test/, condemns the destructive anti-satellite missile test conducted by the Russian Federation on that date. The statement follows.

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On November 15, 2021, the Russian Federation recklessly conducted a destructive test of a direct-ascent anti-satellite missile against one of its own satellites.

This test has so far generated over fifteen hundred pieces of trackable orbital debris and will likely generate hundreds of thousands of pieces of smaller orbital debris. The long-lived debris created by this dangerous and irresponsible test will now threaten satellites and other space objects that are vital to all nations' security, economic, and scientific interests for decades to come. In addition, it will significantly increase the risk to astronauts and cosmonauts on the International Space Station and other human spaceflight activities. The safety and security of all actors seeking to explore and use outer space for peaceful purposes has been carelessly endangered by this test.

The events of November 15, 2021, clearly demonstrate that Russia, despite its claims of opposing the weaponization of outer space, is willing to jeopardize the long-term sustainability of outer space and imperil the exploration and use of outer space by all nations through its reckless and irresponsible behavior.

The United States will work with our allies and partners as we seek to respond to this irresponsible act. We call upon all responsible spacefaring nations to join us in efforts to develop norms of responsible behavior and to refrain from conducting dangerous and irresponsible destructive tests like those carried out by Russia.

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Cross References

U.S. statement on General Assembly resolution on oceans and the law of the sea, **Ch. 13.B.1**

CHAPTER 13

Environment and Other Transnational Scientific Issues

A. LAND AND AIR POLLUTION AND RELATED ISSUES

Climate Change

a. Rejoining the Paris Agreement

Following the submission of a notification of withdrawal from the Paris Agreement on November 4, 2019, U.S. withdrawal from the Paris Agreement took effect on November 4, 2020, in accordance with Article 28.1 and 28.2 of the Agreement. See *Digest 2019* at 430-31 and *Digest 2020* at 222.

On January 20, 2021, in order to rejoin the Agreement, President Biden signed, and the United States deposited, the U.S. instrument of acceptance of the Paris Agreement, done at Paris on December 12, 2015. The instrument of acceptance is available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/. In accordance with Article 21.3, the Agreement entered into force for the United States on February 19, 2021.

On January 25, 2021, Special Presidential Envoy for Climate John Kerry delivered the opening statement for the United States at Climate Adaptation Summit 2021, heralding the U.S. rejoining the Paris Agreement. Mr. Kerry's remarks are excerpted below and available at https://www.state.gov/opening-statement-at-climate-adaptation-summit-2021/.

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Three years ago, scientists gave us a pretty stark warning. They said we have 12 years within which to avoid the worst consequences of climate change. And now we have nine years left. And I regret that my country has been absent for three of those years. In the United States, we spent $265 billion dollars in one year for three storms – just cleaning up after those storms. Last year, one storm $55 billion dollars. We've reached the point that where it's an absolute fact that it is cheaper to invest in preventing damage or minimizing it at least than cleaning it up.

Now without question, I think everyone understands this, the best adaptation is to treat the crisis as the emergency that it is and do more to hold the Earth's temperature increase to the

Paris' stated 1.5 degrees. I think that scientists more and more are landing on the 1.5 as a critical figure. A 3.7 to 4.5 increase centigrade, which is exactly the path we are on now, invites for the most vulnerable and poorest people on Earth fundamentally unlivable conditions.

So, our urgent reduction of emissions is compelled by public consciousness and by common sense. President Biden has made fighting climate change a top priority of his administration. … President Biden knows that we have to mobilize in unprecedented ways to meet a challenge that is fast accelerating and he knows we have limited time to get it under control.

For that reason, the United States immediately rejoined the Paris Agreement and we intend to do everything we possibly can to ensure that COP26 results in ambitious climate action in which all major emitter countries raise ambition significantly and in which we help protect those who are the most vulnerable.

We have already launched our work to prepare a new U.S. nationally determined contribution that meets the urgency of the challenge and we aim to announce our NDC as soon as practicable. The administration also intends to make significant investments in climate action, both domestically, and as part of our efforts to build back better from Covid. And internationally, we intend to make good on our climate finance pledge. In the long term, driving towards net-zero emissions, no later than 2050 and keeping a 1.5-degree limit within reach, remain the best policies for climate resilience and adaptation. There is simply no adapting to a 3- or 4-degree world except for the very richest and most privileged. At the same time, we have to also build resilience to protect communities from the impacts of climate change that are already built into the emissions that are in the atmosphere. Now, some of these impacts are inevitable because of the warming that has taken place, but if we don't act boldly and immediately by building resilience to climate change, we are likely going to see dramatic reversals in economic development for everybody. Poor and climate vulnerable communities everywhere will obviously pay the highest price.

So, the United States will work on three fronts to promote ambition, and resilience, and adaptation. Leverage U.S. innovation and climate data and information to promote a better understanding and management of climate risk, especially in developed countries. We will significantly increase the flow of finance, including concessional finance, to adaptation and resilience initiatives. We will work with bilateral and multilateral institutions to improve the quality of resilience programming. And we will work with the private sector in the United States, and elsewhere, in developing countries, to promote greater collaboration between businesses and the communities in which they depend.

It is our firm conviction throughout all of our administration, every agency is now part of our climate team, and only together are we going to be able to build the resilience to climate change that is critical to save lives and meet our moral obligation to future generations and to those currently living in very difficult circumstances.

So, we are proud to be back. We come back, I want you to know, with humility for the absences of the last four years and we will do everything in our power to make up for it.

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On February 19, 2021, Secretary of State Antony J. Blinken provided a press statement about the United States rejoining the Paris Agreement. The statement is

excerpted below and available at https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement/.

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On January 20, on his first day in office, President Biden signed the instrument to bring the United States back into the Paris Agreement. Per the terms of the Agreement, the United States officially becomes a Party again today.

The Paris Agreement is an unprecedented framework for global action. We know because we helped design it and make it a reality. Its purpose is both simple and expansive: to help us all avoid catastrophic planetary warming and to build resilience around the world to the impacts from climate change we already see.

Now, as momentous as our joining the Agreement was in 2016 — and as momentous as our rejoining is today — what we do in the coming weeks, months, and years is even more important.

You have seen and will continue to see us weaving climate change into our most important bilateral and multilateral conversations at all levels. In these conversations, we're asking other leaders: how can we do more together?

Climate change and science diplomacy can never again be "add-ons" in our foreign policy discussions. Addressing the real threats from climate change and listening to our scientists is at the center of our domestic and foreign policy priorities. It is vital in our discussions of national security, migration, international health efforts, and in our economic diplomacy and trade talks.

We are reengaging the world on all fronts, including at the President's April 22nd Leaders' Climate Summit. And further out, we very much looking forward to working with the United Kingdom and other nations around the world to make COP26 a success.

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b. Executive Order 14008

On January 27, 2021, President Biden issued Executive Order ("E.O.") 14008, entitled, "Tackling the Climate Crisis at Home and Abroad." Part I of the E.O. follows. 86 Fed. Reg. 7619 (Feb. 1, 2021).

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The United States and the world face a profound climate crisis. We have a narrow moment to pursue action at home and abroad in order to avoid the most catastrophic impacts of that crisis and to seize the opportunity that tackling climate change presents. Domestic action must go hand in hand with United States international leadership, aimed at significantly enhancing global action. Together, we must listen to science and meet the moment.

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

PART I—PUTTING THE CLIMATE CRISIS AT THE CENTER OF UNITED STATES FOREIGN POLICY AND NATIONAL SECURITY

Section 101. *Policy*. United States international engagement to address climate change—which has become a climate crisis—is more necessary and urgent than ever. The scientific community has made clear that the scale and speed of necessary action is greater than previously believed. There is little time left to avoid setting the world on a dangerous, potentially catastrophic, climate trajectory. Responding to the climate crisis will require both significant short-term global reductions in greenhouse gas emissions and net-zero global emissions by mid-century or before.

It is the policy of my Administration that climate considerations shall be an essential element of United States foreign policy and national security. The United States will work with other countries and partners, both bilaterally and multilaterally, to put the world on a sustainable climate pathway. The United States will also move quickly to build resilience, both at home and abroad, against the impacts of climate change that are already manifest and will continue to intensify according to current trajectories.

Sec. 102. *Purpose*. This order builds on and reaffirms actions my Administration has already taken to place the climate crisis at the forefront of this Nation's foreign policy and national security planning, including submitting the United States instrument of acceptance to rejoin the Paris Agreement. In implementing—and building upon—the Paris Agreement's three overarching objectives (a safe global temperature, increased climate resilience, and financial flows aligned with a pathway toward low greenhouse gas emissions and climate-resilient development), the United States will exercise its leadership to promote a significant increase in global climate ambition to meet the climate challenge. In this regard:

(a) I will host an early Leaders' Climate Summit aimed at raising climate ambition and making a positive contribution to the 26th United Nations Climate Change Conference of the Parties (COP26) and beyond.

(b) The United States will reconvene the Major Economies Forum on Energy and Climate, beginning with the Leaders' Climate Summit. In cooperation with the members of that Forum, as well as with other partners as appropriate, the United States will pursue green recovery efforts, initiatives to advance the clean energy transition, sectoral decarbonization, and alignment of financial flows with the objectives of the Paris Agreement, including with respect to coal financing, nature-based solutions, and solutions to other climate-related challenges.

(c) I have created a new Presidentially appointed position, the Special Presidential Envoy for Climate, to elevate the issue of climate change and underscore the commitment my Administration will make toward addressing it.

(d) Recognizing that climate change affects a wide range of subjects, it will be a United States priority to press for enhanced climate ambition and integration of climate considerations across a wide range of international fora, including the Group of Seven (G7), the Group of Twenty (G20), and fora that address clean energy, aviation, shipping, the Arctic, the ocean, sustainable development, migration, and other relevant topics. The Special Presidential Envoy for Climate and others, as appropriate, are encouraged to promote innovative approaches, including international multi-stakeholder initiatives. In addition, my Administration will work in partnership with States, localities, Tribes, territories, and other United States stakeholders to advance United States climate diplomacy.

(e) The United States will immediately begin the process of developing its nationally determined contribution under the Paris Agreement. The process will include analysis and input from relevant executive departments and agencies (agencies), as well as appropriate outreach to domestic stakeholders. The United States will aim to submit its nationally determined contribution in advance of the Leaders' Climate Summit.

(f) The United States will also immediately begin to develop a climate finance plan, making strategic use of multilateral and bilateral channels and institutions, to assist developing countries in implementing ambitious emissions reduction measures, protecting critical ecosystems, building resilience against the impacts of climate change, and promoting the flow of capital toward climate-aligned investments and away from high-carbon investments. The Secretary of State and the Secretary of the Treasury, in coordination with the Special Presidential Envoy for Climate, shall lead a process to develop this plan, with the participation of the Administrator of the United States Agency for International Development (USAID), the Chief Executive Officer of the United States International Development Finance Corporation (DFC), the Chief Executive Officer of the Millennium Challenge Corporation, the Director of the United States Trade and Development Agency, the Director of the Office of Management and Budget, and the head of any other agency providing foreign assistance and development financing, as appropriate. The Secretary of State and the Secretary of the Treasury shall submit the plan to the President, through the Assistant to the President for National Security Affairs and the Assistant to the President for Economic Policy, within 90 days of the date of this order.

(g) The Secretary of the Treasury shall:

(i) ensure that the United States is present and engaged in relevant international fora and institutions that are working on the management of climate-related financial risks;

(ii) develop a strategy for how the voice and vote of the United States can be used in international financial institutions, including the World Bank Group and the International Monetary Fund, to promote financing programs, economic stimulus packages, and debt relief initiatives that are aligned with and support the goals of the Paris Agreement; and

(iii) develop, in collaboration with the Secretary of State, the Administrator of USAID, and the Chief Executive Officer of the DFC, a plan for promoting the protection of the Amazon rainforest and other critical ecosystems that serve as global carbon sinks, including through market-based mechanisms.

(h) The Secretary of State, the Secretary of the Treasury, and the Secretary of Energy shall work together and with the Export-Import Bank of the United States, the Chief Executive Officer of the DFC, and the heads of other agencies and partners, as appropriate, to identify steps through which the United States can promote ending international financing of carbon-intensive fossil fuel-based energy while simultaneously advancing sustainable development and a green recovery, in consultation with the Assistant to the President for National Security Affairs.

(i) The Secretary of Energy, in cooperation with the Secretary of State and the heads of other agencies, as appropriate, shall identify steps through which the United States can intensify international collaborations to drive innovation and deployment of clean energy technologies, which are critical for climate protection.

(j) The Secretary of State shall prepare, within 60 days of the date of this order, a transmittal package seeking the Senate's advice and consent to ratification of the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, regarding the phasedown of the production and consumption of hydrofluorocarbons.

Sec. 103. *Prioritizing Climate in Foreign Policy and National Security*. To

ensure that climate change considerations are central to United States foreign policy and national security:

(a) Agencies that engage in extensive international work shall develop, in coordination with the Special Presidential Envoy for Climate, and submit to the President, through the Assistant to the President for National Security Affairs, within 90 days of the date of this order, strategies and implementation plans for integrating climate considerations into their international work, as appropriate and consistent with applicable law. These strategies and plans should include an assessment of:

(i) climate impacts relevant to broad agency strategies in particular countries or regions;

(ii) climate impacts on their agency-managed infrastructure abroad (e.g., embassies, military installations), without prejudice to existing requirements regarding assessment of such infrastructure;

(iii) how the agency intends to manage such impacts or incorporate risk mitigation into its installation master plans; and

(iv) how the agency's international work, including partner engagement,can contribute to addressing the climate crisis.

(b) The Director of National Intelligence shall prepare, within 120 days of the date of this order, a National Intelligence Estimate on the national and economic security impacts of climate change.

(c) The Secretary of Defense, in coordination with the Secretary of Commerce, through the Administrator of the National Oceanic and Atmospheric Administration, the Chair of the Council on Environmental Quality, the Administrator of the Environmental Protection Agency, the Director of National Intelligence, the Director of the Office of Science and Technology Policy, the Administrator of the National Aeronautics and Space Administration, and the heads of other agencies as appropriate, shall develop and submit to the President, within 120 days of the date of this order, an analysis of the security implications of climate change (Climate Risk Analysis) that can be incorporated into modeling, simulation, war-gaming, and other analyses.

(d) The Secretary of Defense and the Chairman of the Joint Chiefs of Staff shall consider the security implications of climate change, including any relevant information from the Climate Risk Analysis described in subsection (c) of this section, in developing the National Defense Strategy, Defense Planning Guidance, Chairman's Risk Assessment, and other relevant strategy, planning, and programming documents and processes. Starting in January 2022, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff shall provide an annual update, through the National Security Council, on the progress made in incorporating the security implications of climate change into these documents and processes.

(e) The Secretary of Homeland Security shall consider the implications of climate change in the Arctic, along our Nation's borders, and to National Critical Functions, including any relevant information from the Climate Risk Analysis described in subsection (c) of this section, in developing relevant strategy, planning, and programming documents and processes. Starting in January 2022, the Secretary of Homeland Security shall provide an annual update, through the National Security Council, on the progress made in incorporating the homeland security implications of climate change into these documents and processes.

Sec. 104. *Reinstatement*. The Presidential Memorandum of September 21, 2016 (Climate Change and National Security), is hereby reinstated.

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c. U.S. submissions under the Paris Agreement and UN Framework Convention

On April 22, 2021, President Biden announced the U.S. target of a 50-52 percent reduction from 2005 levels in economy-wide net greenhouse gas emissions in 2030. The new 2030 emissions target constitutes the "nationally determined contribution," or "NDC," of the United States under the Paris Agreement and was formally communicated as such by the United States through the NDC registry maintained by the secretariat of the United Nations Framework Convention on Climate Change ("UNFCCC"). See White House Fact Sheet, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/. Nationally determined contributions are available at the NDC Registry at https://unfccc.int/NDCREG. The U.S. submission is available at https://unfccc.int/sites/default/files/NDC/2022-06/United%20States%20NDC%20April%2021%202021%20Final.pdf.

In addition to submission of the U.S. NDC under the Paris Agreement, in 2021 the United States published or submitted several other communications and strategy documents related to its implementation of the Paris Agreement and the UNFCCC. These additional submissions are discussed below.

The U.S. International Climate Finance Plan, called for by Executive Order 14008, discussed *supra*, is available at https://www.whitehouse.gov/wp-content/uploads/2021/04/U.S.-International-Climate-Finance-Plan-4.22.21-Updated-Spacing.pdf?source=email with an executive summary available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/executive-summary-u-s-international-climate-finance-plan/. The excerpt of the Climate Finance Plan that follows summarize its goals and scope:

> This Plan has several goals. First, it provides the U.S. government with a strategic vision of international climate finance with a 2025 horizon. Second, it outlines key steps and instruments through which the U.S. government will mobilize climate finance in a strategic and concerted way to most efficiently tackle the challenge. Third, it outlines how the U.S. government will support climate-aligned finance flows more broadly. And fourth, the Plan serves as a signal to other governments, international institutions, and stakeholders that the United States intends to work closely with them to deploy climate finance more efficiently and with highest impact.
>
> The Plan covers five areas: (1) scaling up climate finance and enhancing its impact; (2) mobilizing private sector finance; (3) taking steps to end international official financing for carbon-intensive fossil fuel-based energy; (4) making capital flows consistent with low-emissions, climate-resilient pathways; and (5) defining, measuring, and reporting U.S. public climate finance.

The United States submitted its first biennial communication pursuant to Article 9.5 of the Paris Agreement, conveying "indicative quantitative and qualitative information, as applicable, including, as available, on projected levels of public financial resources to be provided to developing country Parties, starting in 2020." See UNFCCC Biennial Communications webpage at https://unfccc.int/Art.9.5-biennial-communications. The U.S. biennial communication is available at https://unfccc.int/sites/default/files/resource/U.S.%209.5%20Submission_FINAL.pdf.

The United States also submitted an adaptation communication, pursuant to Article 7, paragraphs 10 and 11 of the Paris Agreement. The U.S. Adaptation Communication is available at https://unfccc.int/sites/default/files/resource/USA%20Full%20Adaptation%20Communication%202021.11.2%209am_.pdf.

Pursuant to Article 4, paragraph 19 of the Paris Agreement, the United States submitted its Long-Term Strategy, which is available at https://www.whitehouse.gov/wp-content/uploads/2021/10/US-Long-Term-Strategy.pdf.

Under the UNFCCC, the United States submitted its 7th National Communication and its 3rd and 4th Biennial Report, as a combined report available at https://unfccc.int/documents/307954.

d. Major Economies Forum

President Biden convened 40 world leaders in a virtual Leaders Summit on Climate ("LSOC") on April 22-23, 2021, to help galvanize global efforts and ambition in tackling the climate crisis. Among other things, the LSOC served to reconvene the Major Economies Forum on Energy and Climate ("MEF"). The summary of proceedings is available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/23/leaders-summit-on-climate-summary-of-proceedings/. President Biden again convened a leaders-level meeting of the MEF on September 17, 2021. The Chair's Summary is available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/17/meeting-of-the-major-economies-on-energy-and-climate-september-17-2021-chairs-summary/.

e. Conference of the Parties to the UN Framework Convention on Climate Change

The 26th session of the Conference of the Parties ("COP26") to the UN Framework Convention on Climate Change ("UNFCCC"), which also served as the 3rd session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement ("CMA3"), postponed from November 2020 due to COVID-19, was held in Glasgow, United Kingdom, October 31-November 12, 2021. The COP and CMA adopted a number of decisions relating to the implementation of the UNFCCC and the Paris Agreement. These decisions included the "Glasgow Climate Pact" reflected in decisions 1/CP.26. available at https://unfccc.int/documents/460954, and 1/CMA.3, available at https://unfccc.int/documents/460950.

In addition to decisions taken by the COP and CMA, on the occasion of COP26 the United States joined partners in launching or advancing various initiatives, and announced several U.S. national efforts. On November 3, 2021, the State Department issued a fact sheet discussing some of these actions and initiatives related to the convening of world leaders on November 2. The fact sheet is excerpted below and available at https://www.state.gov/u-s-announcements-on-world-leaders-summit-forest-and-land-use-event/.

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On November 2, 2021, world leaders gathered to commit to ambitious action to reduce emissions and enhance carbon sequestration from forests and other ecosystems. This action is critical to reaching net zero emissions by 2050.

The United States is taking ambitious action to conserve and restore natural ecosystems at home, through partnerships among federal government agencies, states, tribes, nongovernmental organizations (NGOs), and private landowners. The United States has exceeded its 2020 Bonn Challenge goal, with more than 20 million hectares of forest land under restoration to date. The Biden-Harris Administration launched "America the Beautiful," a decade-long challenge to pursue locally led, voluntary nationwide efforts to conserve, connect, and restore the lands, waters, and wildlife, and set out the goal of conserving 30 percent of our lands and waters by 2030.

To complement these efforts and support ambitious action globally, on November 2 the United States proudly:

1) Announced the Plan to Conserve Global Forests: Critical Carbon Sinks. This decade-long, whole-of government Plan sets forth the U.S. approach to conserving critical global terrestrial carbon sinks by deploying a range of diplomatic, policy, and financing tools. The first-of-its-kind plan for the U.S. government seeks to catalyze the global effort to conserve and restore the forests and other ecosystems that serve as critical carbon sinks. The Plan has four key objectives: 1) Incentivize forest and ecosystem conservation and forest landscape restoration; 2) Catalyze private sector investment, finance and action to conserve critical carbon sinks; 3) Build long-term capacity and support the data and systems that enhance accountability; and 4) Increase ambition for climate and conservation action. Subject to Congressional appropriations, by 2030 the United States intends to dedicate up to $9 billion of our international climate funding to support these objectives.

2) Launched the Forest Investor Club. This network of leading public and private financial institutions and other investors, with 17 founding members, aims to unlock and scale up investments that support sustainable, climate-aligned outcomes in the land sector. These financial institutions and Network Partners are committed to increasing the scale and geographic scope of investment in conservation, restoration, sustainable agriculture and forestry, and green infrastructure.

3) Established the Forest Finance Risk Consortium (FFRC).The Consortium will bring together financial institutions and experts in forest monitoring and climate finance disclosure to better assess and disclose exposure to forest-related emissions in investment portfolios. The FFRC will improve disclosure of forest-related climate risk in line with existing

and emerging climate finance disclosure guidance, decreasing future risks to financial markets and helping financial institutions eliminate climate risks from their portfolios.

4) Worked with the United Kingdom and 10 leading agricultural traders to develop a shared roadmap to align corporate goals and supply chain action with a 1.5 degrees Celsius pathway. The resulting commitments will increase collaboration and implementation in enabling policy environments, promoting transparency on scope 3 (non-energy indirect) emissions and indirect supply chains, and improving livelihoods for farmers.

5) Supported the Glasgow Leaders Declaration on Forests and Land Use, committing to working collectively to halt and reverse forest loss and land degradation by 2030 while delivering sustainable development and promoting an inclusive rural transformation.

6) Joined 11 other donors in issuing the Global Forest Finance Pledge, announcing our intention to collectively provide $12 billion for forest-related climate finance from 2021 to 2025.

7) Joined the COP26 Congo Basin Joint Donors' Statement, announcing an initial collective pledge of at least $1.5 billion of financing, from 2021 to 2025, to support ambitious efforts and results in the region to conserve and maintain the Congo Basin forests, peatlands, and other critical global carbon sinks.

8) Supported the COP26 Indigenous Peoples and Local Communities (IPLC) Forest Tenure Joint Statement, announcing an initial, collective pledge of $1.7 billion of financing, from 2021 to 2025, to support the advancement of Indigenous Peoples' and local communities' forest tenure rights and greater recognition and rewards for their role as guardians of forests and nature.

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On November 3, 2021, the State Department issued a fact sheet on the Plan to Conserve Global Forests: Critical Carbon Sinks, which was another outcome of the World Leaders Summit Forest Day session on November 2, 2021. The fact sheet is excerpted below and available at https://www.state.gov/plan-to-conserve-global-forests-critical-carbon-sinks/.

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At COP26 during the World Leaders Summit Forest Day session on November 2, 2021, the United States announced the **Plan to Conserve Global Forests: Critical Carbon Sinks** . This decade-long, whole-of-government Plan sets forth the U.S. approach to conserving critical global terrestrial carbon sinks, deploying a range of diplomatic, policy, and financing tools. The first-of-its-kind plan for the U.S. government seeks to catalyze the global effort to conserve and restore the forests and other ecosystems that serve as critical carbon sinks. Subject to Congressional appropriations, by 2030, the United States intends to dedicate up to $9 billion of our international climate funding to support the objectives of the Plan.

The United States recognizes that without halting deforestation and restoring forests at scale, we cannot reach net zero emissions by 2050, and we cannot limit warming to 1.5 degrees Celsius. This is not a long-term challenge. It is something we must do immediately, in this

critical decade. Forests and other ecosystems could provide as much as one-third of global mitigation by 2030 – by reducing emissions from deforestation and forest degradation and by enhancing the carbon sequestered from the atmosphere through forest restoration. The Plan to Conserve Global Forests: Critical Carbon Sinks has been devised to catalyze even more ambitious global action towards this end.

The Plan supports collective goals the United States has previously endorsed, including efforts to end natural forest loss by 2030; to significantly increase the rate of global restoration of degraded landscapes and forestlands; and to slow, halt, and reverse forest cover and carbon loss. The Plan outlines the initial approaches the United States intends to deploy to achieve four key objectives:

> Incentivize forest and ecosystem conservation and forest landscape restoration;
> Catalyze private sector investment, finance, and action to conserve critical carbon sinks;
> Build long-term capacity and support the data and monitoring systems that enhance accountability;
> Increase ambition for climate and conservation action.

To maximize the potential contribution of forests and other critical ecosystems to a net zero emissions world, the United States intends to work with partners to respond to the challenges of halting deforestation, improving land use, and restoring ecosystems at scale. The implementation of specific elements of the plan will align with the priorities of partner countries, to engender ownership and contribute to coordinated policy and regulatory environments. The design and implementation of Plan elements will prioritize inclusion, particularly of Indigenous peoples and local communities, in partner countries. The United States will continue to consult with the full range of partners and stakeholders, including governments of countries with important terrestrial carbon sinks, indigenous peoples, local communities, civil society organizations, commodity-dependent companies, and public, private, and multilateral finance institutions to further refine and advance the Plan.

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The United States also joined several declarations related to reduction of emissions from international shipping and aviation at the COP in November. The Clydebank Declaration is available at https://www.gov.uk/government/publications/cop-26-clydebank-declaration-for-green-shipping-corridors/cop-26-clydebank-declaration-for-green-shipping-corridors. The Declaration on the International Aviation Climate Ambition Coalition is available at https://www.gov.uk/government/publications/cop-26-declaration-international-aviation-climate-ambition-coalition/cop-26-declaration-international-aviation-climate-ambition-coalition#declaration. The Declaration on Zero Emission Shipping by 2050 is available at https://em.dk/media/14312/declaration-on-zero-emission-shipping-by-2050-cop26-glasgow-1-november-2021.pdf.

At the conclusion of the COP, the White House issued a fact sheet, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/13/fact-sheet-renewed-u-s-leadership-in-glasgow-raises-ambition-to-tackle-climate-crisis/.

On December 14, 2021, Ambassador Elisabeth Millard delivered remarks for the United States at an ECOSOC virtual briefing on the outcomes of COP26. Her remarks are available at https://usun.usmission.gov/remarks-at-an-ecosoc-virtual-briefing-on-cop26-outcomes/ and excerpted below.

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We left Glasgow having met the core U.S. objectives for COP26.

First, the world is far closer to keeping a 1.5 degrees Celsius limit on global temperature rise within reach. U.S. climate diplomacy throughout 2021 focused significantly on this goal, particularly through engagement with the major economies.

Second, the Parties to the Paris Agreement adopted a consensus decision—the "Glasgow Climate Pact"—which makes clear their commitment to keeping the 1.5 degrees Celsius limit within reach.

Acknowledging a gap between where we are and where we need to be, it lays out various actions and timelines related to continuing to increase ambition after Glasgow during this decisive decade.

This includes a request for Parties to revisit and strengthen, by the end of next year, their 2030 targets as necessary to align with the Paris Agreement temperature goal.

Third, the Paris Parties adopted the final set of guidelines that will enable full operationalization of the Paris Agreement, including with respect to providing transparency on Parties' actions towards achieving their targets and the use of international carbon markets.

The United States will continue to push for more progress at home and abroad in this decisive decade for climate action.

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f. Other climate initiatives

The United States also worked with partners on the margins of COP26 as well as at other times during 2021 to launch several new initiatives related to tackling the climate crisis. Some of these initiatives are outlined below.

(1) The Global Methane Pledge

The Global Methane Pledge ("GMP") was first announced on September 18, 2021, and then formally launched on the margins of COP, when the text of the GMP was released. See the September 18, 2021 Joint U.S.-EU Press Release, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/18/joint-us-eu-press-release-on-the-global-methane-pledge/. See also the State Department media note regarding the formal launch of the GMP, available at https://www.state.gov/united-states-european-union-and-partners-formally-launch-global-methane-pledge-to-keep-1-5c-within-reach/. See also President Biden's remarks at the launch on November 2021 of the GMP, available at

https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/11/02/remarks-by-president-biden-at-an-event-highlighting-the-progress-of-the-global-methane-pledge/. The text of the GMP is available at https://www.ccacoalition.org/en/file/8210/download?token=VPYTyJ4z, and follows.

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Recognizing that, in order to ensure that the global community meets the Paris Agreement goal of keeping warming well below 2 degrees C, while pursuing efforts to limit warming to 1.5 degrees C, significant methane emission reductions must be achieved globally by 2030;

Recognizing that the short atmospheric lifetime of methane means that taking action now can rapidly reduce the rate of global warming and that readily available cost-effective methane emission measures have the potential to avoid over 0.2 degrees C of warming by 2050 while yielding important co-benefits, including improving public health and agricultural productivity;

Recognizing that methane accounts for 17 percent of global greenhouse gas emissions from human activities, principally from the energy, agriculture, and waste sectors, and that the energy sector has the greatest potential for targeted mitigation by 2030;

Recognizing that the mitigation potential in different sectors varies between countries and regions, and that a majority of available targeted measures have low or negative cost;

Recognizing that, to keep 1.5 degrees C within reach, methane emission reductions must complement and supplement, not replace global action to reduce carbon dioxide emissions, including from the combustion of fossil fuels (coal, oil and natural gas), industrial processes, and the lands sector;

Recognizing that improvements to the transparency, accuracy, completeness, comparability, and consistency of methane emissions data assessed and validated in accordance with United Nations Framework Convention on Climate Change (UNFCCC) and Paris Agreement standards and Intergovernmental Panel on Climate Change (IPCC) good practice can promote more ambitious and credible action;

Recognizing that, while there are multiple useful international initiatives that address methane, there is a need for high-level political engagement in order to catalyze global methane action.

The Participants in the Global Methane Pledge:

Commit to work together in order to collectively reduce global anthropogenic methane emissions across all sectors by at least 30 percent below 2020 levels by 2030.

Commit to take comprehensive domestic actions to achieve that target, focusing on standards to achieve all feasible reductions in the energy and waste sectors and seeking abatement of agricultural emissions through technology innovation as well as incentives and partnerships with farmers.

Commit to moving towards using the highest tier IPCC good practice inventory methodologies, consistent with IPCC guidance, with particular focus on high emission sources, in order to quantify methane emissions; as well as working individually and cooperatively to continuously improve the accuracy, transparency, consistency, comparability, and completeness of national greenhouse gas inventory reporting under the UNFCCC and Paris Agreement, and to provide greater transparency in key sectors.

Commit to maintaining up-to-date, transparent, and publicly available information on our policies and commitments.

Commit to support existing international methane emission reduction initiatives, such as those of the Climate and Clean Air Coalition, the Global Methane Initiative, and the relevant work of the United Nations Environment Programme, including the International Methane Emissions Observatory, to advance technical and policy work that will serve to underpin Participants' domestic actions.

Welcome and encourage announcements of further parallel specific domestic actions by Participants and commitments taken by the private sector, development banks, financial institutions and philanthropy to support global methane abatement.

Resolve to review progress towards the target of the Global Methane Pledge on an annual basis until 2030 by means of a dedicated ministerial meeting.

Call on other states to join the Global Methane Pledge.

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(2) The Agriculture Innovation Mission for Climate

The Agriculture Innovation Mission for Climate was launched on the margins of COP26. The State Department fact sheet on "AIM for Climate" is available at https://www.state.gov/launching-agriculture-innovation-mission-for-climate-2/, and excerpts follow. The terms of reference for AIM for Climate are available at https://www.aimforclimate.org/media/q0jddyv4/2022_aim4c_tor.pdf.

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On November 2, at the 26th United Nations Climate Change Conference (COP26), the United States and United Arab Emirates officially launched the Agriculture Innovation Mission for Climate (AIM for Climate) alongside 31 countries and over 48 non-government partners. In remarks at the World Leaders Summit, President Biden announced that the United States intends to mobilize $1 billion in investment in climate-smart agriculture and food systems innovation over five years (2021-2025).

Previewed at President Biden's Leaders Summit on Climate in April, AIM for Climate is a pioneering initiative uniquely focused on increasing investment and enabling greater public-private and cross-sectoral partnerships, intended to both raise global climate ambition, and underpin transformative climate action in the agriculture sector in all countries. AIM for Climate has already begun to bear fruit, garnering an "early harvest" of $4 billion in increased investment in climate-smart agriculture and food systems innovation over five years.

AIM for Climate partners are mobilizing this investment to close the global investment gap in climate-smart agriculture and food systems innovation. Climate-smart agriculture is an approach that helps to guide actions needed to transform and reorient agricultural systems to tackle three main objectives: sustainably increasing agricultural productivity and incomes, while adapting and building resilience to climate change and/or reducing/removing greenhouse gas

emissions. AIM for Climate seeks to create incentives for, and mechanisms for maximizing the impact of, new investments toward an agriculture sector that is ready to face a changing climate.

Government partners are providing the crucial foundation of AIM for Climate, through a wave of public investment in climate-smart agriculture and food systems innovation. Other sectors, including business, philanthropy, and other non-government partners are invited to build upon that foundation with "innovation sprints" – investments in specific, impactful, measurable, expedited efforts – or by providing critical knowledge for identifying investment gaps, challenges, and opportunities.

AIM for Climate has three primary objectives:

1) Demonstrate collective commitment to significantly increase investment in agricultural innovation for climate-smart agriculture and food systems over five years (2021-2025);
2) Support frameworks and structures to enable technical discussions and the promotion of expertise, knowledge, and priorities across international and national levels of innovation to amplify the impact of participants' investments; and,
3) Establish appropriate structures for exchanges between Ministers, chief scientists, and other stakeholders as key focal points and champions for cooperation on climate-related agricultural innovation, to engender greater co-creation and cooperation on shared research priorities.

AIM for Climate focuses on increasing and accelerating investment in, and other support for, climate-smart agricultural innovation in the areas of:

- Scientific breakthroughs via basic agricultural research through national-level government and academic research institutions;
- Public and private applied research, including through support to international research centers, institutions, and laboratory networks; and
- Development, demonstration, and deployment of practical, actionable, and innovative products, services, and knowledge to producers and other market participants, including through national agricultural research extension systems.

AIM for Climate government partners announced at COP26 include: Azerbaijan, Australia, Bahamas, Bangladesh, Brazil, Burkina Faso, Canada, Colombia, Denmark, Finland, Georgia, Ghana, Honduras, Hungary, Ireland, Japan, Kenya, Republic of Korea, Israel, Lithuania, Mexico, Morocco, New Zealand, Philippines, Romania, Singapore, Sweden, United States, United Arab Emirates, United Kingdom, Uruguay, Ukraine, Vietnam.

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(3) The First Movers Coalition

The First Movers Coalition, also launched on the margins of COP26, is a public-private partnership between the State Department and the World Economic Forum that works with companies to harness their purchasing power and supply chains to create early markets for innovative clean energy technologies. See Department fact sheet on the Coalition, available at https://www.state.gov/launching-the-first-movers-coalition-at-the-2021-un-climate-change-conference/, and excerpted below.

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At the launch of the First Movers Coalition, more than 25 Founding Members—leading companies from a wide range of industries around the world—made commitments to spur the commercialization of emerging technologies in this decade. The First Movers Coalition's unique approach assembles ambitious corporate purchasing pledges across sectors that represent more than a third of global carbon emissions and span heavy industry and long-distance transportation. The technologies needed to decarbonize these "hard-to-abate" sectors are not yet commercially available or competitive but are essential to bring to market by 2030 to enable their rapid scale-up to achieve net-zero emissions economy-wide by 2050.

U.S. Special Presidential Envoy for Climate John Kerry said, "The First Movers Coalition is a platform for the world's leading global companies to make purchasing commitments to create early markets for critical technologies needed to achieve net-zero by 2050. In this critical decade, we not only need to deploy as rapidly as possible existing clean energy technologies, such as wind turbines, solar panels, and battery storage, but also drive innovation for our long-term decarbonization goals."

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Sectors and Commitments

The International Energy Agency forecasts that roughly half of the emissions reductions to reach net-zero emissions by 2050 must come from technologies that are not currently ready for commercial markets. The First Movers Coalition focuses on accelerating innovation in eight sectors where these technology needs are concentrated: steel, trucking, shipping, aviation, cement, aluminum, chemicals, and direct air capture.

Today, the First Movers Coalition is launching a first phase of sectoral commitments in steel, trucking, shipping, and aviation. The remaining sectoral commitments will launch in early 2022. The purchasing commitments were developed in close consultation with public-, private-, and civil-sector technical experts. The First Movers Coalition purchasing commitments are technology-neutral, but they include ambitious performance standards to target the next generation of innovative solutions that can play a leading role in decarbonizing a sector.

The sectoral purchasing commitments were developed through a range of stakeholder consultations, including with civil society and expert organizations. Additional information on the purchasing commitments and on the First Movers Coalition can be found through the World Economic Forum here.

Founding Member companies have made commitments in at least one of these sectors:

Steel: Members commit to purchasing volumes of near-zero emissions steel by 2030. The deployment of near-zero emissions iron and steelmaking technology is needed to deliver a net-zero steel sector with minimal residual emissions. These technologies include hydrogen direct reduction, carbon capture use and storage, and electrolysis-based production processes. Steel purchasers set a target that at least 10 percent of their annual steel procurement volumes by 2030 meet or exceed the First Movers Coalition definition for "breakthrough steel."

Trucking: Members commit to purchase or contract zero-emission medium and heavy-duty vehicles by 2030. These can include battery or fuel-cell electric vehicles, which enable the use of clean sources of electricity, and hydrogen, for charging. Trucking owners and operators also set a target that at least 30 percent of their heavy-duty and 100 percent of their medium-duty truck purchases will be zero-emission trucks by 2030. Retailers and manufacturers set a target that they will require all of their trucking service providers to meet the trucking owners' and operators' commitment by 2030.

Shipping: Members commit to use zero-emission fuels in new and in retrofitted zero-emission vessels by 2030. Carriers set a target that at least 5 percent of their deep-sea shipping will be powered by zero-emission fuels by 2030 and on ships capable of using zero-emission fuels. Cargo owners set a target that at least 10 percent of the volume of their goods shipped internationally will be on ships using zero-emission fuels by 2030, on the way to 100 percent by 2040.

Aviation: Members commit to use emerging technologies including advanced sustainable aviation fuels (SAF) with significant emissions reductions as well as electric and hydrogen propulsion for air travel by 2030. This commitment recognizes and builds on the Biden administration's Sustainable Aviation Fuels Grand Challenge.

Airlines and air transport companies set a target of replacing at least 5 percent of conventional jet fuel demand with SAF that reduces life-cycle GHG emissions by 85 or more when compared with conventional jet fuel, and/or using zero-carbon emitting propulsion technologies by 2030;

Airfare and air freight purchasers set a target of replacing at least 5% of conventional jet fuel demand for air transport with SAF that reduces life-cycle GHG emissions by 85 percent or more when compared with conventional jet fuel, and/or using zero-carbon emitting propulsion technologies by 2030—in partnership with air transport operators.

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(4) The International Solar Alliance

The International Solar Alliance ("ISA"), launched on the margins of COP21 in 2015 in Paris, is a "platform for increased deployment of solar energy technologies as a means for bringing energy access, ensuring energy security, and driving energy transition in its member countries." See ISA webpage at https://www.isolaralliance.org/about/background. On November 10, 2021, Special Presidential Envoy for Climate John Kerry signed the Framework Agreement on the Establishment of the ISA, taking the first step required to become a member of the ISA. In accordance with Articles VII and XIII of the Framework Agreement, it will enter into force for the United States on the thirtieth day after the United States submits an instrument of ratification, acceptance or approval.

g. Bilateral and regional statements, commitments and partnerships

Throughout 2021, the United States issued a number of joint statements and declarations to advance bilateral and regional efforts to address the climate crisis. Some examples of these statements and declarations are discussed below.

At the conclusion of Special Envoy Kerry's visit to the United Arab Emirates, the two nations released the following statement. The joint statement is available as an April 5, 2021 State Department media note at https://www.state.gov/joint-statement-the-united-states-and-the-united-arab-emirates-working-together-on-climate-challenge/.

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The United States and the United Arab Emirates are committed to working together to take on the climate challenge. We believe decisive action can be an engine for economic growth and sustainable development.

We will work to strengthen the implementation of the Paris Agreement and promote the success of COP26 in Glasgow. Mindful of the importance and urgency of raising global climate ambition, we each intend to take steps to decarbonize our economies in line with our national circumstances and economic development plans, including reducing our emissions by 2030.

We will also cooperate closely to make new investments in financing decarbonization across both the Middle East and North Africa (MENA) region and the wider international community and help the most vulnerable adapt to the inevitable effects of climate change. In this regard, we are encouraged by new regional initiatives, such as the Green Middle East initiative by the Kingdom of Saudi Arabia.

We will particularly focus our joint efforts on renewable energy, hydrogen, industrial decarbonization, carbon capture and storage, nature-based solutions, and low-carbon urban design – exemplified by model cities like Masdar City, and the world's largest single-site solar facility in Noor in Abu Dhabi. We take note of opportunities in the UAE, such as the world's lowest solar power costs, and significant carbon capture investments.

We will partner with the global community to take the necessary steps to keep a Paris-aligned temperature limit within reach, including through country-specific enhancements to nationally determined contributions. We recognize the strong climate efforts of many leading companies and will work closely with the private sector to mobilize the investment and transformative mitigation and adaptation technologies needed to stem the climate crisis and support the economy.

We are encouraged by the conversations we held in Abu Dhabi with other countries in the region, which we believe inaugurated a new era of cooperation in the region for a future focused on prosperity through climate policy, investment, innovation, and sustainable economic growth.

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On April 4, 2021, leaders attending the regional climate dialogue hosted by the UAE issued a joint statement. Special Envoy Kerry and his counterparts from the following participated: United Arab Emirates, Kuwait, Egypt, Bahrain, Qatar, Iraq, Jordan Sudan, and the Kingdom of Morocco. The statement is excerpted below and available as an April 5, 2021 State Department media note at https://www.state.gov/joint-statement-from-the-united-arab-emirates-regional-climate-dialogue/

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Our countries, gathered in Abu Dhabi under the auspices of the United Arab Emirates, are committed to accelerate climate action.

We will work together to ensure the success of the Paris Agreement and will cooperate with our global partners to strengthen climate ambition. We urge the international community to take steps to keep a Paris-aligned temperature limit within reach, including through enhanced nationally determined contributions.

In this critical decade for climate action, we believe that investments in renewable energy, ecosystem-based approaches, nature-based solutions, climate-smart agriculture, carbon capture technologies, and other low-carbon solutions will support sustainable economic growth and job creation. We also recognize the importance of adaptation and the co-benefits of building resilience to climate change.

We are committed to reducing emissions by 2030 and beyond, to working collectively to help the region adapt to the serious impacts of climate change, to collaborating on mobilizing investment in a new energy economy, and to pursuing our respective efforts in mobilizing climate finance.

We also resolve to work together and with other countries to help the world's most vulnerable cope with the devastating consequences of climate change.

We are encouraged by the conversations we held, hosted by the UAE, which we believe will usher in a new era of regional cooperation for a prosperous and sustainable future based on ambitious climate policy, investment, and innovation."

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Also in April, the United States and Japan established a Climate Partnership on Ambition, Decarbonization, and Clean Energy, available at https://www.whitehouse.gov/wp-content/uploads/2021/04/U.S.-Japan-Climate-Partnership.pdf.

On April 17, the United States and China issued a Joint Statement Addressing the Climate Crisis, available at https://www.state.gov/u-s-china-joint-statement-addressing-the-climate-crisis/. On November 10, 2021, the State Department issued a media note on the U.S.-China Joint Glasgow Declaration on Enhancing Climate Action in the 2020s. The declaration is available at https://www.state.gov/u-s-china-joint-glasgow-declaration-on-enhancing-climate-action-in-the-2020s/ and excerpted below.

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1. The United States and China recall their Joint Statement Addressing the Climate Crisis of April 17th, 2021. They are committed to its effective implementation and appreciate the intensive work that has taken place to date and the value of continued discussion.

2. The United States and China, alarmed by reports including the Working Group I Contribution to the IPCC Sixth Assessment Report released on August 9th, 2021, further recognize the seriousness and urgency of the climate crisis. They are committed to tackling it through their respective accelerated actions in the critical decade of the 2020s, as well as through cooperation in multilateral processes, including the UNFCCC process, to avoid catastrophic impacts.
3. The United States and China recall their firm commitment to work together and with other Parties to strengthen implementation of the Paris Agreement. The two sides also recall the Agreement's aim in accordance with Article 2 to hold the global average temperature increase to well below 2 degrees C and to pursue efforts to limit it to 1.5 degrees C. In that regard, they are committed to pursuing such efforts, including by taking enhanced climate actions that raise ambition in the 2020s in the context of the Paris Agreement, with the aim of keeping the above temperature limit within reach and cooperating to identify and address related challenges and opportunities.
4. Moving forward, the United States and China welcome the significant efforts being made around the world to address the climate crisis. They nevertheless recognize that there remains a significant gap between such efforts, including their aggregate effect, and those that need to be taken to achieve the goals of the Paris Agreement. The two sides stress the vital importance of closing that gap as soon as possible, particularly through stepped-up efforts. They declare their intention to work individually, jointly, and with other countries during this decisive decade, in accordance with different national circumstances, to strengthen and accelerate climate action and cooperation aimed at closing the gap, including accelerating the green and low-carbon transition and climate technology innovation.
5. The two sides are intent on seizing this critical moment to engage in expanded individual and combined efforts to accelerate the transition to a global net zero economy.
6. The two sides recall their intention to continue discussing, both on the road to COP 26 and beyond, concrete actions in the 2020s to reduce emissions aimed at keeping the Paris Agreement-aligned temperature limit within reach. With that clear purpose, and anticipating that particular forms of cooperation will have the effect of significantly accelerating emission reductions and limitations, including in the form of specific goals, targets, policies, and measures, the two sides intend to engage in the actions and cooperative activities set forth below.
7. The two sides intend to cooperate on:
    A. regulatory frameworks and environmental standards related to reducing emissions of greenhouse gases in the 2020s;
    B. maximizing the societal benefits of the clean energy transition;
    C. policies to encourage decarbonization and electrification of end-use sectors;
    D. key areas related to the circular economy, such as green design and renewable resource utilization; and
    E. deployment and application of technology such as CCUS and direct air capture.
8. Recognizing specifically the significant role that emissions of methane play in increasing temperatures, both countries consider increased action to control and reduce such emissions to be a matter of necessity in the 2020s. To this end:

A. The two countries intend to cooperate to enhance the measurement of methane emissions; to exchange information on their respective policies and programs for strengthening management and control of methane; and to foster joint research into methane emission reduction challenges and solutions.
B. The United States has announced the U.S. Methane Emissions Reduction Action Plan.
C. Taking into account the above cooperation, as appropriate, the two sides intend to do the following before COP 27:
   i. They intend to develop additional measures to enhance methane emission control, at both the national and sub-national levels.
   ii. In addition to its recently communicated NDC, China intends to develop a comprehensive and ambitious National Action Plan on methane, aiming to achieve a significant effect on methane emissions control and reductions in the 2020s.
D. The United States and China intend to convene a meeting in the first half of 2022 to focus on the specifics of enhancing measurement and mitigation of methane, including through standards to reduce methane from the fossil and waste sectors, as well as incentives and programs to reduce methane from the agricultural sector.

9. In order to reduce CO2 emissions:
   A. The two countries intend to cooperate on:

      I. Policies that support the effective integration of high shares of low-cost intermittent renewable energy;
      II. Transmission policies that encourage efficient balancing of electricity supply and demand across broad geographies;
      III. Distributed generation policies that encourage integration of solar, storage, and other clean power solutions closer to electricity users; and
      IV. Energy efficiency policies and standards to reduce electricity waste.

   B. The United States has set a goal to reach 100% carbon pollution-free electricity by 2035.
   C. China will phase down coal consumption during the 15th Five Year Plan and make best efforts to accelerate this work.

10. Recognizing that eliminating global illegal deforestation would contribute meaningfully to the effort to reach the Paris goals, the two countries welcome the Glasgow Leaders' Declaration on Forests and Land Use. The two sides intend to engage collaboratively in support of eliminating global illegal deforestation through effectively enforcing their respective laws on banning illegal imports.
11. The two sides recall their respective commitments regarding the elimination of support for unabated international thermal coal power generation.
12. With respect to COP 26, both countries support an ambitious, balanced, and inclusive outcome on mitigation, adaptation, and support. It must send a clear signal that the Parties to the Paris Agreement:

A. Are committed to tackling the climate crisis by strengthening implementation of the Paris Agreement, reflecting common but differentiated responsibilities and respective capabilities, in the light of different national circumstances;
B. Recall the Paris Agreement's aim to hold the global average temperature increase to well below 2 degrees C and pursue efforts to limit it to 1.5 degrees C and are committed to pursuing such efforts, including by taking ambitious action during this critical decade to keep the above temperature limit within reach, including as necessary communicating or updating 2030 NDCs and long-term strategies;
C. Recognize the significance of adaptation in addressing the climate crisis, including further discussion on the global goal on adaptation and promoting its effective implementation, as well as the scaling up of financial and capacity-building support for adaptation in developing countries; and
D. Resolve to ensure that their collective and individual efforts are informed by, inter alia, the best available science.

13. Both countries recognize the importance of the commitment made by developed countries to the goal of mobilizing jointly $100b per year by 2020 and annually through 2025 to address the needs of developing countries, in the context of meaningful mitigation actions and transparency on implementation, and stress the importance of meeting that goal as soon as possible.
14. Both countries will work cooperatively to complete at COP 26 the implementing arrangements ("rulebook") for Articles 6 and 13 of the Paris Agreement, as well as common time frames for NDCs.
15. Both countries intend to communicate 2035 NDCs in 2025.
16. The two sides intend to establish a "Working Group on Enhancing Climate Action in the 2020s," which will meet regularly to address the climate crisis and advance the multilateral process, focusing on enhancing concrete actions in this decade. This may include, inter alia, continued policy and technical exchanges, identification of programs and projects in areas of mutual interest, meetings of governmental and non-governmental experts, facilitating participation by local governments, enterprises, think tanks, academics, and other experts, exchanging updates on their respective national efforts, considering the need for additional efforts, and reviewing the implementation of the Joint Statement and this Joint Declaration.

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The US-EU summit statement from June 15, 2021, identifies climate change as a key focus of cooperation between the United States and the European Union. The statement is available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/15/u-s-eu-summit-statement/#:~:text=We%20resolve%20to%20take%20concrete,financial%20and%20trade%20promotion%20support and excerpted below.

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II. Protect our planet and foster green growth

9. Climate change, environmental degradation, and the loss of biodiversity are mutually-reinforcing, extraordinary threats to humanity. We plan to continue and strengthen our cooperation to tackle climate change, environmental degradation and the loss of biodiversity, promote green growth, protect our oceans, and urge ambitious action by all other major players.

10. We are committed to the Paris Agreement and its effective and strengthened implementation. To provide an effective platform for cooperation in this regard, we commit to establish a U.S.-EU High-Level Climate Action Group. We intend to lead by example through becoming net zero greenhouse gases (GHG) economies no later than 2050 and implementing our respective enhanced 2030 targets / Nationally Determined Contributions (NDCs). We resolve to engage our international partners to achieve an ambitious outcome at the 26th UN Climate Change Conference of the Parties (COP26), making every effort to keep a 1.5 degree Celsius limit on global temperature within reach. We intend to closely coordinate to promote robust climate measures, address the risk of carbon leakage, and cooperate on sustainable finance, including by providing the private sector with usable tools and metrics.

11. We are determined to accelerate a climate-neutral future and ensure a just transition that leaves no one behind, including through low greenhouse gas emission technologies, an increasing uptake of renewable energies, a stronger engagement to promote clean energy innovation in Mission Innovation, increased energy efficiency and methane emissions reduction, sustainable food systems, including climate-smart agricultural systems, and sustainable and smart mobility. We commit to rapidly scaling up technologies and policies that further accelerate the transition away from unabated coal capacity and to an overwhelmingly decarbonized power system in the 2030s, consistent with our respective 2030 NDCs and 2050 net zero commitments. The U.S.-EU Energy Council will continue to lead coordination on strategic energy issues, including decarbonization of the energy sector, energy security, and sustainable energy supply chains. We resolve to increase our cooperation on transition towards a climate-neutral, resource-efficient and circular economy. In this context, we intend to work towards a Transatlantic Green Technology Alliance that would foster cooperation on the development and deployment of green technologies, as well as promote markets to scale such technologies.

12. We intend to continue to scale up efforts to meet the USD 100 billion per year climate finance goal through to 2025, in the context of meaningful mitigation actions and transparency on implementation from public and private sources, as well as to continue to scale up finance contributing to climate adaptation action. In order to fulfill the objectives of the Paris Agreement, we stress that international investments in unabated coal must stop now and call for global efforts to phase out unabated coal in energy production. We resolve to take concrete steps towards an absolute end to new direct government support for unabated international thermal coal power generation in third countries by the end of 2021, including through Official Development Assistance, export finance, investment, and financial and trade promotion support. We commit to reviewing our official trade, export, and development finance policies towards these objectives.

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The text of the following statement was issued by the Governments of the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan,

the Republic of Uzbekistan, and the United States of America, on the occasion of the C5+1 Climate Ministerial held virtually on September 16, 2021. The statement was issued as a September 21, 2021 State Department media note, available at https://www.state.gov/joint-statement-of-the-c51-on-addressing-the-climate-crisis/.

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Climate policy leaders of the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan, and the Republic of Uzbekistan and U.S. Special Presidential Envoy for Climate John Kerry convened virtually for a C5+1 Ministerial to discuss their collective and country commitments to act to address the climate crisis on September 16, 2021.

The C5+1 governments affirmed the critical nature of the climate crisis faced by the world today. Climate change has already reduced snowfalls in C5 countries, negatively impacts the availability of water for food security and energy generation, accelerates desertification and land degradation, and undermines biodiversity. It is imperative that all countries demonstrate their commitment to act with urgency by submitting ambitious nationally determined contributions (NDCs) ahead of the 26th UN Climate Change Conference of the Parties (COP26) in Glasgow. All C5 countries pledged their NDCs would include specific targets to reduce greenhouse gas emissions and concrete actions to reach those targets in line with the goal of keeping a 1.5 degree Celsius above pre-industrial levels temperature limit within reach.

The C5+1 governments acknowledged the critical need for the world to work together to advance the transition to a net-zero, clean-energy future by mid-century. Participants noted the significant potential for regional collaboration toward advancing that objective, in areas such as the development of the use of renewable energy and methane abatement, as well as through support of the social transition for segments of the population vulnerable to climate change. At the same time, the C5+1 countries recognized accelerated action to address climate change can be an engine for economic growth, and acknowledged opportunities provided by enhanced regional energy connectivity and energy performance.

The C5+1 governments expressed concern about the large-scale consequences of the drying up of the Aral Sea and stressed the importance of efforts aimed at improving the ecological, social, economic, and demographic situation in the Aral Sea region. The C5+1 governments stressed the importance of a special resolution of the UN General Assembly declaring the Aral Sea region a zone of ecological innovations and technologies, adopted in May 2021.

The C5+1 governments confirmed their interest in mitigating consequences of climate change in Central Asia through high-tech innovations; environmentally friendly, energy, and water-saving technologies; preventing further desertification and potential climate migration; as well as the development of ecotourism.

The C5+1 partners reaffirmed their commitment to increase environmental cooperation within the framework of the C5+1 regional diplomatic platform. Accordingly, the C5+1 governments will plan for the Energy and Environment Working Group to meet ahead of COP26 to strengthen the regional dialogue to support science-based and climate-sustainable actions, including:

- Submitting ambitious NDCs by COP26;
- Developing science-based and climate-resilient solutions;

- Cooperating on projects to reduce emissions, particularly carbon- and methane-related emissions;
- Collaborating on developing the use of renewable energy, energy efficiency, regulatory reform, and regional energy integration;
- Improving water resource management and water quality, including through water resource agreements and strengthened water diplomacy;
- Collaboration on disaster risk reduction and climate resilience;
- Conserving, sustainably managing, and restoring natural ecosystems, including through afforestation and reforestation;
- Jointly addressing the ecological and socioeconomic situation of the Aral Sea Basin;
- Mobilizing climate-aligned private sector investment in Central Asia, including through the Multi-Partner Trust Fund for Human Security for the Aral Sea Region;
- U.S. Government-Central Asia climate-related partnerships; and,
- At this point, C5+1 countries have made the following commitments to showcase their increased ambition to address climate change:
    - Republic of Kazakhstan: Kazakhstan has committed to achieve carbon neutrality by 2060 and reach 15 percent share of renewables by 2030.
    - Kyrgyz Republic: The Kyrgyz Republic is in the final stages of considering a revised NDC of 16 percent reduction in greenhouse gas emissions below business-as-usual levels and 44 percent reduction conditional on international support
    - Republic of Uzbekistan: Uzbekistan intends to submit an enhanced and ambitious NDC aligned with 1.5 degrees Celsius by COP26. Uzbekistan will include its renewable energy target of 25 percent by 2030, enshrined in Uzbekistan national law, in its future enhanced NDC.
    - United States of America: the NDC of the United States is to achieve an economy-wide target of reducing its net greenhouse gas emissions by 50-52 percent below 2005 levels in 2030. The United States also aims to decarbonize its electricity system by 2035.

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On November 2, 2021, the Governments of the Republic of South Africa, the United Kingdom of Great Britain and Northern Ireland, the United States of America, the Republic of France and the Federal Republic of Germany, and the European Union issued a Political Declaration on the Just Energy Transition in South Africa. The Declaration is available at https://ukcop26.org/political-declaration-on-the-just-energy-transition-in-south-africa/, and excerpted below.

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1. *Recognising* the need for accelerated actions towards the goals and objectives of the United Nations Framework Convention on Climate Change and Paris Agreement, including the long-term goals on mitigation, adaptation and finance, to avoid the worst impacts of climate change on our countries, our people and the environment;

2. *Noting* that in order to limit the impacts of climate change, the international community needs to collectively halve global greenhouse gas emissions by 2030 and achieve global net zero CO2 emissions by 2050, while strongly reducing other greenhouse gas emissions;

3. *Underlining* the consequent urgency of decarbonising energy systems by increasing energy efficiency, and by accelerating the retirement of coal power and the deployment of renewables;

4. *Acknowledging* that sustainable financing from developed countries, multilateral institutions and investors is required to enhance support for South Africa's transition;

5. *Emphasising* the necessity of a just, equitable and inclusive transition for workers and affected communities so that all are protected against the risks and benefit from the opportunities presented by this transition, and no one is left behind;

6. *Confirming* that the process of transition needs to be based on the full involvement of organised labour and business in targeted programmes of reskilling and upskilling, creating employment and providing other forms of support to ensure that workers are the major beneficiaries of our transition to a greener future;

7. *Acknowledging* that South Africa faces significant development challenges, including poverty, inequality and unemployment, which have been exacerbated by the impacts of the COVID-19 pandemic;

8. *Recognising* that South Africa requires a transition that is just, especially as there are several important sectors of its economy that may otherwise be negatively affected by such a transition, including mining, energy, manufacturing and transport;

9. *Welcoming*, in this context, South Africa's submission of an enhanced, ambitious Nationally Determined Contribution that strengthens the country's contribution to the adaptation and mitigation goals of the Paris Agreement;

10. Recognising the progress made by the Government of the Republic of South Africa – as well as *leadership* from Eskom, organised labour, businesses, civil society, and local governments – towards the net zero aspirations set out in South Africa's Long-Term Low Emissions Development Strategy;

11. *Noting* South Africa's intention to decommission and repurpose or repower coal-fired power stations, invest in new low-emission generation capacity such as renewables, increase energy efficiency and pursue green industrialisation such as manufacturing using green technology and a shift to the production of electric vehicles;

12. *Embracing* the opportunities for industrial innovation to create quality green jobs, increase renewable energy generation and drive sustainable economic growth for a resilient and net zero South African economy;

13. Recognising the unprecedented opportunity for South Africa to become a leader in the just energy *transition*, and the importance of global collaboration;

14. *Recognising* also the need for long term cooperation, commensurate with the timeline for South Africa's just energy transition; and

15. *Acknowledging* the commitments of developed countries to provide support, including finance, to developing countries' mitigation and adaptation efforts;

Resolve to

16. Establish an ambitious long-term partnership to support South Africa's pathway to low emissions and climate resilient development, to accelerate the just transition and the decarbonisation of the electricity system, and to develop new economic opportunities such as green hydrogen and electric vehicles amongst other interventions to support South Africa's shift towards a low carbon future.

17. Establish an inclusive task force comprised of South Africa and international partners, to enable:

1) The accelerated decarbonisation of South Africa's electricity system to achieve the most ambitious target possible within South Africa's Nationally Determined Contribution range to the extent of available resources;
2) South Africa's efforts to lead a just transition that protects vulnerable workers and communities, especially coal miners, women and youth, affected by the move away from coal;
3) South Africa's nationally determined efforts to successfully and sustainably manage Eskom's debt, define the role of the private sector, and create an enabling environment through policy reform in the electricity sector, such as unbundling and improved revenue collection;
4) Local value chains (including Micro, Small and Medium Enterprises) to benefit from new areas of economic opportunity; and
5) Opportunities for technological innovation and private investment to drive the creation of green and quality jobs as part of a prosperous low emission economy.

18. Subject to concurrence on the investment framework, and in line with budgetary procedures and consensus on the use of funds and terms on which finance may be provided, mobilise an initial amount of approximately $8.5 billion over the next three to five years through a combination of appropriate financial instruments, which may include but is not limited to multilateral and bilateral grants, concessional loans, guarantees and private investments, and technical support to enable the just transition, with a view to longer term engagement.

19. Explore additional sources of financing and mobilise or include additional international partners, to further support South Africa's ambition.

20. This partnership is a demonstration of the willingness of both developed and developing countries to cooperate on a vital challenge facing humanity.

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2. Desertification

On November 22, 2021, Jesse Walter, ECOSOC adviser, delivered the U.S. explanation of position for the adoption of the resolution on implementation of the UN Convention to Combat Desertification. His statement is excerpted below and available at https://usun.usmission.gov/explanation-of-position-for-the-adoption-of-the-implementation-of-the-united-nations-convention-to-combat-desertification/.

> The United States strongly supports the United Nations Convention to Combat Desertification and its efforts to raise the priority of desertification, promote sustainable land use practices at the national level, and mitigate the impacts of

drought and desertification for the more than one billion people worldwide living in dryland ecosystems.

We are pleased to join consensus on this resolution. Regarding references to the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda, we refer you to our general statement delivered on November 18.

3. Ozone Depletion

On November 16, 2021, the Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (the "Montreal Protocol"), adopted at Kigali on October 15, 2016, by the Twenty-Eighth Meeting of the Parties to the Montreal Protocol (the "Kigali Amendment") was received in the Senate and referred to the Committee on Foreign Relations. Treaty Doc No. 117-1. See https://www.senate.gov/legislative/trty_rcd.htm. The President's message to the Senate on transmittal of the Kigali Amendment is available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/16/a-message-to-the-senate-on-the-amendment-to-the-montreal-protocol-on-substances-that-deplete-the-ozone-layer/ and excerpted below.

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With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (the "Montreal Protocol"), adopted at Kigali on October 15, 2016, by the Twenty-Eighth Meeting of the Parties to the Montreal Protocol (the "Kigali Amendment"). The report of the Department of State is also enclosed for the information of the Senate.

The principal features of the Kigali Amendment provide for a gradual phasedown in the production and consumption of hydrofluorocarbons (HFCs), which are alternatives to ozone-depleting substances being phased out under the Montreal Protocol, as well as related provisions concerning reporting, licensing, control of trade with non-Parties, and control of certain byproduct emissions.

The United States has sufficient domestic authority to implement obligations under the Kigali Amendment, including through the American Innovation and Manufacturing Act of 2020 (the "AIM Act") and the Clean Air Act. The Environmental Protection Agency's recent rulemakings under the AIM Act establish a domestic HFC allocation system and other provisions that would enable the United States to begin implementation of the provisions of the Kigali Amendment.

The Kigali Amendment has strong support from the U.S. business community and nongovernmental organizations. Ratification by the United States would advance U.S. interests in remaining a leader in the development and deployment of HFC alternatives, ensuring access to rapidly growing refrigeration and cooling markets overseas and stimulating U.S. investment, exports, and job growth in this sector. Ratification will also ensure the United States continues to

have a full voice to represent U.S. economic and environmental interests as implementation of the Kigali Amendment moves forward in coming years.

The Kigali Amendment entered into force on January 1, 2019, and there are currently 124 Parties to the Amendment. The Senate has given its advice and consent to ratification of all four previous amendments to the Montreal Protocol, with bipartisan support. I recommend that the Senate give favorable consideration to the Kigali Amendment and give its advice and consent to ratification at the earliest date.

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B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION

1. Fishing Regulation

See Chapter 12 for the December 7, 2021 U.S. statement on the UN General Assembly resolution on oceans and the law of the sea and on sustainable fisheries, which is available at https://usun.usmission.gov/remarks-at-the-76th-session-of-the-un-general-assembly-and-the-47th-plenary-meeting-on-agenda-item-78-oceans-and-law-of-the-sea/. The portion of the statement relating to fisheries follows.

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The United States is also pleased to co-sponsor the resolution on sustainable fisheries. As with the resolution on oceans and the law of the sea, limitations on our ability to meet and negotiate led to an agreement to only provide technical updates to the sustainable fisheries resolution.

We appreciate the constructive cooperation of delegations, under the patient leadership of the Coordinator, to develop a pragmatic approach to rescheduling meetings related to sustainable fisheries disrupted by the pandemic. The United States looks forward to the 15th round of informal consultations of States Parties to the UN Fish Stocks Agreement in the first half of 2022, the bottom fishing review also in 2022, and the 16th round of informal consultation of States Parties to the UN Fish Stocks Agreement and resumed Review Conference in 2023.

We encourage States and relevant organizations to consider providing updates that could inform the upcoming workshop on the implementation of measures to address the impacts of bottom fishing on vulnerable marine ecosystems and the long-term sustainability of deep-sea fish stocks.

While we did not have an opportunity to discuss new substantive issues in the sustainable fisheries resolution, the resolution does acknowledge our collective accomplishments regarding the entry into force of the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, as well as the UN Food and Agriculture Organization's Committee on Fisheries 2021 Declaration for Sustainable Fisheries and Aquaculture. Together with these successes, we also recognized new challenges in fisheries management.

Fishing activities continue around the world – contributing to livelihoods and food security during this challenging time, even as COVID-19 continues to create difficulties with

respect to monitoring of some fisheries. The international community has also focused with new urgency on specific examples of inadequately controlled fishing activities, including illegal, unreported, and unregulated fishing, which affect everything from the health of ecosystems and coastal communities to the working conditions of observers and crew to the economic development and prosperity of individual Member States.

We will continue to call for flag states to take responsibility for these activities and adopt more robust management measures where needed in regional fisheries management organizations.

With regard to both the oceans and fisheries resolutions, we refer you to our General Statement delivered on November 18, 2021, to the 76th General Assembly Second Committee session, which addresses our concerns regarding the 2030 Agenda for Sustainable Development, the Addis Ababa Action Agenda, and technology transfer, and underscores the independence of the World Trade Organization.

We would like to thank the coordinators of the informal consultations on both resolutions – Ms. Natalie Morris-Sharma of Singapore and Mr. Andreas Kravik of Norway – for their outstanding coordination of the resolutions through modalities of virtual work resulting from the COVID-19 pandemic. We also would like to thank the Division for Ocean Affairs and the Law of the Sea for its expertise and hard work throughout the virtual consultations on both resolutions.

Finally, we express our appreciation for delegations' flexibility and cooperation in embracing the virtual formats taken for our consultations on both resolutions. It is our hope that this spirit of flexibility and cooperation will characterize our efforts to address the numerous and complex issues that lie ahead for the ocean and for fisheries.

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2. Agreement on fisheries in the Arctic

The State Department issued a media note on June 25, 2021 to highlight that the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean entered into force on that day. The agreement is available at https://www.dfo-mpo.gc.ca/international/agreement-accord-eng.htm. The media note, available at https://www.state.gov/the-agreement-to-prevent-unregulated-high-seas-fisheries-in-the-central-arctic-ocean-enters-into-force/, describes the agreement as "the first multilateral agreement of its kind to take a legally binding, precautionary approach to protect an area from commercial fishing before such fishing has begun." The media note goes on to say:

> 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, commercial fishing may be possible in the foreseeable future. The Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean aims to manage potential fishing in the high seas of this region.
>
> The United States led the negotiation of the Agreement, which was signed in Greenland on October 3, 2018. There were ten participants in the negotiation of and Signatories to 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.

3. Illegal, Unreported, and Unregulated Fishing

U.S. Coast Guard Cutter Stone deployed from the United States in December 2020, and completed its deployment to the South Atlantic to counter Illegal, Unregulated, and Unreported ("IUU") fishing on March 1. 2021. The deployment, Operation Southern Cross, partners with Guyana, Brazil, Uruguay, and Portugal, to counter illicit maritime activity. Among the instruments that formed a basis for these partnerships are a recently- signed information-sharing agreement with the Brazilian navy to drive counter-IUU fisheries enforcement operations and a new maritime law enforcement agreement with Guyana. See U.S. Southern Command media note, available at https://www.southcom.mil/Media/Special-Coverage/SOUTHCOM-Support-to-Operation-Southern-Cross/.

4. Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR")

At the annual meeting of the Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR"), held virtually from October 18-29, 2021, Russia blocked consensus on a conservation measure relating to the toothfish based on "science" that has been rejected by other members. The Scientific Committee recommended the conservation measure and Russia was the only CCAMLR member that did not join consensus. The preliminary meeting report is available at https://www.ccamlr.org/en/system/files/e-cc-40-rep.pdf. The U.S. statement, paragraph 6.30, follows.

> This is a concerning situation. It is not a bilateral issue. It has repercussions for the integrity of CCAMLR and for the Antarctic Treaty System in its entirety.
>
> The USA does not believe there is a scientific basis to close the toothfish fishery in Subarea 48.3. We continue to support the adoption of CM 41-02 with catch limits for toothfish in Subarea 48.3 at the levels indicated in paragraph 3.61 of the Scientific Committee's report.
>
> Underscoring what we said earlier this week: the foundation of Antarctic Treaty System relies on international and scientific cooperation. We have seen a lack of cooperation by one Member on this issue today.
>
> Nevertheless, we remain hopeful that the cooperative spirit that has been the foundation of the Antarctic Treaty System and CCAMLR may yet prevail.

5. Antarctic Treaty Consultative Meeting ("ATCM")

At the Antarctic Treaty Consultative Meeting ("ATCM"), held in June 2021, the United States advocated updating requirements for information exchange on national expeditions. The United States, along with Italy, proposed that modifying the Electronic Information Exchange System ("EIES") would support Parties' compliance with certain reporting requirements. As stated in paragraph 132 of Volume I the final report, available at https://documents.ats.aq/ATCM43/fr/ATCM43_fr001_e.pdf, "The United States expressed the view that the credibility of the Antarctic Treaty was increased when the Parties provided input and the Secretariat disseminated reliable and relevant information." The ATCM adopted Decision 7 (2021): Updating requirements for Information Exchange on national expeditions. See paragraph 251 at page 69 and page 337 of the final report.

6. Arctic Council

On May 20, 2021, Secretary Blinken delivered the U.S. intervention at the Arctic Council ministerial in Reykjavik, Iceland. Secretary Blinken's remarks are excerpted below and available at https://www.state.gov/secretary-antony-j-blinken-intervention-at-arctic-council-ministerial/.

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[T]he United States welcomes Russia's chairmanship of the council. We look forward to implementing the council's first-ever strategic plan in cooperation with Russia and all of our partners. It's fitting that we would adopt this 10-year plan for the council's 25th anniversary. It represents an important step forward in ensuring that the council becomes even more effective and cooperative for the future.

And I do want to echo what several of my fellow ministers have already said. We're committed to advancing a peaceful Arctic region where cooperation prevails on climate, the environment, science and safety, and where sustainable economic development benefits the people of the region themselves.

This council is indispensable to this vision. This is the preeminent forum for the eight Arctic states and six permanent participants to cooperate and address shared priorities together. Let me quickly just mention a few of the priorities from our perspective.

One is effective governance and the rule of law to ensure that the Arctic remains a region free of conflict, where countries act responsibly. Another is stopping COVID-19 and making sure that we're better prepared for future global health emergencies. The council has analyzed the health, economic, and social impacts of COVID-19 on Arctic communities and reinforced our understanding of what communities need to respond effectively to the pandemic.

Another priority, of course, that everyone has touched on, and it's a focus of our work, is the climate crisis. The Arctic, as others have noted, is warming at three times the global average, which adds even greater urgency to our efforts. Reducing emissions of black carbon and methane is particularly important. I'm proud that the most recent report on the United States black carbon

emissions was 34 percent below 2013 levels, the largest reported black carbon reduction by any Arctic state. And we're grateful to the council for being on the leading edge of assessing and reporting impacts of climate change in the Arctic.

In addition to climate, we need to protect the environment of the Arctic. And on that front, I want to applaud the work of the council's six working groups and one expert group, which has increased the council's preparedness to handle the risks that come with increased human activity in the region. The United States intends to provide up to a million dollars to support the council's climate environmental protection work, and we'll work with and notify Congress of our intent.

Additionally, under Iceland's leadership, the council has increased its work on marine litter and plastic pollution, as others have noted. It's conducted exercises to prepare for possible oil spills and search and rescue events, signed a statement of cooperation with the Arctic Coast Guard Forum, and the U.S. Coast Guard is a proud partner in that work. And the council has increased its focus on wildland fires, which are one of the most significant early impacts of climate change in the Arctic.

There are now projects underway across multiple working groups, and critically, indigenous knowledge is being incorporated. That's vital. Indigenous peoples have generations worth of knowledge about how to be good stewards of the Arctic. We must be true and equal partners in this work. And we have to bring the same partnership to bear in pursuing economic development in a sustainable and transparent way that directly benefits indigenous communities. That's the core test of this council. I'm confident that we can meet it together.

Let's take a step back for just a moment. The council has proven itself to be responsive and adaptable, to make good use of expertise, to be partners to indigenous leaders and communities. Our cooperation has become stronger. At the same time, the Arctic as a region for strategic competition has seized the world's attention, but the Arctic is more than a strategically or economically significant region. It's home to our people. Its hallmark has been and must remain peaceful cooperation. It's our responsibility to protect that peaceful cooperation and to build on it as neighbors and as partners.

So let me close by thanking everyone who has contributed to the broad range of Arctic Council initiatives, including government officials, permanent participants, working groups, expert groups, secretariats, observers. Thank you all for your diligence and commitment. The United States shares your commitment to the Arctic region. We look forward to working with you through this council for many years to come. Thank you.

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Also on May 20, 2021, the State Department issued a media note announcing the release of the 2021 joint declaration of the Arctic Council and other outcomes of the ministerial. The media note is available at https://www.state.gov/release-of-the-2021-arctic-council-joint-declaration-and-strategic-plan-in-reykjavik-iceland/ and excerpted below.

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Today, at the 12th Arctic Council Ministerial meeting in Reykjavik, Iceland, foreign ministers from all eight Arctic States signed onto the 2021 joint declaration reaffirming the Council's commitment to maintain peace, stability, and constructive cooperation in the Arctic region, emphasizing Arctic States' unique position to promote responsible governance in the region, and asserting the importance of immediately addressing the climate crisis in the Arctic. Secretary of State Antony Blinken's participation in the Arctic Council ministerial and signing of the joint declaration reaffirmed the U.S. commitment to a peaceful, prosperous, and sustainable Arctic region. In recognition of the Council's 25th anniversary, the ministers approved the Council's first ever strategic plan that reflects the shared values and joint aspirations of the eight Arctic States and six indigenous Permanent Participant organization. It will guide the Council's work for the next decade.

Members also recognized the Arctic Council's 25th anniversary and marked the passing of the two-year chair from Iceland to the Russian Federation (2021 to 2023). During its time as Arctic Council chair, Iceland emphasized work on the Arctic marine environment, climate and clean energy solutions, people and communities in the Arctic, and strengthening the Arctic Council. Iceland's leadership and adaptability these past two years have strengthened the Arctic Council and allowed its work not only to continue, but flourish under challenging conditions posed by the COVID-19 pandemic. The Council's accomplishments during Iceland's time as chair include deliverables that strengthen the knowledge base on Arctic shipping, enhance emergency response in Arctic waters, assess climate impacts on Arctic ecosystems, reduce pollution, promote the well-being of Arctic inhabitants, and much more. Major reports adopted at the Ministerial meeting include the Arctic Climate Change Update 2021, the State of the Arctic Terrestrial Biodiversity Report, a Regional Action Plan on Marine Litter in the Arctic, Gender Equality in the Arctic report, and the Summary of Progress and Recommendations from the Council's Expert Group on Black Carbon and Methane. All deliverables are available via the Arctic Council's open archive (**https://oaarchive.arctic-council.org/**).

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7. International instrument to combat ocean plastic pollution

On November 18, 2021, Secretary Blinken announced U.S. support for the negotiation of an international instrument to combat ocean plastic pollution. Secretary Blinken's remarks, delivered at a UN Environmental Program event in Nairobi, Kenya, are excerpted below, and available at https://www.state.gov/secretary-antony-j-blinken-at-an-ocean-plastics-event//.

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[T]oday, we are stepping up and stepping up our efforts to tackle another pollutant that threatens our planet, plastic, by announcing the United States support for multilateral negotiations on a global agreement to combat ocean plastic pollution. By launching these negotiations at the UN

Environmental Assembly in February 2022, our goal is to create a tool that we can use to protect our oceans and all of the life that they sustain from growing global harms of plastic pollution.

It's crucial that the agreement call on countries to develop and enforce strong national action plans to address this problem at its source. Many countries, climate and ocean advocates, private companies have supported this effort for some time. We're grateful for the serious work that they've already put into this effort and look forward to working with them. The private sector in particular will need to do more to cut plastic pollution and invest in innovation. We recognize that different actors will have different capacities to act, but every nation, every community, and indeed every individual has a role to play, and let me just say a little bit about why.

It's estimated that we add between eight and fourteen million tons of plastic pollution to the ocean every single year. That's about one truckload dumped in the sea every minute of every day, and that rate is increasing, not decreasing. Plastic can take anywhere from decades to millions of years to break down. In that time, waste is carried everywhere from Antarctica to the Marianas Trench. Some of it is caught in massive swirling sea currents. The biggest one, the Great Pacific Garbage Patch, is spread across an area three times the size of France.

The negative effects of plastic pollution on sea life and on human beings are serious. Much of the plastic at sea is broken down into tiny pieces that sea animals eat. These microplastics can tear apart animals' organs, clog their intestines, and give them the illusion they're full, causing them to starve to death. And because plastics absorb toxins, when we eat seafood, we're not only consuming microplastics, but toxins as well. In addition, plastic pollution can hurt small-scale fishing and discourage tourism to coastal areas.

As we know, our health, our survival is bound up in the health of our oceans. We have to do more to protect them. Supporting the development of this new agreement is just one way that we're working to do that, but it comes atop many others. At the 2019 Our Ocean Conference, the United States announced over 20 new commitments valued at more than $1.2 billion to promote sustainable fisheries, combat marine debris, invest in marine science. In February, the United States will co-host the next Our Ocean Conference with Palau, where we'll focus on the link between oceans and climate change and the importance of healthy oceans to the survival of Small Island Developing States.

That connection is at the heart of the SALPIE Initiative that President Biden launched in March to increase U.S. economic cooperation with island countries and territories. This overarching goal has strong bipartisan support from the United States Congress which passed the landmark 2020 Save Our Seas 2.0 legislation. As that legislation recognizes, innovation is crucial, and on this, the United States is leading by the power of our example, such as the U.S. Department of Energy's Plastics Innovation Challenge, which is investing millions of dollars of research in national labs, universities, and industry to make leaps in areas such as developing new plastics that are recyclable by design.

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8. Sea Turtle Conservation and Shrimp Imports

The Department of State makes annual certifications related to conservation of sea turtles, consistent with § 609 of U.S. Public Law 101-162, 16 U.S.C. § 1537 note ("Section

609"), which prohibits imports of shrimp and shrimp products harvested with methods that may adversely affect sea turtles. On October 21, 2021, the State Department announced in a media note, available at https://www.state.gov/the-united-states-certifies-mexicos-shrimp-imports/, that it had notified Congress on October 21, 2021 of the certification of Mexico under Section 609. 86 Fed. Reg. 61,825 (Nov. 8, 2021). The media note explains:

> This certification, allowing again for importation of wild-caught shrimp into the United States from Mexico pursuant to Section 609, is based on a determination that Mexico's turtle excluder devices (TEDs) program is again comparable in effectiveness to the U.S. program.
>
> The United States and Mexico have been working in close cooperation on sea turtle conservation as well as a range of bilateral fisheries and marine conservation issues. The Government of Mexico implemented a plan of action in the past several months to strengthen sea turtle conservation in its shrimp trawl fisheries, resulting in significantly improved use of TEDs by its fishing industry, as verified by a team of representatives from the State Department and National Marine Fisheries Service.
>
> The U.S. government is currently providing technology and capacity-building assistance to other nations to contribute to the recovery of sea turtle species and help them receive certification under Section 609. When properly designed, built, installed, used, and maintained, TEDs allow 97 percent of sea turtles to escape the shrimp net without appreciable loss of shrimp. The U.S. government also encourages legislation in other countries to prevent the importation of shrimp harvested in a manner harmful to protected sea turtles.

C. OTHER ISSUES

1. The Global Health Response to the COVID-19 Pandemic

a. Negotiations of a pandemic instrument

The United States cosponsored a decision at a special session of the World Health Assembly ("WHA") on December 1, 2021 to launch negotiations of an international instrument on pandemic prevention, preparedness, and response. Excerpts follow from the December 1, 2021 decision, which is available at https://apps.who.int/gb/ebwha/pdf_files/WHASS2-REC1/WHASS2_REC1-en.pdf#page=1.

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Decided:

(1) to establish, in accordance with Rule 41 of its Rules of Procedure, an intergovernmental negotiating body open to all Member States and Associate Members (the "INB") to draft and negotiate a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response, with a view to adoption under Article 19, or under other provisions of the WHO Constitution as may be deemed appropriate by the INB;

(2) that the first meeting of the INB shall be held no later than 1 March 2022, in order to elect two co-chairs, reflecting a balance of developed and developing countries, and four vice-chairs, one from each of the six WHO regions, and to define and agree on its working methods and timelines, consistent with this decision and based on the principles of inclusiveness, transparency, efficiency, Member State leadership and consensus;

(3) that as part of its working methods, the INB shall determine an inclusive Member State led process, to be facilitated by the co-chairs and vice-chairs, to first identify the substantive elements of the instrument and to then begin the development of a working draft to be presented, on the basis of progress achieved, for the consideration of the INB at its second meeting, to be held no later than 1 August 2022, at the end of which the INB will identify the provision of the WHO Constitution under which the instrument should be adopted in line with paragraph (1);

(4) that the process referred to in paragraph (3) should be informed by evidence and should take into account the discussions and outcomes of the Member States Working Group on Strengthening WHO Preparedness and Response to Health Emergencies, considering the need for coherence and complementarity between the process of developing the new instrument and the ongoing work under resolution WHA74.7, particularly with regard to implementation and strengthening of the IHR (2005);

(5) that the INB shall submit its outcome for consideration by the Seventy-seventh World Health Assembly, with a progress report to the Seventy-sixth World Health Assembly;

Requested the Director-General to support the INB by:

(1) convening its first meeting no later than 1 March 2022, and subsequent meetings at the request of the co-chairs as frequently as necessary;

(2) holding public hearings, in line with standard WHO practice, prior to the second meeting of the INB to inform its deliberations;

(3) facilitating the participation, to the extent the INB so decides, in accordance with relevant Rules of Procedure and resolutions and decisions of the Health Assembly, of representatives of organizations of the United Nations system and other intergovernmental organizations with which WHO has established effective relations, Observers, representatives of non-State actors in official relations with WHO, and of other relevant stakeholders and experts as decided by the INB, recognizing the importance of broad engagement to ensure a successful outcome;

(4) providing the INB with the necessary services and facilities for the performance of its work, including complete, relevant and timely information and advice.

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b. Proposed amendments to the International Health Regulations

The United States has advocated for targeted amendments to the International Health Regulations. On August 31, 2021, Secretary Blinken and Department of Health and Human Services Secretary Xavier Becerra published an editorial calling for targeted amendments, excerpted below and available at https://jamanetwork.com/journals/jama/fullarticle/2783866.*

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Since the SARS-CoV-2 outbreak emerged in late 2019, more than 623 000 people in the US and 4.4 million people worldwide are known to have died from COVID-19.1,2 The true death count is probably many times higher. More than 200 million more people around the world have been infected. The rapid spread of highly contagious variants is a grim signal that those numbers will continue to rise.

Behind the daily reports are the momentous health, economic, and security challenges this crisis poses for the US and the rest of the world. The pandemic has revealed significant weaknesses in global health security. While working to end the COVID-19 pandemic as quickly as possible, leaders around the world must also marshal the resources and commitment to look beyond this pandemic and build much stronger global health security for the future. There are 4 critical components of an effective global health security system in a post-COVID world, which US government and global leaders must come together to pursue.

First, global leaders must modernize essential global institutions, starting with the World Health Organization (WHO). Many of the institutions that are critical to global health security—including the WHO, other technical agencies of the United Nations, and the regional and global multilateral development banks that facilitate funding for preparedness and response—were created decades ago. A reassessment is needed to ensure that they have the resources, organizational capabilities, and flexibility necessary to respond swiftly to today's threats.

Second, countries and institutions must strengthen international laws and norms, and agreements written at an earlier time may need to be revised. For example, as the climate crisis gives rise to emerging infectious diseases, mechanisms for efficient and effective sharing of data on genetic sequencing must be examined. In a globalized world, regional public health organizations such as the Africa Centres for Disease Control and Prevention should be more involved in decision-making; so should organizations like the International Civil Aviation Organization. New technologies are rapidly changing response capabilities, from state-of-the-art laboratory equipment to medical countermeasures like newly developed vaccines. Many existing agreements, including those governing public health, intellectual property, information sharing, and deliberate biological events, do not reflect these new realities. By reexamining and modernizing these agreements and norms, they could work better for the 21st-century world.

Third, the international community must mobilize sustained financing. Without sufficient funding, it is far more difficult to detect and respond to biological threats, help countries build their own national capacities to respond to crises, fund research and development into new treatments, and carry out rapid response. A critical first step is the creation of a financial

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* Editor's note: Proposed amendments were circulated to member states in January 2022.

intermediary fund, capitalized with a mix of private and public funding; the US plans to work with countries and financial institutions to create such a fund. In the wake of past global health threats, including SARS and Ebola, national governments, international organizations, and civil society all failed to make the investments necessary to prevent future crises. The international community must seize the momentum around the current pandemic to make sure the entire world is prepared for the next one.

Fourth, global leaders must strengthen global governance, with an emphasis on transparency and accountability. Facts, data, and science are the most effective tools available. When governments and organizations share data openly, coordinate policies forthrightly, and take responsibility for missteps so they and everyone can do better, the inevitable result is lives saved.

Across all this work, health equity must be addressed and advanced. COVID-19 has exacerbated existing inequities and inequalities around the world. The goal must be to design a global health security regime that will reduce morbidity and mortality and improve well-being across all populations in all countries. It is the right thing to do, and it is in the enlightened self-interest of each nation because viruses like SARS-CoV-2 do not stop at borders. Without an equitable and fully inclusive approach, every country and every person is vulnerable. Whether building regional vaccine manufacturing capacity, facilitating voluntary technology transfers, or sharing samples at the onset of an outbreak, approaches must be designed that can be adapted for countries at every income level, not just the wealthiest.

Some major strides to advance global health security may take years to accomplish, for example, the creation of a new international instrument on preparedness and response, which the WHO and a number of other countries have endorsed. But it is not necessary to choose between a new instrument and a revised standing legal framework; immediate steps can make a meaningful difference. One is strengthening the WHO's International Health Regulations (IHR), adopted by the World Health Assembly in 1969 and revised in 2005.[4] This is the legal framework under which 196 States Parties are responsible for developing their capacities to prevent, detect, report, and respond to public health emergencies within their borders, to prevent them from spreading to other countries. The IHR key provisions include how to report public health events quickly, handle international travel and transport safely, and protect people's personal health information. It is a vital legal agreement, but the COVID-19 pandemic revealed weaknesses in it that can be fixed, particularly around early warning systems, coordinating the response, and information sharing.

Through targeted amendments following established practice at the WHO, the IHR can be revised to improve risk assessments, advance equity, help create an environment in which the WHO can fulfill its mission, encourage better information sharing, and clarify the roles and responsibilities of different organizations and governments in an emergency.

Specifically, the amendments to the IHR could include the following:

- Establish early warning triggers for action, for example, through a system of intermediate, graded, or regional health alerts prior to determination of a Public Health Emergency of International Concern (PHEIC) or pandemic.
- Enable more rapid sharing of information by countries and the WHO when an event that may constitute a PHEIC is identified. This would make it easier to identify emerging infectious

[4] World Health Organization. International Health Regulations (2005) Third Edition. https://www.who.int/publications/i/item/9789241580496.

diseases, track genomic sequence data, and establish disease surveillance quickly.

- Strengthen implementation of the IHR, for example, through a new compliance committee or regular conferences that bring all parties together to address pressing issues.
- Bolster rapid assessments and responses from the WHO to provide assistance and expertise in response to a possible PHEIC.
- Enhance the effectiveness of guidance provided by the WHO Emergency Committee convened to assess potential PHEICs by making its deliberations more transparent and by expanding the professional and geographic diversity of its membership.
- The IHR was last revised in 2005, yet the world has changed a great deal in the past 16 years. Amending the IHR again will make it more effective, build on the work advanced by public health experts through the years, and sharpen the work for the future.

Since the influenza pandemic more than a century ago, the world has made major leaps forward in science and medicine, as well as diplomacy, global governance, and the creation of a system of international law and organizations to foster cooperation across borders. Now is the time to take another leap forward to establish a more effective, innovative, responsive, and equitable system for global health security. That is how the legacy of the COVID-19 pandemic could result in a healthier, safer, and more secure world for all.

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2. 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 provided notice of a public information session regarding upcoming United Nations negotiations concerning marine biodiversity in areas beyond national jurisdiction, scheduled for February 25, 2020, 85 Fed. Reg. 6010 (Feb. 3, 2020), was rescheduled for August 2021, and was rescheduled again for March 2022, due to COVID-19. Additional information on the BBNJ process is available at https://www.un.org/bbnj/.

The meeting of the Conference of the Parties ("COP") to the UN Convention on Biological Diversity ("CBD"), which was scheduled to take place in May 2020 in Kunming, China, convened, in part, largely as an online event in October 2021 for a ceremonial opening session. In August 2021 a meeting of the Open-ended Working Group ("OEWG") on development of a post-2020 Global Biodiversity Framework ("GBF") was held virtually. The OEWG meeting was primarily comprised of negotiations on the GBF, as well as ongoing negotiations about digital sequence information (or, according to U.S. framing, genetic sequence data). Negotiations on these items did not conclude and were left to be further negotiated at the OEWG meetings in 2022. The second part of the COP, which is intended to finalize and adopt the GBF, is scheduled for December 2022 in Montreal.

3. Sustainable Development

On July 15, 2021, Acting Representative to the Economic and Social Affairs Council Jason R. Mack delivered the U.S. explanation of position at the High-Level Political Forum on Sustainable Development. His statement is excerpted below and available at https://usun.usmission.gov/explanation-of-position-at-the-high-level-political-forum-on-sustainable-development-full-statement/.

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The United States thanks the Governments of Finland and Iraq as co-facilitators for their diligence and creativity in shepherding the negotiation of today's Ministerial Declaration.

The United States strongly supports the 2030 Agenda and we are committed to its implementation. We value the declaration's reaffirmation of the crucial cross-cutting values that drive progress in the achievement of the SDGs, including transparency, good governance and the rule of law, combatting inequality, respect for human rights, inclusive economic growth, environmental protection, gender equality, the empowerment of women and girls, preventing and responding to gender-based violence, poverty eradication, and the use of science and data to support policymakers. We are pleased to join consensus on the adoption of this declaration with the following clarifications.

First, we stress that the declaration should not be used to attempt to renegotiate the goals and targets of the 2030 Agenda. Where language in this declaration does not accurately reflect agreed language from the 2030 Agenda, such as in paragraph 8, the United States will not view it as a basis for future negotiations. In addition, we understand the reference to "human rights to safe drinking water and sanitation" to refer to the human right to safe drinking water and sanitation derived from economic, social, and cultural rights contained in the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

We regret that the declaration fails to recognize the critical importance of the One Health approach to pandemic preparedness. Understanding the interconnection between the health of people, animals, both domestic and wild, plants, and their shared environment is vital to achieving improved health outcomes and mitigating pandemic and epidemic risks posed by zoonotic spillover.

The United States is deeply committed to ending hunger and malnutrition and building more sustainable, equitable, and resilient food systems. The United States is the largest single provider of international development and humanitarian assistance for food security and nutrition. With respect to paragraph 15 on SDG2, we stress that references to "the right of everyone to have access to safe and nutritious food" and the "right to adequate food" are to be understood as consistent with the right to an adequate standard of living, including food, in the ICESCR.

Decent work is essential to pandemic recovery efforts and the achievement of the 2030 Agenda. In our global recovery, we must promote and protect workers' rights everywhere. We regret that during this International Year for the Elimination of Child Labor, the declaration does not specifically address elimination of the "worst forms of child labor." We are pleased to note that the United States has developed a whole of government action pledge to support the

elimination of child labor, forced labor, human trafficking, and modern slavery, which supports SDG target 8.7. We would also note that the United States implements its strong commitment to pursuing gender pay equity by observing the principle of "equal pay for equal work."

The inclusion of paragraph 35 from the 2030 Agenda does not contribute to this declaration, and represents an attempt to politicize the important work that Member States undertake in the HLPF. We have consequently voted against its inclusion as paragraph 29 in the declaration, and we also dissociate from it. We stress, too, that the term "right to development" is not recognized in any of the core UN human rights conventions and does not have an agreed international meaning.

The United States supports a multilateral trading system that is open, rules-based predictable, transparent, and non-discriminatory, recognizing it as an important factor in facilitating sustainable development. However, characterizing a trading system under the World Trade Organization (WTO), which has its own membership and mandate, is outside of the scope of the UN. The UN must respect the independent mandates of other processes and institutions, including trade negotiations, and must not attempt to characterize or interfere with decisions and actions in those fora, including at the WTO. In addition, we would stress that, in paragraphs 15 and 35, global supply chains cannot "ensure" the free flow of goods, though governments can take appropriate actions to facilitate this flow. Regarding the language on "trade finance and trade facilitation measures," we stress that decisions on trade finance transactions are made by private entities, not governments, and that trade facilitation measures apply to all goods, regardless of origin. We will not consider trade facilitation measures for one class of countries.

The United States firmly considers that strong protection and enforcement of intellectual property provides critical incentives needed to drive the innovation that will address the health, environmental and development challenges of today and tomorrow. The United States understands, with respect to this declaration in general and paragraphs 7, 20, and 22 in particular, that references to dissemination of technology and transfer of, or access to, technology are to voluntary transfers on mutually agreed terms, as reflected in paragraph 39, and that all references to access to information and/or knowledge are to information or knowledge that is made available with the authorization of the legitimate holder. The United States underscores the importance of regulatory and legal environments that support innovation. The language in paragraphs 7, 20, and 22 concerning technology transfer and knowledge and information sharing, does not, from the United States' perspective, serve as a precedent for future negotiated documents.

The United States is committed to international cooperation to address pressing global challenges, including to combat the COVID-19 pandemic and its effects. We have pledged to donate half-a-billion Pfizer vaccines to 92 low-and lower-middle income countries around the world and the African Union. These vaccines are in addition to the 80 million doses we have committed to supply by the end of this month, and the $2 billion we have already contributed to COVAX, the multilateral COVID-vaccination effort.

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Regarding paragraph 46, the United States stresses that the language and structure of the Debt Service Suspension Initiative (DSSI) was negotiated in the appropriate fora, including the G20, G7, and Paris Club, to allow the program to operate in a rapid and efficient manner. The role of the private sector was carefully considered, and parties agreed that participation by the

private sector in DSSI should be encouraged but ultimately voluntary. It is not appropriate for the UN to attempt to reinterpret the agreement reached in the appropriate fora. Similarly, we cannot accept references suggesting that debt treatment is in any way a prerequisite for the achievement of the SDGs or Paris Agreement. Such suggestions are an attempt to condition commitments made under those frameworks on independent processes. The United States therefore dissociates from that language and will not consider it agreed in future negotiations.

The United States recognizes the vital importance of sustainable infrastructure in achieving the SDGs, as reflected in President Biden's commitment to the G7 Build Back Better World partnership. However, paragraph 47 does not account for existing work being done on this topic in appropriate fora, nor does it recognize the importance of ensuring that infrastructure is developed using international standards and best practices on the environment, debt, and labor. Sustainable infrastructure is not simply a question of funding or capital; it requires strengthening the institutions that help support sustainable funding streams and capacity building to help ensure that countries are able to secure and benefit from investments.

Finally, the United States reaffirms its position on the 2030 Agenda as detailed in its Explanation of Position delivered on September 1, 2015.

The United States appreciates the efforts by delegations to negotiate an impactful statement that reflects our shared commitment to sustainable development, as well as the innovative and thoughtful contributions presented in this year's HLPF. We look forward to continuing to work with Member States and stakeholders to meet the ambition and promise of the 2030 Agenda.

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4. Wildlife Trafficking

On November 4, 2021, the State Department released its 2021 Report to Congress pursuant to the Eliminate, Neutralize, and Disrupt ("END") Wildlife Trafficking Act of 2016, P.L. 114-231, Section 201. The report is available at https://www.state.gov/2021-end-wildlife-trafficking-report/. On November 4, 2021, the State Department released a media note on the END Wildlife Trafficking Report for 2021, which is available at https://www.state.gov/eliminate-neutralize-and-disrupt-end-wildlife-trafficking-act-report-2021/ and excerpted below.

> 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. The identification as a Focus Country does not reflect a positive or negative designation or indicate that these countries are not working diligently to combat wildlife trafficking. 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 2021 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 2021 Countries of Concern are Cambodia, Cameroon, Democratic Republic of Congo, Laos, Madagascar, and Nigeria.

5. Columbia River Treaty

The United States and Canada continued negotiations to modernize the Columbia River Treaty regime in 2021. See *Digest 2018* at 511 regarding the first four rounds of negotiations, conducted in 2018; see *Digest 2019* at 446-47 regarding the fifth through eighth rounds; see *Digest 2020* at 519 regarding the ninth and tenth rounds. In a December 13, 2021 State Department media note, available at https://www.state.gov/conclusion-of-the-eleventh-round-of-the-columbia-river-treaty-negotiations/, the Department noted the conclusion of the eleventh round of negotiations. See also November 29, 2021 State Department media note announcing the eleventh round, available at https://www.state.gov/eleventh-round-of-the-columbia-river-treaty-negotiations/. The next round of negotiations was scheduled for early 2022. The media note includes the following:

> During this round, the United States and Canada discussed ecosystem priorities, post-2024 flood risk management, and Canada's desire for more operational flexibility.
>
> The U.S. Department of State leads a negotiating team consisting of representatives from the Bonneville Power Administration, the U.S. Army Corps of Engineers Northwestern Division, the U.S. Department of the Interior, and the National Oceanic and Atmospheric Administration. The U.S. delegation also included the U.S. Department of Energy and expert-advisors from the Confederated Tribes of the Colville Reservation, the Kootenai Tribe of Idaho, and the Confederated Tribes of the Umatilla Indian Reservation.

Cross references

Measures in response to the COVID-19 pandemic, **Ch.1.B.5.a**
World Health Organization, **Ch. 4.B.3**
UN 3C general statement on any right relating to the environment, **Ch. 6.A.4.a**
Virtual meetings due to COVID-19 pandemic, **Ch. 7.A.5**
ILC work on protection of the atmosphere, **Ch. 7.C.1**
Environmental measures, **Ch. 11.B.1.d**
U.S. statement on General Assembly resolution on oceans and law of the sea, **Ch. 12.A.1.a**

CHAPTER 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTION

In 2021, the United States entered into nine agreements, and acted on an additional request for emergency restrictions, 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. §§ 2601-2613.

If the requirements of 19 U.S.C. § 2602(a)(1) and/or (e) are satisfied, the President has the authority to enter into 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 2021 to protect the cultural property of Morocco, Costa Rica, Turkey, and Albania, by entering into cultural property agreements; Italy, Colombia, Greece, Egypt, and Bolivia, by entering into agreements extending import restrictions; and Afghanistan, by considering imposition of unilateral emergency import restrictions pursuant to 19 U.S.C. § 2603. Current cultural property agreements and import restrictions pertaining to those agreements can be found at https://eca.state.gov/cultural-heritage-center/cultural-property/current-agreements-and-import-restrictions.

1. Italy

Italy and the United States entered into a memorandum of understanding ("MOU"), extending and superseding the existing MOU that entered into force on January 19, 2001. The 2021 MOU, signed October 29, 2020, with entry into force January 12, 2021, is available at https://www.state.gov/italy-21-112. On January 12, 2021, U.S. Customs and Border Protection ("CBP") extended import restrictions on certain categories of archaeological material of the Italian Republic, pursuant to the MOU. 86 Fed. Reg. 2255 (Jan. 12, 2021).

2. Morocco

On January 14, 2021, the United States and Morocco signed an MOU protecting Moroccan cultural property. See media note, available at https://2017-2021.state.gov/united-states-and-morocco-sign-cultural-property-agreement/index.html. The MOU is available at https://www.state.gov/morocco-21-114. CBP published notice of the imposition of import restrictions on certain categories of archaeological and ethnological material from the Republic of Morocco pursuant to the MOU. 86 Fed. Reg. 6561 (Jan. 22, 2021).

3. Turkey

On January 19, 2021, the United States and Turkey signed an MOU protecting Turkish cultural property. See State Department media note, available at https://2017-2021.state.gov/united-states-and-turkey-sign-cultural-property-agreement/index.html. The MOU entered into force March 24, 2021 and is available at https://www.state.gov/turkey-21-324. CBP published notice of the imposition of import restrictions on certain categories of archaeological and ethnological material from the Republic of Turkey pursuant to the MOU, effective June 16, 2021. 86 Fed. Reg. 31,910 (June 16, 2021).

4. Albania

On February 5, 2021, the State Department provided notice of the receipt of a request from the Government of the Republic of Albania under Article 9 of the 1970 UNESCO Convention. 86 Fed. Reg. 8476 (Feb. 5, 2021). On August 23, 2021, the United States and Albania signed an MOU to protect Albanian cultural property. See State Department media note, available at https://www.state.gov/united-states-and-albania-sign-cultural-property-agreement/.

5. Colombia

Colombia and the United States entered into a new cultural property agreement extending and superseding the existing agreement that took effect on March 15, 2006. The 2021 agreement with Colombia, signed at Bogota March 4, 2021, which entered into force March 10, 2021, is available at https://www.state.gov/colombia-21-310. CBP extended import restrictions on certain archaeological and ecclesiastical ethnological material from the Republic of Colombia pursuant to the agreement. 86 Fed. Reg. 13,993 (Mar. 12, 2021).

6. Costa Rica

As discussed in *Digest 2020* at 522, the U.S. Department of State provided notice of a request from the government of the Republic of Costa Rica under Article 9 of the

Convention in 2020. On January 15, 2021, the United States and Costa Rica entered into an MOU protecting Costa Rican cultural property. CBP provided notice of the imposition of import restrictions, effective March 31, 2021, on certain archaeological material from the Republic of Costa Rica pursuant to the MOU. 86 Fed. Reg. 17,055 (Apr. 1, 2021). The Costa Rica MOU is available at https://www.state.gov/costa_rica-21-115.

7. Afghanistan

Afghanistan made a request to the Government of the United States under Article 9 of the 1970 UNESCO Convention, which was received by the United States on April 28, 2021. Afghanistan's request seeks U.S. import restrictions on archaeological and ethnological material representing Afghanistan's cultural patrimony. The State Department published notification of the request in the Federal Register. 86 Fed. Reg. 52,542 (Sept. 21, 2021).*

8. Greece

CBP provided notice on November 21, 2021 of import restrictions on certain archaeological and ecclesiastical ethnological material of the Hellenic Republic (Greece), based on the Government of the United States and the Government of Greece entering into a new cultural property MOU, superseding the November 21, 2016 MOU. 86 Fed. Reg. 66,164 (Nov. 22, 2021). The MOU, which was signed September 22, 2021 and entered into force November 19, 2021, with effect from November 21, 2021, is available at https://www.state.gov/greece-21-1119.

9. Egypt

On November 30, 2021, the United States and Egypt entered into a new MOU concerning import restrictions, extending and superseding the MOU that entered into force on November 30, 2016. The 2021 MOU with Egypt, signed at Cairo, November 30, 2021, entered into force on November 30, 2021, and is available at https://www.state.gov/16-1130/. See media note, available at https://www.state.gov/the-united-states-and-egypt-sign-new-memorandum-of-understanding-on-cultural-property-protection/. CBP extended import restrictions on certain archaeological material and imposed import restrictions on ethnological material of the Arab Republic of Egypt on December 3, 2021, pursuant to the MOU. 86 Fed. Reg. 68,546 (Dec. 3, 2021).

10. Bolivia

The United States and Bolivia agreed via exchange of diplomatic notes to extend an MOU regarding import restrictions, originally signed in December 2001. CBP extended

* Editor's note: CBP provided notice that the emergency unilateral import restrictions took effect on February 18, 2022. 87 Fed. Reg. 9439 (Feb. 22, 2022).

import restrictions on certain archaeological and ethnological material of the Plurinational State of Bolivia, effective December 4, 2021, pursuant to the MOU, as extended. 86 Fed. Reg. 68,544 (Dec. 3, 2021). The extension is available at https://www.state.gov/bolivia-21-1124.

B. CULTURAL PROPERTY AT THE UN

On December 6, 2021, U.S. ECOSOC Advisor Kara Eyrich delivered the U.S. explanation of position for the Third Committee resolution on the return of cultural property. The statement follows and is available at https://usun.usmission.gov/explanation-of-position-for-the-third-committee-return-of-cultural-property-resolution/.

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* * * *

The United States would like to thank Greece for their able facilitation of the resolution.

The United States welcomes resolutions at the United Nations General Assembly and other international fora that draw attention to the important issue of trafficking in cultural property.

We believe strongly that the protection of cultural heritage in countries of origin is not only the right thing to do for moral reasons, but it also helps promote regional stability and good governance.

We also encourage States to modernize efforts to disrupt cultural property trafficking by taking into account the rights of indigenous peoples to the use and control of their ceremonial objects and to the repatriation of their human remains and by working to enable the access and/or repatriation of human remains and ceremonial objects that have been trafficked, consistent with the aspirations of the UN Declaration on the Rights of Indigenous Peoples.

* * * *

C. EXCHANGE PROGRAMS

1. Fulbright-National Parks Partnership

On January 14, 2021, the U.S. Department of State's Bureau of Educational and Cultural Affairs ("ECA"), the National Park Service ("NPS") of the U.S. Department of the Interior, and the Fulbright Foreign Scholarship Board ("FFSB") signed a memorandum of understanding ("MOU") establishing the Fulbright-National Parks Partnership. See ECA media note, available at https://eca.state.gov/highlight/fulbright-national-parks-partnership. The MOU outlines additional opportunities for Fulbright Program participants to study and gain professional experience within U.S. national parks and for U.S. national park rangers to explore national parks systems around the world to advance NPS protection and conservation efforts at home and for Fulbright scholars to have greater exposure to U.S. national parks during their Fulbright exchanges in the United States.

2. Fulbright Program Partnership with National Archives

On January 19, 2021, the U.S. Department of State, the Fulbright Foreign Scholarship Board, and the National Archives and Records Administration formalized a new partnership to establish the Fulbright-National Archives Heritage Science Fellowship. See National Archives press release, available at https://www.archives.gov/press/press-releases/2021/nr21-26. The new fellowship provides an opportunity for Fulbright visiting scholars to connect with National Archives scientists and experts while conducting research at the National Archives' research lab.

3. Education Cooperation Arrangement with Indonesia

On December 14, 2021, the U.S. Department of State and the Ministry of Education, Culture, Research, and Technology of the Republic of Indonesia signed an MOU on cooperation in the field of education. The arrangement provides a framework for academic exchanges, scholarships, language teaching programs, professional development, and other links between the two countries.

4. Principles in Support of International Education

U.S. Secretary of State Antony Blinken announced the Department of State and Department of Education Joint Statement of Principles in Support of International Education at the 2021 EducationUSA Forum. The Joint Statement is available at https://educationusa.state.gov/us-higher-education-professionals/us-government-resources-and-guidance/joint-statement and excerpted below:

* * * *

The United States cannot afford to be absent from the world stage: U.S. leadership and engagement makes an essential difference abroad, as well as at home. Indeed, in today's interconnected world, our foreign and domestic policies are inextricably intertwined in pursuit of a preeminent goal – improving the lives of the American people.

Many of our most pressing challenges are inherently global in scope and impact and can only be addressed by nations and individuals working together. From tackling pandemics and the climate crisis, to reducing economic disparities and building prosperity, to countering threats to democracy and maintaining peace – resolving these global challenges requires partnership and collaboration across borders. It is imperative that we continue to cooperate with our allies, invest in our relationships, and broaden our engagement worldwide.

The robust exchange of students, researchers, scholars, and educators, along with broader international education efforts between the United States and other countries, strengthens relationships between current and future leaders. These relationships are necessary to address shared challenges, enhance American prosperity, and contribute to global peace and security.

U.S. students, researchers, scholars, and educators benefit when they engage with peers from around the world, whether overseas or through international education at home. All Americans need to be equipped with global and cultural competencies to navigate the ever-changing landscapes of education, international business, scientific discovery and innovation, and the global economy. International education enhances cultural and linguistic diversity, and helps to develop cross-cultural communication skills, foreign language competencies, and enhanced self-awareness and understanding of diverse perspectives.

* * * *

D. INTERNATIONAL EXPOSITIONS

On July 29, 2021, the State Department issued a media note announcing the U.S. bid to host Expo 2027. The media note, available at https://www.state.gov/united-states-bid-to-host-expo-2027/, is excerpted below.

> Today, the U.S. Chargé d'affaires in Paris delivered a letter of candidature from Secretary Blinken to the Bureau International des Expositions (BIE) confirming that a proposal from Minnesota USA Expo is the United States' national bid to host Expo 2027. The proposed specialized Expo, commonly known as a World's Fair, will focus on global health and sustainability under the theme "Healthy People, Healthy Planet: Wellness and Well-Being for All," and will invite the world's nations to showcase innovative and collaborative solutions to our shared challenges.
>
> The Department of State, in collaboration with the Department of Commerce, will work with the Minnesota organizing committee, U.S. businesses and industry, cultural leaders and organizations, and civil society to develop an Expo that promotes American prosperity, strengthens global alliances, and connects our global community. The United States looks forward to securing support from member states of the BIE ahead of the expected vote in November 2022 to select the host city for Expo 2027.

Cross References

Protecting power arrangement regarding Afghanistan, **Ch. 2.A.2**

CHAPTER 15

Private International Law

A. COMMERCIAL LAW/UNCITRAL

Mark Simonoff, legal adviser, delivered the U.S. statement at the UN General Assembly Sixth Committee on October 18, 2021, on the report of the UN Commission on International Trade Law on the work of its 54th session. The U.S. statement is excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-80-report-of-the-un-commission-on-international-trade-law-on-the-work-of-its-54th-session/.

* * * *

The United States welcomes the Report of the 54th session of the United Nations Commission on International Trade Law (UNCITRAL) 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 commend the Secretariat for its tireless efforts to continue to facilitate productive meetings in spite of the challenges presented by the COVID-19 crisis and the need to conduct meetings in a hybrid format. Indeed, this past year, in spite of these challenges, UNCITRAL brought to conclusion and adopted a number of important instruments that will be of value to micro-, small-, and medium-sized enterprises as well as other enterprises engaged in international trade. The new procedural rules for expedited arbitration as well as the new instruments in the area of mediation will bring important efficiencies and benefits to cross-border dispute settlement. In addition, the new legislative guides in the areas of access to credit and insolvency are of significance to micro-, small- and medium-sized enterprises seeking to thrive in a COVID and post-COVID environment.

We note with satisfaction that the Commission has approved work on a number of new projects, ensuring that UNCITRAL will continue its important normative work in the coming years. Among others, the Commission approved future work on both asset tracing and applicable law in insolvency. The Commission also approved a colloquium to explore fruitful areas for further work in dispute resolution and the digital economy. Finally, the United States looks forward to continued engagement with the Secretariat and other delegations on ways to shape the project on artificial intelligence in the area of automated contracting, which was also approved for further work.

In the area of investor-State dispute settlement reform, although the United States has strong reservations about the need for additional conference time and resources being devoted to Working Group III as a general matter, we do not object to the consensus to provide these additional resources on a limited one-time basis for four years, subject to annual review by the Commission. This review will be key to ensuring that the Working Group uses its time efficiently and can present the Commission with completed reform options on a rolling basis. The United States appreciates that the issue of enlargement of UNCITRAL membership raised a number of important questions on the appropriate size and composition of UNCITRAL, and welcomes the consensus decision that was reached in this regard.

We hope to see continued progress on the joint UNCITRAL-UNIDROIT project on warehouse receipts and look forward to assignment of that project to a working group in the near future. We look forward to continuing our productive engagement with UNCITRAL this year and hope that 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.

* * * *

B. FAMILY LAW

See Chapter 2 for discussion of litigation regarding the Hague Abduction Convention.

C. INTERNATIONAL CIVIL LITIGATION

See Chapter 5 for discussion of cases considering application of the doctrine of international comity.

1. *Saint-Gobain v. Venezuela*

On June 9, 2021, the United States filed an amicus brief in *Saint-Gobain v. Venezuela*, No. 21-7019 (D.C. Cir.), a case concerning the Hague Service Convention. The U.S. brief is excerpted below.

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* * * *

I. Saint-Gobain Did Not Effect Service On Venezuela Under Articles 2 Through 6 Of The Hague Service Convention By Mailing A Request For Service To Venezuela's Central Authority

The Hague Service Convention establishes procedures to simplify the process of serving documents abroad. See *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1507 (2017). The Convention's "primary innovation" was to require states parties to create a Central Authority for processing service requests, as set forth in Articles 2 to 6. See *id*. at 1507–08. The district court misunderstood that process to permit service upon the Central Authority when the state itself is

the defendant. The treaty's unambiguous text and structure, the Executive Branch's longstanding interpretation, and other authoritative guidance all demonstrate that delivery to the Central Authority does not effect service on the state.

A. The Central Authority Receives Service Requests But Is Not An Agent For The Party Being Served

The Convention's text and structure make clear that the Central Authority receives service requests and makes service on persons within the state's jurisdiction, but the Central Authority does not itself accept service on behalf of the parties being served. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) ("When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used." (quotation marks omitted)). Articles 2 to 4 describe the Central Authority's role as limited to processing requests for service and specify that sending documents to the Central Authority is just a "request" for service: Article 2 requires parties to designate a Central Authority that will "receive requests for service." Article 3 provides that the "document to be served" should be "annexed to the request" sent to the Central Authority. And Article 4 authorizes the Central Authority to reject a service "request" if it fails to comply with the Convention's formal requirements, such as the inclusion of duplicate copies. See Convention art. 3 (specifying formalities).

Next, Articles 5 and 6 provide that the Central Authority serves the documents by delivering them to persons within the state's jurisdiction: Article 5 states that the Central Authority (or an "appropriate agency" designated by the Central Authority) "shall itself serve the document," either by a method prescribed by the state's "internal law" or by a method requested by the serving party, if that method is compatible with internal law. Article 6 then provides that the Central Authority must send the applicant a certificate stating either that "the document has been served" or, "[i]f the document has not been served," explaining the reasons that "prevented service." See *Water Splash*, 137 S. Ct. at 1508.

The unambiguous text and structure of the treaty therefore resolves the question on appeal. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) ("The clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." (quotation marks omitted)).

In any event, other interpretive aids confirm what the text makes clear: the Central Authority is not an agent for service. See *Water Splash*, 137 S. Ct. at 1511 (relying on "extratextual sources" to interpret the Convention). First, the drafting history strongly suggests that the Central Authority only processes requests for service. A member of the United States delegation involved in drafting the Convention reported that the Central Authority's role is to "serve the document" or to "have it served" by an appropriate agency. Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A.J. 650, 652 (1965); see *Water Splash*, 137 S. Ct. at 1511 (relying on Amram article); see also Report of the U.S. Delegation to the 10th Session of the Hague Conference on Private International Law, October 7-28, 1964, 52 Dep't State Bull. 265, 268 (1965) ("[The Central Authority] will undertake responsibility for the service of papers ... ."). The official drafting history, while published only in French, summarizes the role of the Central Authority similarly. See Rapport de la Commission Spéciale Présenté par M. Vasco Taborda Ferreira, Conférence de la Haye de Droit International Privé, Actes et Documents de la Dixième Session 81, 83–84 (1965), https://perma.cc/K34V-WTFW.

"The Court also gives great weight to the Executive Branch's interpretation of a treaty." *Water Splash*, 137 S. Ct. at 1512 (quotation marks omitted). When the State Department submitted its recommendation to President Johnson in support of ratifying the Convention, it confirmed that the Central Authority "serve[s] the document" or has "it served" by an appropriate agency. Letter of Submittal from the Dep't of State to the President 4, reprinted in Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Message from the President of the United States, S. Exec. C, 90th Cong., 1st Sess. (1967). The Senate provided its advice and consent to ratification on the same understanding. See S. Exec. Rpt. No. 90-6, at 2 (1967) ("Article 5 requires the central authority to serve the document or to have it served by an appropriate agency ... ." (quotation marks omitted)). The Executive has continued to maintain that view. As the United States' Central Authority explains, "receipt of a request for service from a foreign court by the U.S. Central Authority is not effective service" under the Convention. Office of Int'l Judicial Assistance, U.S. Dep't of Justice, Service of Judicial Documents on the United States Government Pursuant to the Hague Service Convention 1–2 (Jan. 12, 2018), https://go.usa.gov/xHvmw (Service of Judicial Documents).

The Court also gives "considerable weight to the views of other parties to a treaty." *Water Splash*, 137 S. Ct. at 1512 (quotation marks omitted). Other states parties agree that service is not made upon the Central Authority. See *Barinci v. United States*, Trib. Pisa, Mar. 16, 2021, n. 67/2021 (It.) (stating that "service is executed when the document to be served is delivered by the Central Authority to the recipient and not when such document is merely received by the Central Authority"); *Mauron v. Servais*, Cass. [Court of Cassation] (1st ch.), Dec. 21, 2007, C.06.0155.F (Belg.) (similar); see also *Areios Pagos [A.P.]* [Supreme Court] 110/2018 (Greece) (similar); *Epheteia [Ephet.]* [Court of Appeals] 263/2018 (Greece) (similar).

The Practical Handbook, a practice guide to the Convention prepared by the Hague Conference, an inter-governmental organization that administers the Convention, also confirms that service is not made upon receipt of a request for service by the Central Authority. See Practical Handbook ¶ 112, A6–7; see also *Water Splash*, 137 S. Ct. at 1511 (relying on the Practical Handbook to interpret the Convention). It explains that the Central Authority is "a receiving authority, in charge of receiving requests for service from requesting States and executing them or causing them to be executed." Practical Handbook ¶ 112, A6. It expressly notes that the Central Authority "may not be treated as an agent of the defendant on whom the document may be served." Id., A7.

Like the text of the treaty, these other interpretive aids conclusively establish that a Central Authority created under the Convention does not accept service on behalf of the party to be served.

B. The Central Authority's Role Does Not Change When A State Is The Party Being Served

There is no basis to apply the Convention's service provisions any differently when the defendant to be served is a sovereign state. See *Doe I v. Israel*, 400 F. Supp. 2d 86, 101–02 (D.D.C. 2005) (describing service on Israel through its Central Authority, "which receives the papers and then effects service on the named party"). Nothing in the Convention suggests that the Central Authority is itself an entity capable of receiving service for the sovereign, particularly when the sovereign has designated some other entity for receipt of service. Courts should not override sovereigns' choice in this way without clear support from the Convention's text, and here there is none.

The Convention does not alter the role of the Central Authority when the state is the defendant to be served. Nor does it otherwise create special procedures to govern service on sovereign states, which historically were served through diplomatic channels. See Bruno A. Ristau, 1 International Judicial Assistance: Civil and Commercial 116 (1995 rev.); House FSIA Report 25 (describing historical practice). There is nothing in the Convention to suggest that its provisions should be applied differently to service on sovereign states.

The United States also has long taken the view that delivering a request for service on the United States to its Central Authority is not service on the United States under the Convention. In public guidance, the United States' Central Authority has advised that "[t]he U.S. Central Authority receives and executes requests for service on the U.S. Government, but the Central Authority is not the legal representative or agent of the U.S. Government." Service of Judicial Documents 1. As noted, this view is entitled to significant deference. See Sumitomo Shoji, 457 U.S. at 184–85.

Other states parties have adopted the same interpretation. For example, Italy has expressly concluded that the Central Authority is distinct from the state for service purposes. See *Graham v. United States*, App. Catania, July 6, 2020, n. 421/2020 (It.) ("[I]t must be noted that the central authority is not the legal representative of the defendant and therefore, for the completion of the service, a certificate ... attesting the receipt of the documents by the final recipient is required."); see also Letter from Szabolcs Boreczki, Ministry of Justice of Hungary, Dep't of Private Int'l Law, to Rick Hamilton, ABC Legal (Sept. 7, 2020), *Magyar Farming Co. v. Hungary*, No. 20-cv-637 (D.D.C. May 26, 2021), ECF No. 11-1, at 13 (stating that receipt of a request for service by the Central Authority "cannot be construed that the service on Hungary has duly taken place" (emphasis omitted)). Moreover, when the Permanent Bureau solicited feedback in 2008 on how the Convention has been used to serve sovereign states, states parties uniformly reported that the Central Authority, after receiving "[r]equests for service," would "forward these requests" to the relevant entity to "effect service." Summary of Responses 33–34. There appears to be little additional precedent on point, presumably because it is commonly understood that delivery to the Central Authority never effects service on the defendant. See *supra* p. 17–19.

Moreover, the Practical Handbook confirms that, under Article 5, a state is not served until the Central Authority effects service in accordance with the state's internal law. It reports that states use the Convention "to forward requests for service upon States ... via the Central Authority channel." Practical Handbook ¶ 26, A4. But those requests do not always result in service being made: The Central Authority may "refuse to effect the request for service" in cases against the state. *Id*. ¶ 24, A4 (emphasis omitted); see also *id*. ¶ 26, A4 (noting that "requests for service" on the state via the Central Authority are "in some cases without success").

As the district court acknowledged (J.A. 2304 n.9), under Venezuelan law, the Attorney General must be served to effect service on the state. See J.A. 2207 (providing excerpt of Organic Law of the Attorney General's Office, art. 95, published in Official Extraordinary Gazette No. 6.210, at 18 (Dec. 30, 2015)). There is nothing in the record to indicate that the Central Authority served the Attorney General in this case. Venezuela thus was not served under the plain terms of Articles 2 to 6. See Convention art. 5 ("The Central Authority ... shall itself serve the document ... by a method prescribed by its internal law ... ."). And nothing in those provisions allowed the district court to treat the Central Authority as "the party being served," J.A. 2305, simply because it is part of the Venezuelan state.

II. Saint-Gobain Did Not Effect Service On Venezuela Under Article 15 Of The Hague Service Convention

The district court also erred in concluding that Venezuela was served under Article 15 of the Convention. Article 15 does not create a method to effect service, and in any case, Saint-Gobain did not satisfy Article 15's requirements.

A. Article 15 Is Not A Service Provision

The district court misread Article 15 as creating an additional method of service under the Convention. But Article 15 is not a service provision; neither of its two paragraphs purports to create or permit an additional method of service. Instead, the Supreme Court has explained that Article 15 is a judgment provision that "limit[s] the circumstances in which a default judgment may be entered." See *Schlunk*, 486 U.S. at 699 (describing Article 15 as a "judgment" provision, in contrast to Articles 5–6, 8–11, and 19, which set forth "methods of service"). Saint-Gobain thus could not have effected service on Venezuela under Article 15 because Article 15 does not authorize methods of service.

1. The text of Article 15(1) makes clear that it is not a service provision. It provides that when process is "transmitted abroad for the purpose of service" pursuant to the Convention "and the defendant has not appeared, judgment shall not be given" unless the plaintiff establishes either that (a) "the document was served by a method prescribed by the internal law of the State" or that (b) "the document was actually delivered to the defendant ... by another method provided for by this Convention." As the Practical Handbook explains, this provision is "clearly designed to protect the defendant" by establishing "minimum safeguards for judgments in default." Practical Handbook ¶¶ 311–312, A11.

To the extent that Article 15(1) refers to service methods, it incorporates service methods set forth elsewhere in the Convention. Under Article 15(1)(a), the "internal law of the State" is what creates the service method. And under Article 15(1)(b), the documents must have been delivered "by another method provided for by this Convention," which plainly refers to service methods set forth elsewhere in the Convention. See, *e.g.*, Convention arts. 8-9 (consular or diplomatic channels); id. art. 10 (postal channels); id. art. 11 (separate agreement).

"[E]xtratextual sources" confirm that Article 15(1) is a judgment provision, not a service provision. See *Water Splash*, 137 S. Ct. at 1511. The drafting history explains that Article 15 imposes "stringent limitations" on default judgments to "sharply restrict[]" their use and "minimize the possibility of abuses." Amram, *supra*, at 653. The State Department expressed a similar view when it recommended submission to the Senate for advice and consent to ratification, summarizing that "Articles 1 through 14 are concerned with providing machinery to facilitate service of documents," while "Articles 15 and 16 provide substantial 'due process' protection for the addressee." See Letter of Submittal, supra, at 4–5.

2. Although neither Saint-Gobain nor the district court relied on Article 15(2), it is not a service provision either. It provides that a court may enter judgment "even if no certificate of service or delivery has been received" if the documents were "transmitted by one of the methods provided for in this Convention," at least six months' time has elapsed, and the plaintiff made "every reasonable effort" to obtain a certificate of service. This provision is thus "designed to protect the legitimate interests of a diligent plaintiff" in rare cases where the defendant "evades service in bad faith." Practical Handbook ¶¶ 312, 314, A11–12.

Article 15(2) plainly does not create an alternative service method, as it governs judgment in cases where service has not been established. And because Article 15(2) provides for judgment in cases where there is no proof of service, it cannot be used to give a court

personal jurisdiction over a foreign state under the FSIA, which conditions personal jurisdiction on "service" having been "made." 28 U.S.C. §§ 1330(b), 1608(a).

B. In Any Event, Saint-Gobain Did Not Satisfy Article 15's Terms

Even if Article 15 had some bearing on the service question, Saint- Gobain did not meet the requirements for judgment under that provision.

1. As an initial matter, Saint-Gobain did not meet the threshold requirement for judgment under Article 15(1) that "the defendant has not appeared." See *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 600 n.4 (7th Cir. 2007) (quotation marks omitted) ("Article 15, by its terms, does not apply to a party who has appeared"). Although the Clerk of the Delaware District Court entered a default against Venezuela, Venezuela appeared in the litigation to oppose the court's entry of a default judgment and sought dismissal or a change in venue. J.A. 3–4, 1794, 2286. Venezuela continued to litigate the case after it was transferred to the D.C. District Court. J.A. 2159. There is no basis to employ a standard governing the entry of default judgments to contested litigation. See *e360 Insight*, 500 F.3d at 600 n.4 (refusing to apply Article 15 where the defendant "appear[ed] in the action and raise[d] improper service of process under the Hague Convention as an affirmative defense"); *Practical Concepts, Inc. v. Republic of Bol.*, 811 F.2d 1543, 1547 (D.C. Cir. 1987) (noting that a defendant "may appear" to "raise [a] jurisdictional objection" and thereby avoid "exposing himself to the risk of a default judgment"). Indeed, it is notable that Saint-Gobain moved for summary judgment rather than default judgment in D.C. District Court. J.A. 2287.

Nor did Saint-Gobain satisfy the particular requirements of either subsection of Article 15(1). To satisfy Article 15(1)(a), it must show that Venezuela "was served" by a method prescribed by "the internal law" of Venezuela. As noted, there is nothing in the record to establish that the documents were delivered to the Attorney General, as required by Venezuelan law. See *supra* p. 22.

Similarly, to satisfy Article 15(1)(b), Saint-Gobain must show that the documents were "actually delivered to the defendant ... by another method provided for by this Convention." But the Central Authority is not "the defendant" in suits against the state. It is merely a processing agent; the Attorney General must be served to effect service on the state under Venezuelan law. There is no basis in the Convention to conflate the Central Authority with the state itself. See *supra* p. 19–22.

Regardless, even if the Central Authority could be served on behalf of the state, Saint-Gobain did not deliver the documents "by another method provided for by this Convention." Saint-Gobain mailed the documents to Venezuela's Central Authority. But the Convention does not permit service by mail for states parties that object to that mode of service. See Convention art. 10 (stating that service by mail is permissible "[p]rovided the State of destination does not object "); *Water Splash*, 137 S. Ct. at 1513 (recognizing that service by mail is permissible under Article 10 only if the receiving state did not object). And Venezuela has objected to service by mail. See Hague Conference, Venezuela: Reservation to Article 10(a), https://perma.cc/8TK7-45YW ("The Republic of Venezuela does not agree to the transmission of documents through postal channels."). Article 10 thus does not permit service by mail in Venezuela, whether the defendant is a private litigant or the state itself.

This understanding is further confirmed by U.S. practice. As noted, one method of service under the FSIA is by mail "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." 28 U.S.C. § 1608(a)(3). The State Department and the Administrative Office of the United States Courts have advised

that service by mail should not be attempted under this provision on foreign states that have objected to service by mail. See Memorandum from the Administrative Office of the U.S. Courts to All U.S. District Court Clerks Re: Service of Process in Foreign Countries (Nov. 7, 2000), A1. In such cases, the State Department undertakes service through diplomatic channels, as contemplated by 28 U.S.C. § 1608(a)(4). *Id*.; see also Fed. R. Civ. P. 4(f)(2)(C) (permitting service by mail "unless prohibited by the foreign country's law").

The Practical Handbook confirms that Article 15(1) cannot be used to evade the limitations on service set forth in Article 10. "When the method of transmission ... includes certain formalities to be observed, it is not sufficient for the defendant to have personally received the ... document ... ." Practical Handbook ¶ 307, A10. Accordingly, the Practical Handbook explains that default judgment is inappropriate under Article 15(1) where, as here, documents were sent by registered mail to a defendant in a country that objects to service by mail. See *id*. In such cases, Article 10 cannot be used to show delivery by "another method provided for by this Convention" under Article 15(1) because Article 10 does not permit delivery by mail on objecting states.

2. Article 15(2) governs cases in which "no certificate of service or delivery has been received." Saint-Gobain has not relied on Article 15(2) in this litigation, however, presumably because there is no evidence that it made "every reasonable effort" to obtain a certificate of service, as required by that provision. See, *e.g., Universal Trading & Inv. Co. v. Kiritchenko*, No. C-99-3073, 2007 WL 660083, at *4 (N.D. Cal. Feb. 28, 2007) (placing a single call to Antigua Governor's office did not meet "every reasonable effort" standard). There is nothing in the record to suggest that Saint-Gobain made any effort, much less "every reasonable effort," to obtain a completed certificate of service.

3. The district court disregarded Article 15(1)'s requirements because it was concerned that they could be "manipulated to evade service." J.A. 2304 n.9. But that concern ignores that the plaintiff has available other established means of service under the FSIA, such as diplomatic channels—a means through which Venezuela has agreed to be served in this very case, which would establish personal jurisdiction over Venezuela under 28 U.S.C. § 1608(a)(4). J.A. 2189; see also 28 U.S.C. § 1608(a)(4) (providing that service is effective once the Secretary of State effects transmission through diplomatic channels). Numerous litigants have successfully effected service in this way on Venezuela with the State Department's assistance. It also ignores that Article 15(2) was drafted to protect "the legitimate interests of a diligent plaintiff " and to address "cases in which a defendant evades service in bad faith." Practical Handbook, ¶¶ 312, 314, A11, A12. That provision sets out the limited circumstances in which judgment may be entered even without a certificate of service—circumstances which are not satisfied here. Further, given the widely accepted practice of serving foreign states through diplomatic channels, the risk of a foreign state defendant evading service is significantly reduced.

In any case, even were there some basis for the district court's concern, courts may not revise the negotiated terms of a multilateral treaty that is founded on the consent of contracting states to remedy a deficiency the court perceives. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 533 (1987) ("In interpreting an international treaty, we are mindful that it is in the nature of a contract between nations ... . " (quotation marks omitted)). Moreover, this Court has insisted on "strict adherence" to the FSIA's service provisions, *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994), including the requirement that, absent a "special arrangement" for service, service be made "in accordance with an applicable international convention" where possible, 28 U.S.C.

§ 1608(a)(2). Such "strict adherence" requires courts to hew closely to the actual terms of the Convention.

Maintaining strict adherence to the Convention is essential to protect the United States' interest in reciprocal treatment in foreign litigation. See *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984) (considering the reciprocal interests of the United States). Article 15(1) should not be construed to permit judgment against a foreign sovereign when it was not served by a method provided for in the Convention, each of which requires adherence to the state's internal laws. When the U.S. Central Authority rejects requests for service on the U.S. Government, it treats service as defective. See Service of Judicial Documents 3. The United States thus is not a party to the litigation, does not file a response or appear, and will not recognize the validity of any judgment rendered against the United States. Id. The district court's interpretation would undermine the ability of the United States to effectively make these arguments when faced with defective service in foreign litigation. Moreover, to the extent that foreign courts follow the district court's interpretation, the United States would face an increased risk of default judgments in foreign litigation. The United States thus has a strong reciprocal interest in the proper construction of the Hague Service Convention.

* * * *

2. *Servotronics v. Rolls-Royce PLC, et al.*

Also in June 2021, the United States filed an amicus brief in the Supreme Court of the United States in *Servotronics, Inc. v. Rolls-Royce PLC, et al.*, No. 20-794. The question presented to the Supreme Court is whether 28 U.S.C. 1782(a) authorizes a district court to order the production of materials for use in a private commercial arbitration. The U.S. brief, arguing that Section 1782 does not apply in the private commercial arbitration context, is excerpted below. The case was dismissed pursuant to a joint stipulation of the parties in September 2021.

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* * * *

I. SECTION 1782 DOES NOT AUTHORIZE DISCOVERY FOR USE IN A PRIVATE COMMERCIAL ARBITRATION

Section 1782 authorizes a district court to order a person who "resides or is found" in the district "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." 28 U.S.C. 1782(a). Properly construed in light of the statutory context and history, that language does not encompass private commercial arbitration.

A. The Statutory Phrasing, Context, And History Show That Congress Did Not Intend "A Proceeding In A Foreign Or International Tribunal" To Include A Private Commercial Arbitration

In construing Section 1782, "a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). Because the term "tribunal" is not defined in the statute, courts first "ask what that term's 'ordinary, contemporary, common meaning' was when Congress

enacted" Section 1782's relevant language in 1964. …

The parties and lower courts have offered starkly different understandings of the word "tribunal" at that time. As the court of appeals below observed, legal and nonlegal dictionaries in 1964 primarily defined a "tribunal" in ways that connote a judicial forum and would appear to exclude private arbitration. Pet. App. 9a. The court observed that, for example, Black's defined "tribunal" to mean "[t]he seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise." *Ibid.* (quoting *Black's* 1677). Other contemporaneous dictionaries offered similar principal definitions. See, *e.g., Webster's New International Dictionary of the English Language* 2707 (2d ed. 1960) ("the seat of a judge; the bench on which a judge and his associates sit for administering justice; a judgment seat; ***[h]ence, a court or forum of justice"). And respondents marshal additional evidence from dictionaries and from usage in federal statutes predating the 1964 Act suggesting that the term "tribunal" in 1964 generally described a sovereign decisionmaker. See Rolls-Royce Br. 15-16, 20-23; Boeing Br. 18-21. Petitioner, however, points to decisions of this Court and others referring to arbitral bodies as "tribunals." Pet. Br. 10-14. Petitioner's amici and lower courts have pointed to additional cases and commentary that they assert used the term "tribunal" in similar ways. FedArb Br. 8-10; see also, e.g., *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710, 720-722 (6th Cir. 2019); but see Rolls-Royce Br. 27-31; Boeing Br. 34-36.

Like the Second and Fifth Circuits, the court of appeals here ultimately found the competing evidence of the ordinary meaning of "tribunal" inconclusive. Pet. App. 9a-10a. It found that term standing alone to be ambiguous as to whether it includes or excludes private arbitral proceedings. *Ibid.;* see *National Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 188 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999). The court accordingly looked to the statutory history and context as the "key to unlocking" Section 1782's meaning. Pet. App. 10a.

This Court similarly need not resolve the meaning of the word "tribunal" "in a vacuum" because its meaning in Section 1782 is clarified by the "statutory context," including Section 1782's "history" and "purpose." *Abramski v. United States*, 573 U.S. 169, 179 (2014) (citation omitted). …

To begin, the word "tribunal" in Section 1782 is part of the broader phrase "foreign or international tribunal." 28 U.S.C. 1782(a). The most natural reading of that broader phrase is that it refers to a standing *governmental* body - the judicial or quasi-judicial body of a "foreign" country or an "international" state-to-state commission or similar formal entity established by two or more nations. See Rolls-Royce Br. 15-17, 24-27. And the evolution of Section 1782 and its overall structure confirm that understanding.

1. Before Congress revised Section 1782 in the 1964 Act to include the relevant language, the provision and its precursors had long authorized judicial assistance only in connection with proceedings in foreign courts. The first federal statute authorizing such assistance permitted a circuit court to appoint a commissioner to examine witnesses at the request of "any court of a foreign country." 1855 Act § 2, 10 Stat. 630. Subsequent enactments similarly referred to foreign "court[s]." 1863 Act § 1, 12 Stat. 769; 1877 Act, 19 Stat. 241; 1948 Act § 1782, 62 Stat. 949. Immediately prior to the 1964 Act's revisions, Section 1782 authorized taking "[t]he deposition of any witness within the United States to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace." 28 U.S.C. 1782 (1958).

The 1964 Act revised Section 1782 in various respects, including regarding what types of proceedings abroad may be the object of domestic judicial assistance. But Congress's replacement of the phrase "any judicial proceeding pending in any court in a foreign country," 28 U.S.C. 1782 (1958), with the phrase "a proceeding in a foreign or international tribunal," 28 U.S.C. 1782, embodied only a measured expansion of the provision's scope to capture quasi-judicial entities (such as investigating magistrates) and certain inter-governmental bodies (such as state-to-state claims commissions), which were of concern at the time, see 1963 Report 45.

The 1964 Act's revision of Section 1782 was the work of the Rules Commission that Congress had established six years earlier and charged with drafting legislation to improve judicial assistance that domestic courts provide to, and receive from, foreign courts and certain analogous entities. The legislation establishing the Rules Commission tasked it with "drafting] and recommend[ing] to the President any necessary legislation," treaties, and other actions to render "more readily ascertainable, efficient, economical, and expeditious" the "procedures necessary or incidental to the conduct and settlement of litigation in State and Federal courts and quasi-judicial agencies which involve the performance of acts in foreign territory," including service of documents and obtaining evidence. 1958 Act § 2, 72 Stat. 1743. The Rules Commission was additionally charged with drafting legislation and recommending other actions to "similarly improve[]" "the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." *Ibid*.

The Rules Commission carried out that task, drafting and submitting to Congress the text that became the 1964 Act, including revisions to Section 1782. See 1963 Report 1-52. The Rules Commission explained that "[t]he word 'tribunal' [wa]s used" in its proposed revision of Section 1782 "to make it clear that assistance is not confined to proceedings before conventional courts." Id. at 45. As an "example," the Rules Commission observed that "[a] rather large number of requests for assistance emanate from investigating magistrates," and the word "tribunal" was designed to provide district courts with "discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries." *Ibid.* More generally, the Commission explained that, "[i]n view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court."*Ibid.*

The Rules Commission also proposed including "international tribunals]" in Section 1782 to address a different deficiency it perceived in then-existing law. 1963 Report 37. In 1930, "in direct response to problems that arose in an arbitration proceeding between the United States and Canada" - a state-to-state arbitration - Congress had enacted 22 U.S.C. 270-270c (1958), which authorized members of "international tribunals to administer oaths, to subpoena witnesses or records, and to charge contempt." *NBC,* 165 F.3d at 189. In 1933, after another "intergovernmental" body - the United States-German Mixed Claims Commission - concluded that it lacked authority under the 1930 legislation to compel testimony or other evidence, Congress enacted 22 U.S.C. 270d-270g (1958), which authorized United States agents before such bodies to seek judicial assistance in obtaining evidence. *NBC,* 165 F.3d at 189. In the Rules Commission's view, however, those existing provisions were "inadequate." 1963 Report 36. In particular, they "improperly limit[ed] the availability of assistance to the United States agent before an international tribunal," and they afforded less assistance to litigants before bodies such as the United States-German Mixed Claims Commission than litigants in courts of foreign countries. *Id*. at 36-37. The Rules Commission recommended putting such intergovernmental

bodies on the same footing with foreign courts by repealing those prior provisions and "making the assistance provided by proposed Section 1782 ***available in proceedings before international tribunals." *Id*. at 37.

Congress was aware of the Rules Commission's rationales for making those measured changes in existing law governing judicial assistance. Both the House and Senate reports explained the intention and effect of the 1964 Act's provisions in substantially the same terms as the Rules Commission's 1963 Report. See House Report 5-6, 9-10; Senate Report 3-4, 7-8. Congress thereafter unanimously enacted the Rules Commission's recommended legislation. 1964 Act § § 3, 9(a), 78 Stat. 995, 997; *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241, 248 (2004).

Considered against that background of the existing law and Congress's objective in undertaking the revision, Congress's use of the phrase "proceeding in a foreign or international tribunal" in Section 1782 cannot fairly bear the broad meaning petitioner imputes to it (Br. 14-19). The 1964 Act's revisions to that provision undoubtedly expanded the provision's scope to an extent. But the history and context discussed above show, and the Rules Commission's and congressional reports confirm, that the revisions merely put foreign quasi-judicial entities (and intergovernmental bodies) on the same footing with foreign courts.

2. That analysis and conclusion accord with *Intel*, supra, the only decision from this Court construing Section 1782. As relevant here, the Court in *Intel* concluded that Section 1782 authorized judicial assistance in obtaining documents for use before the European Commission's Directorate General for Competition "to the extent that it acts as a first-instance decisionmaker." 542 U.S. at 258; see *id*. at 257-258. As the Court explained, the Directorate General was responsible for enforcing European competition laws - first by investigating an alleged violation and deciding whether to pursue a complaint, and then either "issu[ing] a decision" finding infringement and imposing penalties" or "dismis[sing] the complaint," with its decision subject to judicial review. *Id*. at 255 (citation omitted).

In concluding that the Directorate General was a "foreign or international tribunal," the Court in *Intel* emphasized Congress's instruction to the Rules Commission in the 1958 Act "to recommend procedural revisions 'for the rendering of assistance to foreign courts *and quasi-judicial agencies."'*542 U.S. at 257-258. The Court recounted the Rules Commission's replacement of "'any judicial proceeding"' in the prior version of Section 1782 "with 'a proceeding in a foreign or international tribunal,"' observing that "Congress understood that change to 'provide the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad."' *Id*. at 258 (brackets and citation omitted). Although the Intel Court did not have occasion to delineate every type of adjudicator that Section 1782 encompasses, the Court's focus on the statutory context - and in particular on the history and purpose of the 1964 Act's revisions reflecting Congress's limited intention to include quasijudicial governmental bodies - supports construing Section 1782 to encompass only the types of judicial and quasi-judicial decisionmakers that Congress and the Rules Commission contemplated.

3. Whatever precise array of tribunals that Congress intended revised Section 1782 to encompass, no sound basis exists to conclude that the 1964 Act swept private commercial arbitration into Section 1782's ambit. Nothing in the text or context of that amendment evinces any intent to extend Section 1782's discovery tools to private commercial arbitration - which bears little resemblance to the types of judicial proceedings that Section 1782 and its precursors had long covered, or to the examples of standing quasi-judicial bodies that the Rules

Commission and Congress considered and that this Court confronted in Intel. And "[t]here is no contemporaneous evidence that Congress contemplated extending § 1782 to the then-novel arena of international commercial arbitration" in particular. *Biedermann Int'l,* 168 F.3d at 882.

Moreover, as the court of appeals observed, other portions of the 1964 Act reinforce the conclusion that Congress's revision to Section 1782 did not sweep in private commercial arbitration. See Pet. App. 12a-13a. The 1964 Act added to Section 1782(a) language providing that a court granting an application under that provision "may prescribe the practice and procedure" for production of testimony or other evidence, "which may be in whole or part the practice and procedure of the foreign country or the international tribunal." § 9(a), 78 Stat. 997 (28 U.S.C. 1782(a)). That proviso makes perfect sense for judicial and quasi-judicial governmental bodies of a foreign country or a standing intergovernmental entity established by multiple nations, which typically have established procedures applicable to a category of cases that come within their jurisdiction. But it would be puzzling if applied to a private commercial arbitration, which follows whatever practice and procedure the parties select in their particular contract. Pet. App. 13a.

The 1964 Act also employed the phrase "foreign or international tribunal" in two other provisions where the context again strongly suggests that Congress contemplated judicial and quasi-judicial entities. Section 1696, captioned "Service in foreign and international litigation," authorizes a district court, on receipt of "a letter rogatory issued, or request made, by a foreign or international tribunal or upon application of any interested person," to order service on a person in the district "of any document issued in connection with a proceeding in a foreign or international tribunal." 1964 Act § 4(a), 78 Stat. 995 (28 U.S.C. 1696(a)) (emphasis omitted). And Section 1781 grants express (but nonexclusive) authority to the State Department "to receive a letter rogatory issued, or request made, by a foreign or international tribunal," and to transmit a letter from a U.S. court to such a tribunal. § 8(a), 78 Stat. 996 (28 U.S.C. 1781(a)). Especially given the subject matter of both provisions - serving litigation documents, and transmittal of letters rogatory - the phrase "foreign or international tribunal" most naturally refers to judicial and quasi-judicial governmental bodies. See Pet. App. 12a-13a. Had Congress intended also to bring private commercial arbitration within Section 1782, that phrasing would have been at best an awkward fit.

B. Extending Section 1782 To Cover Private Commercial Arbitration Would Create Tension With The FAA

Beyond the immediate context and history of Section 1782 itself, the broader context of federal arbitration law and policy counsels strongly against interpreting Section 1782 to authorize discovery in private commercial arbitration.

As the court of appeals recognized, extending judicial assistance under Section 1782 to such arbitration would create tension with the FAA, 9 U.S.C. 1 et seq., by allowing more expansive discovery in foreign disputes than what is permitted domestically. Pet. App. 13a-15a. "The methods for obtaining evidence under § 7 of the FAA are more limited than those under § 1782." *NBC*, 165 F.3d at 187. For example, Section 7 of the FAA, 9 U.S.C. 7, "explicitly confers authority only upon arbitrators; by necessary implication, the parties to an arbitration may not employ this provision to subpoena documents or witnesses." *Ibid*. In addition, Section 7 "confers enforcement authority only upon the 'district court for the district in which such arbitrators, or a majority of them, are sitting." *Ibid*. It does not permit the arbitrator to order discovery in jurisdictions where parties reside but where the arbitral panel does not sit. Nor does the FAA "grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to

demand that non-parties provide the litigating parties with documents during prehearing discovery." *COMSAT Corp. v. National Sci. Found*., 190 F.3d 269, 275 (4th Cir. 1999). Those limitations are by design: by reducing the opportunities for lengthy discovery, they enable arbitrations to be less costly relative to litigation.

Section 1782, in contrast, contains none of those limitations. Section 1782 "permits both foreign tribunals *and litigants* (as well as other 'interested persons') to obtain discovery orders from district courts." Pet. App. 14a. And it is not confined to authorizing discovery in the district where the arbitrators (or a majority of them) are sitting, or to discovery from the parties themselves. Instead, it empowers a court to order testimony or production of other evidence from any person who "resides or is found" in the district. 28 U.S.C. 1782(a).

As the court of appeals observed, it is "hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations." Pet. App. 14a. To be sure, Section 1782's text does not mechanically confine judicial assistance to circumstances where domestic law would allow the same discovery. See *Intel*, 542 U.S. at 263. In that sense, Section 1782 "does not direct United States courts to engage in [a] comparative analysis to determine whether analogous proceedings exist here." *Ibid.* But in determining which of two competing interpretations of Section 1782 best reflects Congress's intent, this Court should take into account that one reading would produce such a stark asymmetry.

Moreover, as the court of appeals further explained, see Pet. App. 14a-15a, extending Section 1782 to private commercial arbitration would result in the application of inconsistent standards in the context of certain foreign arbitrations that are subject to the FAA, "by virtue of legislation implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 7 I.L.M. 1046 ***, and the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336." *NBC*, 165 F.3d at 187; see 9 U.S.C. 208, 307. It would be incongruous to construe a general federal statute that governs international judicial assistance - and that permits broad assistance in obtaining discovery - to override a separate, arbitration-specific statute authorizing narrower assistance in that context.

II. SECTION 1782 SHOULD NOT BE EXTENDED TO ENCOMPASS INVESTOR-STATE ARBITRATION

Although the facts of this case and the question presented concern private commercial arbitration, the logic of petitioner's argument would appear also to extend to the context of investor-state arbitration. The analytical approaches to Section 1782 followed by some lower courts would likewise appear to encompass investor-state arbitration. That result would be problematic and would raise significant policy concerns. The Court should reject the conclusion that Section 1782 extends to investor-state arbitration, or should at a minimum expressly reserve judgment on that question.

A. Investor-state arbitration is a relatively recently developed method for resolving disputes between investors and foreign states in which they have invested or sought to invest (their host states). Historically, the predominant mechanism for an investor to resolve a dispute with a host state was a process known as diplomatic protection. An investor's home state would "treat[] an injury to [its] national caused by an act or omission of the host State as an international wrong against that national's home State, for which the home State was entitled - but not bound - to seek reparation in its own name." 0. Thomas Johnson, Jr., et al., *From Gunboats to BITs: The Evolution of Modern Investment Law,* Yearbook on Int'l Investment L. & Pol'y 651 (2011) (Johnson). Representatives from each state would then seek to negotiate

resolution of the foreign national's claim.

Adjudication of claims subject to diplomatic protection often took the form of resolution before mixed-claims commissions established by treaties between the host and home states. Johnson 653. For example, the Jay Treaty between the United States and Great Britain, see Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116, T.S. No. 105, "established three arbitral commissions" to resolve, among other things, "claims brought by U.S. shipowners against Great Britain for the unlawful capture and condemnation of vessels." Johnson 653 n.19. By the mid-1900s, there were at least sixty such commissions (such as the U.S.-German Mixed Claims Commission) "set up to deal with disputes arising from injury to the interests of aliens." Ian Brownlie, *Principles of Public International Law* 521 (4th ed. 1990).

Although diplomatic protection provided a potential for recourse for the investor who otherwise might not obtain any redress, it was not always a complete solution. Because the negotiations occurred between sovereigns, whose broader foreign relations were at stake, no guarantee existed that a particular investor's claim would ultimately be settled. Exercising diplomatic protection also consumed significant diplomatic resources, risked politicizing disputes, and was not always peaceful. See Johnson 653.

Investor-state arbitration arose as an alternative dispute-resolution model that did not require direct participation by the investor's home state. Following the formation of the United Nations, the development of international economic institutions, and a substantial rise in foreign investment, the 1965 Washington Convention established the International Center for the Settlement of Investment Disputes (ICSID). Johnson 669. Twenty nations ratified the convention, agreeing not to exercise diplomatic protection if a foreign national and host state entered into arbitration under ICSID. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 27, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090. Several years thereafter, bilateral investment treaties - international agreements that set conditions for private investment by individuals or companies - "began to include ***[a] provision for compulsory arbitral jurisdiction over disputes between investors and host States, available to the investor without any intervention on the part of his government." Johnson 669, 677, 679. The United States today is a party to many bilateral investment treaties and free-trade agreements that provide for such arbitration.

The advent of treaty-based investor-state arbitration offered several advantages. Because investors could bring a claim in arbitration directly against the host state, investors often no longer needed to exhaust their remedies in the host state's local courts, nor were they dependent on diplomatic efforts by their home state. That, in turn, reduced the costs associated with dispute resolution and ensured that claims could be heard by an experienced and neutral arbiter. It also depoliticized the dispute-resolution process and reduced friction between nations. Johnson 669. In addition, investor-state arbitration generally allows the parties to determine the arbitral rules that will govern, including agreeing on rules with respect to discovery.

B. Like a private commercial arbitration, an investor-state arbitration is not properly understood as a "proceeding in a foreign or international tribunal" within the meaning of Section 1782. 28 U.S.C. 1782(a). Investor-state arbitration resembles private commercial arbitration in the most salient respects. The parties (an investor and a host state) voluntarily submit their dispute for resolution by a nonjudicial body empowered by the parties' consent to decide it. The authority of investor-state arbitration panels to decide a dispute derives from the parties' consent to the arbitration. Investor-state arbitration also does not entail adjudication of a claim by a foreign court or by a standing quasi-judicial entity of the kind Congress contemplated in enacting

the 1964 Act. And unlike intergovernmental bodies of which the Rules Commission and Congress were aware in revising Section 1782, such as mixed-claims commissions, see p. 22, *supra*, investor-state arbitration does not involve state-to-state claim resolution. It entails only proceedings between an investor that brings a claim and a foreign state that has consented to resolve the claim through arbitration. Congress, moreover, could not have envisioned the application of Section 1782 to investor-state arbitration because that form of dispute resolution did not exist in 1964. To the government's knowledge, the first international agreements containing provisions for investor-state arbitration were not adopted until several years later.

Extending judicial assistance under Section 1782 to investor-state arbitration would also threaten to jeopardize the advantages that it affords. For example, injecting broad discovery, aided by the assistance of U.S. courts, into streamlined investor-state arbitrations could undermine the efficiency and cost-effectiveness of those mechanisms. Doing so could upset settled expectations of investors and foreign states that select a particular arbitral regime, including rules applying to discovery, by allowing one party, or potentially both, to circumvent those settled rules. And to the extent that the availability of broad, court-aided discovery would dissuade investors and foreign states from selecting that model, it could hinder certain benefits that stem from the availability of investor-state arbitration.

C. Although petitioner does not specifically address investor-state arbitration in its brief, its position (e.g., Br. 7) that the term "tribunal" in Section 1782(a) categorically encompasses all arbitral panels would appear equally to encompass investor-state arbitration. In addition, some of petitioner's amici start from the mistaken assumption that investor-state arbitration is covered by Section 1782 and reason that private commercial arbitration must be covered as well. See Bermann Br. 10-18; FedArb Br. 21-24. Conversely, some district courts have held or suggested that private commercial arbitration is not covered by Section 1782 because (in their view) it lacks certain attributes that they ascribe to investor-state arbitration, such as the involvement of states in entering international agreements addressing such arbitration, the participation of a foreign state, or other factors. See, *e.g.*, *In re Grupo Unidos Por El Canal, S.A.*, No. 14-226, 2015 WL 1810135, at *8 (D. Colo. Apr. 17, 2015) (citing *In re Oxus Gold PLC*, No. 06-82, 2007 WL 1037387, at *5 (D.N.J. Apr. 2, 2007)). And still other courts have adopted an approach to Section 1782 that calls for a multi-factor inquiry into the role played by a foreign government in a particular dispute-resolution mechanism in order to determine whether it constitutes private arbitration falling outside Section 1782, or a covered proceeding before a foreign or international tribunal. See *In re Guo*, 965 F.3d 96, 107-108 (2d Cir. 2020).

To the extent that any of those approaches would sweep investor-state arbitration within Section 1782's scope, they are unsound and should be rejected for the reasons set forth above. … If the Court concludes that Section 1782 does not extend to the type of commercial arbitration between private parties at issue here, it should make clear that its determination applies equally to an analogous arbitration between an investor and a foreign state. At a minimum, the Court should reserve judgment on that issue, to avoid any misimpression that the Court's decision would lead to a particular conclusion for investor-state arbitration.

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Cross References

Children's issues, **Ch. 2.B.**
International comity, **Ch. 5.C**

CHAPTER 16

Sanctions, Export Controls, and Certain Other Restrictions

This chapter discusses selected developments during 2021 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 AND OTHER RESTRICTIONS

1. Iran

a. General

On February 18, 2021, the State Department offered a briefing with senior officials regarding the efforts to achieve a U.S. return to the Joint Comprehensive Plan of Action ("JCPOA") relating to Iran's nuclear program. The transcript of the briefing is available at https://www.state.gov/briefing-with-senior-state-department-officials-on-diplomacy-to-constrain-irans-nuclear-program/. Excerpts below from the briefing address sanctions. Talks on a mutual return to full implementation of the JCPOA began in April 2021 and were held at intervals through the end of the year.

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SENIOR STATE DEPARTMENT OFFICIAL TWO: Great, thank you, and I'll be very brief before we get to your questions. Just a couple actions up in New York today related to Iran that

we would like to highlight as well. The acting representative of the United States to the United Nations, Ambassador Mills, submitted a letter today to the United Kingdom's permanent representative to the United Nations in her capacity as president of the UN Security Council for the month of February reversing the previous administration's position on the UN Security Council Iran sanctions snapback issue. In so doing, the United States is affirming that UN Security Council Resolution 2231 remains in full effect. And that letter was circulated to the full Security Council and has now taken effect.

Separately, the U.S. Mission to the United Nations up in New York has notified the Iranian mission that the United States is bringing the domestic travel controls on Iranian representatives back in line with those in place for several other missions to the UN. So essentially, returning to the status quo of the last few years before the last administration.

Today's actions return our longstanding posture with regard to Iran at the UN and, in our view, will strengthen our ability to work with allies and partners in the UN Security Council to address Iran's nuclear program and other destabilizing activities.

* * * *

On snapback, snapback was designed to help ensure that Iran performed its commitments under the JCPOA. And as your question indicated, no other member of the UN Security Council agreed that the previously terminated provisions of prior resolutions had snapped back last September, despite the prior administration's position. So that essentially isolated the United States on the Security Council and in the UN system and weakened our ability to work with our allies and partners on the Security Council to address Iran's destabilizing activity. So by reversing this position, it basically puts us back in good stead with our allies and partners and strengthens our ability to engage other Security Council members on Iran, and work within the format of 2231 as we pursue the diplomacy that my colleague has been talking about.

* * * *

b. 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 individuals or entities. The United States' cessation of participation in the JCPOA did not have any effect on resolution 2231.

As discussed in *Digest 2020* at 538-43, the United States submitted letters to the UN asserting its right to initiate "snapback" of sanctions on Iran under resolution 2231. The U.S. Mission to the UN submitted a letter to the UN Security Council on February 18, 2021, reversing the U.S. position regarding snapback, notifying the Council of the

withdrawal of letters the United States previously submitted to the Council triggering the snapback mechanism and laying out the U.S. legal case for doing so. The body of the letter follows:

> I write to notify the Security Council, on behalf of my Government, that the United States of America hereby withdraws its letters to the Security Council of August 20, 2020 (S/2020/815), August 21, 2020 (S/2020/822), and September 21, 2020 (S/2020/927). It is the view of the United States that the measures contained in paragraphs 7, 8, and 16 to 20 of resolution 2231 remain in effect, and the provisions of resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), and 1929 (2010) that were terminated by resolution 2231 remain terminated.

c. U.S. sanctions and other controls

Further information on Iran sanctions is available at https://www.state.gov/iran-sanctions/ and https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/iran-sanctions.

(1) E.O. 13949

Executive Order ("E.O.") 13949, ''Blocking Property of Certain Persons with Respect to the Conventional Arms Activities of Iran,'' was issued in 2020. See *Digest 2020* at 548.

In a January 15, 2021 press statement from Secretary of State Michael R. Pompeo, available at https://2017-2021.state.gov/imposing-sanctions-on-iranian-entities-for-activities-related-to-conventional-arms-proliferation/index.html, the State Department announced the designation under E.O. 13949 of Iran's Marine Industries Organization ("MIO"), Aerospace Industries Organization ("AIO"), and the Iran Aviation Industries Organization ("IAIO"). The press statement explains:

> Each of these entities manufactures lethal military equipment for Iran's military, including the Islamic Revolutionary Guards Corps (IRGC), a designated foreign terrorist organization that is also designated under our authority targeting Weapons of Mass Destruction (WMD) proliferators and their supporters. This military equipment, which includes attack boats, missiles, and combat drones, provides a means for the Iranian regime to perpetrate its global terror campaign. MIO, AIO, and IAIO were all previously sanctioned pursuant to the same WMD counterproliferation authority.

On March 11, 2021, the State Department published the designations, pursuant to the authority in Section 1(a)(i) of: Iranian Ministry of Defense and Armed Forces Logistics ("MODAFL"), Iran's Defense Industries Organization ("DIO"), DIO Director Mehrdad Akhlaghi-Ketabchi, and Venezuela's nominal president Nicholas Maduro, in addition to MIO, AIO, and IAIO. 86 Fed. Reg. 13,954 (Mar. 11, 2021).

(2) E.O. 13871

E.O. 13871 is entitled "Imposing Sanctions With Respect to the Iron, Steel, Aluminum, and Copper Sectors of Iran." See *Digest 2019* at 482-83. On January 5, 2021, the Treasury Department's Office of Foreign Assets Control ("OFAC") designated the following pursuant to E.O. 13871: KAIFENG PINGMEI NEW CARBON MATERIALS TECHNOLOGY CO., LTD; KHAZAR STEEL CO.; PASARGAR STEEL COMPLEX; VIAN STEEL COMPLEX; BONAB STEEL INDUSTRY COMPLEX; ESFARAYEN INDUSTRIAL COMPLEX; GILAN STEEL COMPLEX; GMI PROJECTS HAMBURG GMBH; GMI PROJECTS LTD; MIDDLE EAST MINES AND MINERAL INDUSTRIES DEVELOPMENT HOLDING COMPANY; SIRJAN IRANIAN STEEL; SOUTH ROUHINA STEEL COMPLEX; WEST ALBORZ STEEL COMPLEX; WORLD MINING INDUSTRY COMPANY LTD; YAZD INDUSTRIAL CONSTRUCITONAL STEEL ROLLING MILL; ZARAND IRANIAN STEEL COMPANY. 86 Fed. Reg. 1581 (Jan. 8, 2021).

(3) E.O. 13876

E.O. 13876, entitled, "Imposing Sanctions With Respect to Iran," was issued in 2019. See *Digest 2019* at 483-85. On January 13, 2021, OFAC designated two organizations, along with their leaders and subsidiaries, controlled by the Supreme Leader of Iran, the EXECUTION OF IMAM KHOMEINI'S ORDER ("EIKO"), and ASTAN QUDS RAZAVI ("AQR"), under E.O. 13876. See Treasury Department press release, available at https://home.treasury.gov/news/press-releases/sm1234#_blank.

(4) Section 1245 of FY-2012 NDAA and E.O. 13846

On January 14, 2021 and on May 19, 2021, 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." 86 Fed. Reg. 7789 (Feb. 2, 2021); 86 Fed. Reg. 28,235 (May 26, 2021). The determination was made under Section 1245(d)(4)(B) and (C) of the National Defense Authorization Act for Fiscal Year 2012 (FY-2012 NDAA), Public Law 112–81, and is based on reports submitted to the U.S. Congress by the Energy Information Administration, and other relevant factors.

On January 6, 2021, the State Department published the sanctions, pursuant to Section 3(a)(ii) of E.O. 13846, on Arya Sasol Polymer Company, Binrin Limited, Bakhtar Commercial Company, Kavian Petrochemical Company, and Strait Shipbrokers PTE. LTD. Each of these entities was determined to have knowingly, on or after November 5, 2018, engaged in a significant transaction for the purchase, acquisition, sale, transport, or marketing of petroleum products from Iran. 86 Fed. Reg. 672 (Jan. 6, 2021). On January 19, 2021, the State Department published the sanctions, on the same basis, under E.O. 13846, of Vietnam Gas and Chemicals Transportation Corporation. 86 Fed. Reg. 5309 (Jan. 19, 2021). On April 26, 2021, the State Department published the January 23, 2020 sanctions on three entities and two individuals pursuant to E.O. 13846, Triliance

Petrochemical, Shandong Qiwangda Petrochemical Co., Ltd. and Jiaxiang Industry Hong Kong Limited. 86 Fed. Reg. 22,090 (Apr. 26, 2021).

The Secretary of State terminated sanctions under E.O. 13846, on Aoxing Ship Management (Shanghai) Ltd and Sea Charming Shipping Company Limited and removed those entities from OFAC's List of Specially Designated Nationals and Blocked Persons ("SDN List"). 86 Fed. Reg. 33,466 (June 24, 2021).

(5) E.O. 13599

E.O. 13599, entitled "Blocking Property of the Government of Iran and Iranian Financial Institutions," has been in effect since 2012. See *Digest 2012* at 504-06. On June 10, 2021, OFAC determined that the following individuals who had been identified pursuant to E.O. 13599 should be removed from the SDN list: Farzad Ali BAZARGAN, Ahmad GHALEBANI, and Mohammad MOINIE. 86 Fed. Reg. 31,821 (June 15, 2021).

(6) Nonproliferation sanctions

(a) E.O. 13382

E.O. 13382, entitled "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters," authorizes sanctions on persons for their material contribution to proliferation of weapons of mass destruction ("WMDs") and their means of delivery or by persons or countries of proliferation concern or for their ties to, or support for, persons previously designated under the E.O. See *Digest 2005* at 1125-31.

On March 11, 2021, the State Department published the designations in 2020 of four individuals under E.O. 13382: Majid Agha'i; Amjad Sazgar; Hamid Reza Ghadirian; and Ahmad Asghari Shiva'i. 86 Fed. Reg. 13,955 (Mar. 11, 2021).

On July 2, 2021, OFAC determined that circumstances no longer warrant the inclusion of the following three individuals, who had been designated under E.O. 13382, on the SDN List: Mohammed Reza DEZFULIAN, Behzad Daniel FERDOWS, Mehrzad Manuel FERDOWS. 86 Fed. Reg. 36,185 (July 8, 2021).

On October 8, 2021, OFAC determined that circumstances no longer warrant the inclusion of two entities on the SDN list designated under E.O. 13382: MAMMUT INDUSTRIAL GROUP P.J.S and MAMMUT DIESEL. 86 Fed. Reg. 57,474 (Oct. 15, 2021).

On October 29, 2021, the State Department announced in a press statement, available at https://www.state.gov/designation-of-six-targets-involved-in-irans-destabilizing-unmanned-aerial-vehicle-activities/, designations of Iran-based Mado Company, Yousef Aboutalebi, and Chief Brigadier Gen. 2 Abdollah Mehrabi under E.O. 13382 for their links to the IRGC and its affiliate units and to Iran's unmanned aerial vehicles ("UAV") activity. See also Treasury press release, available at https://home.treasury.gov/news/press-releases/jy0443 (designations were made simultaneously under E.O. 13224).

(b) Iran Freedom and Counter-Proliferation Act ("IFCA")

The October 19, 2020 sanctions pursuant to IFCA and the Iran Sanctions Act of 1996 ("ISA"), discussed in *Digest 2020* at 558, were published in the Federal Register on March 11, 2021. 86 Fed. Reg. 13,956 (Mar. 11, 2021) (Reach Holding Group (Shanghai) Company Ltd., Reach Shipping Lines, Delight Shipping Co., Ltd., Gracious Shipping Co. Ltd., Noble Shipping Co. Ltd., and Supreme Shipping Co. Ltd.; Eric Chen of Reach Holding Group (Shanghai) Company Ltd. and Reach Shipping Lines, and Daniel Y. He of Reach Holding Group (Shanghai) Company Ltd.). Also published on that day were the IFCA sanctions regarding Pamchel Trading Beijing Co. Ltd., Global Industrial and Engineering Supply Ltd., Kaifeng Pingmei New Carbon Materials Technology Co., Ltd, Hafez Darya Arya Shipping Company, Jiangyin Mascot Special Steel Co., Ltd, Hafez Darya Arya Shipping Company, Jiangyin Mascot Special Steel Co. Ltd, Iran Transfo Company, Zangan Distribution Transformer Company, Accenture Building Materials, Safiran Payam Darya Shipping Company (SAPID), Islamic Republic of Iran Shipping Lines (IRISL), and Mobarakeh Steel Company. 86 Fed. Reg. 13,958 (Mar. 11, 2021). That notification also included the sanctions under ISA on Majid Sajdeh of Hafez Darya Arya Shipping Company, Mohammad Reza Modarres Khiabani of IRISL, and Hamidreza Azimian of Mobarakeh Steel Company. *Id*.

In a January 5, 2021 press statement, available at https://2017-2021.state.gov/sanctioning-companies-supporting-irans-metal-industry/index.html, the State Department announced IFCA sanctions on 17 companies and one individual for supporting Iran's metal industry:

> The Department of State is designating China-based Kaifeng Pingmei New Carbon Materials Technology Co., LTD (KFCC) and Iran-based Hafez Darya Arya Shipping Company (HDASCO), a subsidiary of the Islamic Republic of Iran Shipping Lines (IRISL), pursuant to Section 1245(a)(1)(C)(i)(II) of the Iran Freedom and Counter-Proliferation Act of 2012 (IFCA). Both companies knowingly sold, supplied, or transferred, directly or indirectly, graphite to or from Iran and such graphite was sold, supplied, or transferred to or from an Iranian person (South Kaveh Steel Company and Arfa Iron and Steel Company) included on the Department of Treasury's Specially Designated Nationals List. The State Department is also imposing sanctions on Majid Sajdeh, who is a principal executive officer of HDASCO.

On January 15, 2021, the State Department announced, in a press statement available at https://2017-2021.state.gov/imposing-sanctions-related-to-the-islamic-republic-of-iran-shipping-lines-and-iranian-shipping-entities/index.html, that it was imposing IFCA sanctions on the Islamic Republic of Iran Shipping Lines ("IRISL"), as well as Mohammad Reza Modarres Khiabani, the Chief Executive Officer of IRISL, the PRC-based Jiangyin Mascot Special Steel Co., LTD, Iran Transfo Company and Zangan Distribution Transformer Company, the UAE-based Accenture Building Materials, Iran's

Mobarakeh Steel Company, the IRISL subsidiary Sapid Shipping, and Hamidreza Azimian, the Chief Executive Officer of Mobarakeh Steel Company.

Also on January 15, 2021, the Secretary of State submitted the report including the determination required under IFCA with respect to: (1) Whether Iran is (A) using any of the materials described in 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. 86 Fed. Reg. 8473 (Feb. 5, 2021).

(7) Human Rights, Cyber, and other sanctions programs (CISADA, TRA, E.O. 13553, E.O. 13606, E.O. 13608, and E.O. 13846, CAATSA)

See also section A.11 *infra* for discussion of other human rights-related designations of Iranians. 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"). See *Digest 2010* at 656-60. 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." See *Digest 2012* at 496-97.

On September 3, 2021, OFAC designated the following four individuals under E.O. 13553: Alireza Shahvaroghi FARAHANI; Mahmoud KHAZEIN; Omid NOORI; and Kiya SADEGHI. 86 Fed. Reg. 50,951 (Sep. 13, 2021). Secretary Antony J. Blinken explained in a September 3, 2021 press statement, available at https://www.state.gov/sanctioning-iranian-intelligence-affiliates-for-targeting-dissidents-abroad/, that these designations relate to a plot to kidnap a U.S. citizen due to her criticism of the Iranian government. The press statement includes the following:

> Today, in response to this specific plot, the United States is imposing sanctions on senior Iran-based intelligence official Alireza Shahvaroghi Farahani, who led a network of affiliates, including Mahmoud Khazein, Kiya Sadeghi, and Omid Noori, tasked with planning this kidnapping on U.S. soil as well as targeting Iranian dissidents in the United Kingdom, Canada, and the United Arab Emirates. The failed plot to kidnap a U.S.-based journalist and human rights activist resulted in a U.S. Department of Justice indictment of members of the network in July of this year. All four individuals are being sanctioned pursuant to Executive Order 13553, for having acted for or on behalf of, directly or indirectly, the Iranian Ministry of Intelligence and Security, a U.S.-sanctioned entity.

Treasury's September 3, 2021 press release is available at https://home.treasury.gov/news/press-releases/jy0343 and a July 13, 2021 Department

of Justice press release on the indictment is available at https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-kidnapping-conspiracy-charges-against-iranian.

OFAC designated the following pursuant to E.O. 13553 on December 7, 2021: Individuals—Qahtan KHALIL; Adeeb Namer SALAMEH; Ali HEMMATIAN; Masoud SAFDARI; Gholamreza SOLEIMANI; Leila VASEGHI; Seyed Reza Mousavi AZAMI; Mohsen EBRAHIMI; Hassan KARAMI—and entities—IRAN'S COUNTER-TERROR SPECIAL FORCES; SPECIAL UNITS OF IRAN'S LAW ENFORCEMENT FORCES. 86 Fed. Reg. 71,120 (Dec. 14, 2021). Also on December 7, 2021, OFAC designated four targets that the State Department had reported as meeting the criteria of Section 106 of CAATSA: ZAHEDAN PRISON, ISFAHAN CENTRAL PRISON, Soghra KHODADADI, and Mohammad KARAMI. See Treasury Department press release available at https://home.treasury.gov/news/press-releases/jy0517.

2. People's Republic of China ("PRC")

a. Relating to human rights abuses, including in Xinjiang

See also section A.11 *infra* for discussion of designations relating to violations of human rights, including designations of PRC officials. On March 22, 2021, the foreign ministers of Canada, and the United Kingdom, and the United States Secretary of State issued a joint statement announcing coordinated action in response to human rights abuses in Xinjiang. The joint statement is available at https://www.state.gov/joint-statement-on-xinjiang/. It includes the following:

> …The evidence, including from the Chinese Government's own documents, satellite imagery, and eyewitness testimony is overwhelming. China's extensive program of repression includes severe restrictions on religious freedoms, the use of forced labour, mass detention in internment camps, forced sterilisations, and the concerted destruction of Uyghur heritage.
>
> Today, we have taken coordinated action on measures, in parallel to measures by the European Union, that send a clear message about the human rights violations and abuses in Xinjiang. We are united in calling for China to end its repressive practices against Uyghur Muslims and members of other ethnic and religious minority groups in Xinjiang, and to release those arbitrarily detained.

Secretary Blinken's March 22, 2021 press statement elaborates on the actions taken by the United States, in coordination with others, to promote accountability for human rights abuses in Xinjiang. The statement is excerpted below and available at https://www.state.gov/promoting-accountability-for-human-rights-abuse-with-our-partners/.

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Today, the United States, in unity with our partners, is imposing sanctions against Wang Junzheng, the Secretary of the Party Committee of the Xinjiang Production and Construction Corps (XPCC) and Chen Mingguo, Director of the Xinjiang Public Security Bureau (XPSB) under the Global Magnitsky sanctions program. We are doing so in response to serious human rights abuse against members of ethnic and religious minority groups in Xinjiang.

Wang Junzheng and Chen Mingguo are being designated pursuant to Executive Order 13818 in connection with the People's Republic of China's (PRC) appalling abuses in Xinjiang. Wang is being designated for having acted or purported to act for or on behalf of, directly or indirectly, the XPCC. Chen is being designated for being a foreign person who is a leader or an official of the XPSB, which has engaged in, or whose members have engaged in, serious human rights abuse related to Chen's tenure.

Amid growing international condemnation, the PRC continues to commit genocide and crimes against humanity in Xinjiang. The United States reiterates its calls on the PRC to bring an end to the repression of Uyghurs, who are predominantly Muslim, and members of other ethnic and religious minority groups in Xinjiang, including by releasing all those arbitrarily held in internment camps and detention facilities.

We have taken this action today in solidarity with our partners in the United Kingdom, Canada, and the European Union. As part of their actions today, our partners also sanctioned human rights abusers in connection with the atrocities occurring in Xinjiang and other countries. These actions demonstrate our ongoing commitment to working multilaterally to advance respect for human rights and shining a light on those in the PRC government and CCP responsible for these atrocities.

The United States is committed to playing a strong leadership role in global efforts to combat serious human rights abuse, through the Global Magnitsky sanctions program and similar efforts. Targeted sanctions, including against those who violate or abuse human rights, are an important tool to discourage malign actors and promote accountability

The United States applauds the EU's broader human rights sanctions action today. We welcome the EU's use of this powerful tool to promote accountability for human rights abuse on a global scale. A united transatlantic response sends a strong signal to those who violate or abuse international human rights, and we will take further actions in coordination with likeminded partners. We will continue to stand with our allies around the world in calling for an immediate end to the PRC's crimes and for justice for the many victims.

For further information, see the Department of the Treasury's **press release** .

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In a March 27, 2021 press statement, available at https://www.state.gov/prc-sanctions-on-u-s-officials/, Secretary Blinken condemned the imposition of sanctions by the PRC on two U.S. Commission on International Religious Freedom commissioners "apparently in retaliation" for U.S. sanctions in connection with human rights abuses in Xinjiang. The PRC also imposed sanctions in January 2021 and July 2020 on U.S. officials and organizations promoting democracy and human rights.

On June 24, 2021, the U.S. Mission to the UN in Geneva issued a fact sheet on U.S. government actions on forced labor in Xinjiang. The fact sheet is available at https://geneva.usmission.gov/2021/06/24/fact-sheet-new-u-s-government-actions-on-forced-labor-in-xinjiang/, and excerpted below.

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At the recent G7 Summit in Cornwall, United Kingdom, the world's leading democracies stood united against forced labor, including in Xinjiang, and committed to ensure global supply chains are free from the use of forced labor. The United States is translating these commitments into action. The Biden-Harris administration is taking additional steps to hold those who engage in forced labor accountable and ensure that we continue to remove goods made with forced labor from our supply chains through actions by the Department of Homeland Security's U.S. Customs and Border Protection, the Department of Commerce, and the Department of Labor.

These actions demonstrate our commitment to imposing additional costs on the People's Republic of China (PRC) for engaging in cruel and inhumane forced labor practices and ensuring that Beijing plays by the rules of fair trade as part of the rules-based international order. The United States believes that state-sponsored forced labor in Xinjiang is both an affront to human dignity and an example of the PRC's unfair economic practices. The PRC's use of forced labor in Xinjiang is an integral part of its systematic abuses against the Uyghur population and other ethnic and religious minority groups, and addressing these abuses will remain a high priority for the Biden-Harris administration. The systematic abuses go beyond forced labor to include sexual violence and large-scale forced detentions, and the PRC continues to commit genocide and crimes against humanity in Xinjiang.

The PRC's forced labor practices run counter to our values as a nation and expose American consumers to unethical practices. They also leave American businesses and workers to compete on an uneven playing field by allowing firms to gain advantage over their competitors by exploiting workers and artificially suppressing wages. The United States will not tolerate forced labor in our supply chains and will continue to stand up for our values and for U.S. workers and businesses. This includes maintaining support for the development of transparent and diverse clean energy supply chains at home free of forced labor — and supporting President Biden's commitment to bold climate action, the domestic solar industry, and the jobs this vital industry creates.

U.S. Customs and Border Protection (CBP) Issues Withhold Release Order (WRO): CBP has issued a WRO on silica-based products made by Hoshine Silicon Industry Co., Ltd., a company located in Xinjiang, and its subsidiaries. This WRO is based on information reasonably indicating that Hoshine used forced labor to manufacture silica-based products. As a result, personnel at all U.S. ports of entry have been instructed to immediately begin detaining shipments that contain silica-based products made by Hoshine or materials and goods derived from or produced using those silica-based products. CBP investigates allegations of forced labor in U.S. supply chains and will continue investigating allegations in the polysilicon industry and other industries in Xinjiang and elsewhere.

CBP's forced labor investigations have produced six Withhold Release Orders in Fiscal Year 2021, including one on cotton and tomato products from the Xinjiang region, another on

cotton products originating from the Xinjiang Production and Construction Corps (XPCC), and one on the Dalian Ocean Fishing Co., Ltd. As demonstrated by the Dalian WRO, the United States is also taking action to combat the PRC's use of forced labor beyond Xinjiang – including in the seafood industry. Currently, 35 of 49 active WROs are on goods from the PRC, and 11 WROs are on goods made by forced labor from Xinjiang.

Department of Commerce Updates its Entity List: The Department of Commerce's Bureau of Industry and Security added to the Entity List five PRC entities: Hoshine Silicon Industry (Shanshan); Xinjiang Daqo New Energy; Xinjiang East Hope Nonferrous Metals; Xinjiang GCL New Energy Material Technology, and XPCC— for participating in the practice of, accepting, or utilizing forced labor in Xinjiang and contributing to human rights abuses against Uyghurs and other minority groups in Xinjiang. This action, which follows the 48 PRC entities previously added to the Entity List for their connections to human rights abuses in Xinjiang, restricts the export, reexport, or in-country transfer of commodities, software, and technology subject to the Export Administration Regulations where such entities are a party to the transactions (e.g., end-user, purchaser, intermediate or ultimate consignee).

Department of Labor Updates the "List of Goods Produced by Child Labor or Forced Labor": The Department of Labor has published a Federal Register Notice updating its "List of Goods Produced by Child Labor or Forced Labor," to include polysilicon produced with forced labor in the PRC. Every two years, the Department of Labor publishes an updated list of goods produced by child labor or forced labor in violation of international standards. This update is the first time a good has been added outside of that two-year cycle, highlighting its strong response to the severity of the ongoing human rights abuses against Uyghurs and other minority groups in Xinjiang. The report currently includes other products from the PRC that have links to forced labor in Xinjiang or by Uyghur workers transferred to other parts of the PRC, including cotton, garments, footwear, electronics, gloves, hair products, textiles, thread/yarn, and tomato products.

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On July 13, 2021, Secretary Blinken announced the issuance of an updated Xinjiang Supply Chain Business Advisory ("Advisory") in a press statement, available at https://www.state.gov/issuance-of-the-updated-xinjiang-supply-chain-business-advisory/. The Advisory comes from the State Department, Treasury Department, Commerce Department, Department of Homeland Security, Office of the U.S. Trade Representative, and the Department of Labor and is available at https://www.state.gov/xinjiang-supply-chain-business-advisory/. The press statement further explains:

> The updated Advisory highlights the heightened risks for businesses with supply chain and investment links to Xinjiang given the entities complicit in forced labor and other human rights abuses there and throughout China.
>
> Among other elements, the updated Business Advisory:
>
> Includes information from the Department of Labor and the Office of the U.S. Trade Representative, which are now co-signatories;

Notes that the PRC government is perpetrating genocide and crimes against humanity in Xinjiang;
Provides specific information regarding risks related to investment in PRC companies linked to surveillance and forced labor in Xinjiang;
Strengthens recommendations for businesses regarding the risks and potential exposure related to supply chains and investment links to Xinjiang, including but not limited to surveillance;
Updates the list of U.S. government enforcement actions in and in connection to Xinjiang;
Adds information on silicon and polysilicon supply chains linked to Xinjiang; and
Provides a list of other countries' relevant regulatory provisions and information on forced labor in supply chains.

b. Relating to Hong Kong

On July 14, 2020, the President issued E.O. 13936, relating to Hong Kong. See *Digest 2020* at 569-71; 85 Fed. Reg. 43,413 (July 17, 2020). In a January 15, 2021 press statement, available at https://2017-2021.state.gov/designating-prc-and-hong-kong-officials-after-widespread-pro-democracy-arrests-in-hong-kong/index.html, the State Department announced designations of six PRC and Hong Kong officials under E.O. 13936, after a January 6 crackdown on pro-democracy politicians and activists advocating for open primary elections for Hong Kong's Legislative Council. Those designated are: You Quan, Vice Chairman of the Central Leading Group on Hong Kong and Macau Affairs; Sun Wenqing AKA Sun Qingye, Deputy Director of the Office for Safeguarding National Security in the HKSAR; and Tam Yiu-Chung, Hong Kong delegate to the National People's Congress Standing Committee; Frederic Choi Chin-Pang, Kelvin Kong Hok Lai, and Andrew Kan Kai Yan, officials in the National Security Division of the Hong Kong Police. 86 Fed. Reg. 8472 (Feb. 5, 2021).

On January 22, 2021, the State Department published designations under E.O. 13936 of the following fourteen individuals for implementing the National Security Law: Wang Chen, Cao Jianming, Zhang Chunxian, Shen Yueyue, Ji Bingxuan, Arken Imirbaki, Wan Exiang, Chen Du, Wang Dongming, Padma Choling, Ding Zhongli, Hao Mingjin, Cai Dafeng, and Wu Weihua. 86 Fed. Reg. 6729 (Jan 22, 2021).

On March 16, 2021, Secretary Blinken announced an update to the Hong Kong Autonomy Act **report**, responding to a March 11 decision regarding Hong Kong's electoral system. The March 17 press statement from Secretary Blinken is available at https://www.state.gov/hong-kong-autonomy-act-update/ and includes the following:

> Today's update identifies 24 PRC and Hong Kong officials whose actions have reduced Hong Kong's high degree of autonomy, including 14 vice chairs of the National People's Congress Standing Committee and officials in the Hong Kong Police Force's National Security Division, the Hong Kong and Macau Affairs Office, and the Office for Safeguarding National Security. Foreign financial

institutions that knowingly conduct significant transactions with the individuals listed in today's report are now subject to sanctions.

Effective July 16, 2021, the State Department designated Chen Dong, Yang Jianping, Qiu Hong, Lu Xinning, Tan Tieniu, He Jing, and Yin Zonghua under E.O. 13936. 86 Fed. Reg. 41,881 (Aug. 3, 2021).

Also on July 16, 2021, the U.S. Department of State, along with the U.S. Department of the Treasury, the U.S. Department of Commerce, and the U.S. Department of Homeland Security, issued a **business advisory** regarding Hong Kong. The State Department fact sheet on the Hong Kong business advisory is excerpted below and available at https://www.state.gov/issuance-of-a-hong-kong-business-advisory/.

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The policies which the PRC government and the Government of Hong Kong have implemented undermine the legal and regulatory environment that is critical for individuals and businesses to operate freely and with legal certainty in Hong Kong.

Businesses should be aware that the risks faced in mainland China are now increasingly present in Hong Kong. The National Security Law and actions taken by PRC and Hong Kong authorities may negatively affect their staff, finances, legal compliance, reputation, and operations.

The advisory highlights the following:

Businesses operating in Hong Kong, as well as individuals and businesses conducting business on their behalf, are subject to the laws of Hong Kong, including the National Security Law. Foreign nationals, including one U.S. citizen, have been arrested under the NSL.

Businesses face risks associated with electronic surveillance without warrants and the surrender of corporate and customer data to authorities.

Businesses that rely on a free and open press may face restricted access to information.

Individuals and entities should be aware of potential consequences of certain types of engagement with sanctioned individuals or entities.

Businesses operating in Hong Kong may face heightened risks and uncertainty related to PRC retaliation against companies that comply with sanctions imposed by the United States and other countries, including through enforcement of the PRC's Countering Foreign Sanctions Law.

Businesses with potential exposure should be aware of the potential reputational, economic, and legal risks of maintaining a presence or staff in Hong Kong.

In order to mitigate reputational and other risks, businesses should apply industry due diligence policies and procedures to address applicable and identified risks.

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c. Software developed or controlled by Chinese companies

President Trump issued E.O. 13971 on January 5, 2021, "Addressing the Threat Posed by Applications and Other Software Developed or Controlled by Chinese Companies." 86 Fed. Reg. 1249 (Jan. 8, 2021). This order was revoked by President Biden on June 9, 2021 via E.O. 14034. 86 Fed. Reg. 31423 (June 11, 2021).

d. Relating to "securities investments that finance Chinese military companies"

On November 12, 2020, the President issued E.O. 13959, "Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies." See *Digest 2020* at 574-75. On January 13, 2021, the President issued E.O. 13974 amending E.O. 13959. 86 Fed. Reg. 4875 (Jan. 19, 2021). On January 2, 2021, the President issued E.O. 14032, further amending E.O. 13959 and revoking E.O. 13974 in its entirety. 86 Fed. Reg. 30145 (June 7, 2021). See also November 9, 2021 "Notice on the Continuation of the National Emergency with Respect to the Threat from Securities Investments that Finance Certain Companies of the People's Republic of China," available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/09/notice-on-the-continuation-of-the-national-emergency-with-respect-to-the-threat-from-securities-investments-that-finance-certain-companies-of-the-peoples-republic-of-china/#:~:text=For%20this%20reason%2C%20the%20national,effect%20beyond%20November%2012%2C%202021.

On June 3, 2021, OFAC published the names of 59 additional entities (not listed herein) added to the SDN List pursuant to E.O. 13959, as amended. 86 Fed. Reg. 30,677 (June 9, 2021).

On December 16, 2021, OFAC designated the following under E.O. 13959, as amended by E.O. 14032: CLOUDWALK TECHNOLOGY CO., LTD; DAWNING INFORMATION INDUSTRY CO., LTD; LEON TECHNOLOGY COMPANY LIMITED; MEGVII TECHNOLOGY LIMITED; NETPOSA TECHNOLOGIES LIMITED; SZ DJI TECHNOLOGY CO., LTD.; XIAMEN MEIYA PICO INFORMATION CO., LTD; and YITU LIMITED. 86 Fed. Reg. 72,680 (Dec. 22, 2021). On December 21, 2021, OFAC designated SENSETIME GROUP LIMITED pursuant to E.O. 13959. 86 Fed. Reg. 73,842 (Dec. 28, 2021).

3. Russia

a. Orders Relating to Ukraine and CAATSA

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.

In a January 19, 2021 press statement, available at https://2017-2021.state.gov/sanctions-on-russian-entity-and-a-vessel-engaging-in-the-construction-of-nord-stream-2/index.html, the State Department announced sanctions on the Russia-based entity KVT-RUS and the identification of the vessel FORTUNA as blocked property, measures taken pursuant to Section 232 of CAATSA. The press statement explains KVT-RUS was determined to have knowingly sold, leased, or provided to the Russian Federation goods, services, technology, information, or support for the construction of Russian energy export pipelines. In particular, the measures relate to the Nord Stream 2 pipeline, which,

> if completed, would give Russia the means to completely bypass Ukraine, depriving Ukraine of vital revenues and opening it up to further Russian aggressive actions, while providing the means to use natural resources as a tool of political pressure and malign influence against western Europe.

On March 2, 2021, OFAC designated seven individuals—Aleksandr Vasilievich BORTNIKOV; Alexander Petrovich KALASHNIKOV; Sergei Vladilenovich KIRIYENKO; Igor Victorovich KRASNOV; Aleksei Yurievich KRIVORUCHKO; Pavel Anatolievich POPOV; and Andrei Veniaminovich YARIN—under E.O. 13685. 86 Fed. Reg. 13,609 (Mar. 9, 2021).

Also effective March 2, 2021, pursuant to the authority in CAATSA Section 231(e), the Secretary of State updated guidance on the list of persons that are part of, or operate for or on behalf of, the defense and intelligence sectors of the Government of the Russian Federation to include the following: 27th Scientific Center; 48 Central Scientific Research Institute Sergiev Posad (also known as [aka] 48 TsNII Sergiev Posad; aka 48th Central Research Institute, Sergiev Posad); 48 Central Scientific Research Institute Kirov (aka 48th Central Research Institute Kirov; aka 48th TsNII); 48 Central Scientific Research Institute Yekaterinburg (aka 48th TsNII Yekaterinburg); State Scientific Research Institute of Organic Chemistry and Technology (aka GoSNIIOKhT); 33rd Scientific Research and Testing Institute (aka 33rd TsNIII). 86 Fed. Reg. 20,430 (Apr. 19, 2021).

On April 7, 2021, the Department of State determined, pursuant to CAATSA, that the Turkish entity Presidency of Defense Industries (SSB), formerly known as the Undersecretariat for Defense Industries (SSM), has knowingly, on or after August 2, 2017, engaged in a significant transaction with a person that is part of, or operates for or on behalf of, the defense or intelligence sectors of the Government of the Russian Federation. Sanctions were also imposed on SSB and Ismail Demir, SSB's president; Faruk Yigit, SSB's vice president; Serhat Gencoglu, SSB's Head of the Department of Air Defense and Space; and Mustafa Alper Deniz, Program Manager for SSB's Regional Air Defense Systems Directorate, pursuant to CAATSA. 86 Fed. Reg. 18,110 (Apr. 7, 2021).

OFAC designated several individuals and entities under E.O. 13660 and E.O. 13685 on April 15, 2021 (in conjunction with designations under new E.O 14024,

discussed *infra*): Larisa Vitalievna KULINICH (13660); Leonid Kronidovich RYZHENKIN (13685); Pavel Leonidovich KARANDA (13660); Vladimir Nikolaevich TERENTIEV (13660); Leonid MIKHAILIUK (13660); FEDERAL GOVERNMENT INSTITUTION PRETRIAL DETENTION CENTER NO 1 OF THE DIRECTORATE OF THE FEDERAL PENITENTIARY SERVICE FOR THE REPUBLIC OF CRIMEA AND SEVASTOPOL (13685); JOINT STOCK COMPANY THE BERKAKIT-TOMMOT-YAKUTSK RAILWAY LINE'S CONSTRUCTION DIRECTORATE (13685); LENPROMTRANSPROYEKT (13685). 86 Fed. Reg. 20,605 (Apr. 20, 2021).

b. Relating to the Poisoning of Aleksey Navalny

(1) March 2 actions

On March 2, 2021, the United States took multiple sanctions measures in response to the poisoning of Aleksey Navalny. These actions were publicly announced through fact sheets, press releases, and publication in the Federal Register. The State Department fact sheet, providing an overview of the measures applied under multiple sanctions authorities, is available at https://www.state.gov/u-s-sanctions-and-other-measures-imposed-on-russia-in-response-to-russias-use-of-chemical-weapons/, and excerpted below.

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CHEMICAL AND BIOLOGICAL WEAPONS ACT SANCTIONS

Today, the Secretary of State determined that the Government of the Russian Federation has used a chemical weapon against its own nationals, in violation of the Chemical Weapons Convention. As a result, the following sanctions will be imposed (full or partial waivers are noted below) after the 15-day Congressional notification period:

Foreign Assistance: Termination of assistance to Russia under the Foreign Assistance Act of 1961, except for urgent humanitarian assistance and food or other agricultural commodities or products.

Arms Sales: Termination of (a) sales to Russia under the Arms Export Control Act of any defense articles, or defense services, and (b) licenses or other approvals for the export to Russia of any item on the United States Munitions List, except in support of commercial space cooperation following a six-month transition period, and government space cooperation.

Arms Sales Financing: Termination of all foreign military financing for Russia under the Arms Export Control Act.

Denial of United States Government Credit or Other Financial Assistance: Denial to Russia of any credit, credit guarantees, or other financial assistance by any department, agency, or instrumentality of the United States Government, including the Export-Import Bank of the United States.

Exports of National Security-Sensitive Goods and Technology: Prohibition on the export to Russia of any goods or technology on that part of the control list established under Section 2404(c)(1) of the Appendix to Title 50.

Duration and Conditions for Removal

The sanctions will take effect following the publication of a Federal Register notice and they will remain in place for a minimum of 12 months. The sanctions can only be removed after this 12-month period if the Executive Branch determines and certifies to Congress that the Russian government has met several conditions described in the CBW Act (22 U.S.C. 5605(c)), including (1) providing reliable assurances that it will not use chemical or biological weapons in violation of international law and will not use lethal chemical or biological weapons against its own nationals; (2) it is not making preparations to use chemical weapons in violation of international law or to use lethal chemical or biological weapons against its own nationals; (3) that it is willing to allow on-site inspections by United Nations observers or other internationally recognized, impartial observers to verify that it is not making preparations to use chemical or biological weapons in violation of international law or to use lethal chemical or biological weapons against its own nationals, or other reliable means exist to verify that it is not making such preparations; and (4) that it is making restitution to those affected by any use of chemical or biological weapons in violation of international law or by any use of lethal chemical or biological weapons against its own nationals.

Waivers

The United States government has determined that it is essential to U.S. national security interests to waive certain restrictions on foreign assistance and exports.

Foreign Assistance: The restriction will continue to be waived in all respects.

Export Restrictions: Some of the waivers to restrictions on arms sales and Commerce-controlled exports of national security-sensitive (NS) items that were implemented as part of sanctions imposed in August 2018 in response to the Skripal attack will continue, including:

— Export license exceptions: Temporary Imports, Exports, and Reexports (TMP); Governments, International Organizations, and International Inspections under the Chemical Weapons Convention (GOV); Baggage (BAG); Aircraft and Vessels (AVS); or Encryption Commodities and Software (ENC).

— Exports needed to ensure the safe operation of commercial passenger aviation;

— Exports to wholly-owned subsidiaries of U.S. and other foreign companies in Russia;

— Deemed export licenses for Russian nationals working in the United States; and

— Exports in support of government space cooperation.

License applications subject to these waivers will continue to be reviewed on a case-by-case basis. However, several existing export-related waivers will be removed. These include:

— The waivers for license exceptions Service and Replacement of Parts and Equipment (RPL), Technology and Software Unrestricted (TSU), and Additional Permissive Reexports (APR) will be removed. Exporters will no longer be able to use these exceptions for exports and reexports of NS items to Russia.

— The waiver for exports and reexports of NS items to commercial end-users in Russia for civil end-uses will be removed. Applications for such exports will now be reviewed under a "presumption of denial" policy.

— The waivers for exports of U.S. Munitions List items and NS items in support of commercial space flight activities in Russia will be removed following a six-month transition

period, after which such exports will be subject to a license review policy of a presumption of denial.

For additional information on the export restrictions, please visit the websites of the State Department's Directorate of Defense Trade Controls (DDTC) and Department of Commerce's Bureau of Industry and Security (BIS).

COUNTERING AMERICA'S ADVERSARIES THROUGH SANCTIONS ACT (CAATSA) SECTION 231 LIST OF SPECIFIED PERSONS ADDITIONS:

Today, the Department of State added six entities to the Countering America's Adversaries Through Sanctions Act (CAATSA) Section 231 List of Specified Persons as persons that are part of, or operate for or on behalf of, the defense or intelligence sectors of the Government of the Russian Federation. Henceforth, any person who knowingly engages in a significant transaction with any of the persons will be subject to mandatory sanctions. We are taking this step due to the malign activities in which Russia's defense sector engages – especially with respect to its chemical weapons program – and the revenue, access, and influence that transactions with its defense sector provide the Russian government. The entities added are the following.

27th Scientific Center;
48 Central Scientific Research Institute Sergiev Posad (also known as [aka] 48 TsNII Sergiev Posad; aka 48th Central Research Institute, Sergiev Posad);
48 Central Scientific Research Institute Kirov (aka 48th Central Research Institute Kirov; aka 48th TsNII);
48 Central Scientific Research Institute Yekaterinburg (aka 48th TsNII Yekaterinburg);
State Scientific Research Institute of Organic Chemistry and Technology (aka GoSNIIOKhT);
33rd Scientific Research and Testing Institute (aka 33rd TsNIII).

E.O. 13382 SANCTIONS

Today, the Department of State designated the FSB, GosNIIOKhT, the 33rd TsNIII, the 27th Scientific Center, the GRU, and GRU officers Alexander Yevgeniyevich Mishkin and Anatoliy Vladimirovich Chepiga pursuant to Section 1(a)(ii) of E.O. 13382 ("Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters ") for having engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer or use such items, by Russia. The Department of the Treasury also designated Alexander Vasilievich Bortnikov, the Director of the FSB, under E.O. 13382.

The FSB was involved in the August 2020 poisoning of Aleksey Navalny with a chemical weapon, specifically a nerve agent known as "Novichok." The FSB is being designated for its role in the Navalny poisoning and for possessing a Novichok chemical weapon.

The Main Intelligence Directorate (GRU), GRU officer Alexander Yevgeniyevich Mishkin, and GRU officer Anatoliy Vladimirovich Chepiga have engaged in activities that materially contribute to the possession, transport, and use of WMD by Russia, namely the chemical weapon Novichok. Mishkin and Chepiga conducted a poisoning using a Novichok nerve agent in the United Kingdom in 2018.

The 33rd TsNIII, GosNIIOKhT, and the 27th Scientific Center have engaged in activities to develop Russia's chemical weapons capabilities, including technologies for delivering such

weapons. GosNIIOKhT is a Russian institute with a longstanding role in researching and developing chemical weapons, and GosNIIOKhT developed Russia's Novichok chemical weapons. Since 2016, GosNIIOKhT has expanded its research, development, testing, and evaluation capabilities. 33rd TsNIII and the 27th Scientific Center are organizations subordinate to the Russian Federation Armed Forces Chemical, Biological, and Radiological Defense troops. 33rd TsNIII stewards Russia's Shikhany Chemical Proving Ground, where Russia conducts chemical weapons-related testing. The 27th Scientific Center has been involved with Russian chemical weapons research and testing activities.

E.O. 13661 SANCTIONS

Additionally, today, the Department of the Treasury is designating seven Russian officials pursuant to E.O. 13661 ("Blocking Property of Additional Persons Contributing to the Situation in Ukraine") as a part of the response to the Navalny poisoning and imprisonment. The seven individuals are Pavel Anatolievich Popov, Aleksei Yurievich Krivoruchko, Sergei Vladilenovich Kiriyenko, Andrei Veniaminovich Yarin, Alexander Vasilievich Bortnikov, Igor Victorovich Krasnov and Alexander Petrovich Kalashnikov.

Popov is the Deputy Minister in the Ministry of Defense of the Russian Federation with overall responsibility for research activities. This includes the oversight and development of the Ministry's scientific and technical capabilities, including the development of potential and modernization of existing weapons and military equipment.

Krivoruchko is the Deputy Minister in the Ministry of Defense of the Russian Federation with the overall responsibility for armaments. This includes the oversight of the Ministry's stocks of weapons and military equipment. He is also responsible for their elimination within the framework of the implementation of international treaties assigned to the Ministry of Defense.

Kiriyenko is First Deputy Chief of Staff of the Presidential Executive Office of the Russian Federation. In this function, he is responsible for domestic affairs, including political groups and activities.

Yarin is First Deputy Chief of Staff of the Presidential Executive Office of the Russian Federation. In this function, he is in charge of designing and implementing internal political orientations. He was also appointed to a task force whose role was to counter Navalny's influence in Russian society including through operations meant to discredit him.

Bortnikov, as noted above, is the Director of the FSB, and is being concurrently designated pursuant to E.O. 13382 and E.O. 13661 for his role in the poisoning of Navalny.

Krasnov is the Prosecutor General for the Russian Federation, which has prosecuted Navalny and advocated for his incarceration.

Kalashnikov is the Director of the Federal Penitentiary Service in Russia, or FSIN. Navalny was accused of violating the terms of his parole while he was recovering from the poisoning in Germany, which FSIN used as a pretext to seek his arrest and request his suspended sentence be converted into an actual prison term.

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Notice of the March 2, 2021 determination by the Secretary of State, acting under authority delegated pursuant to Executive Order 12851, pursuant to section 306(a) of the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 ("CBW Act"), 22 U.S.C. 5604(a), that the Government of the Russian Federation used chemical or biological weapons in violation of international law or lethal chemical

or biological weapons against its own nationals, was published on March 18, 2021 in the Federal Register, under Public Notice 11374, which resulted in the CBW Act sanctions against Russia described in the fact sheet, *supra*. 86 Fed. Reg. 14,804 (Mar. 18, 2021). Secretary Blinken's press statement on the CBW Act sanctions is available at https://www.state.gov/imposing-sanctions-on-russia-for-the-poisoning-and-imprisonment-of-aleksey-navalny/ and includes the following:

> The United States joins the European Union in condemning and responding to the Russian Federation's use of a chemical weapon in the attempted assassination of Russian opposition figure Aleksey Navalny in August 2020 and his subsequent imprisonment in January 2021. We share the EU's concerns regarding Russia's deepening authoritarianism and welcome the EU's determination to impose sanctions on Russia under its new global human rights authorities.
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> * * * *
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> In today's actions, the Department of State, under the U.S. Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, will expand existing sanctions first imposed on Russia after its 2018 chemical weapon attack against Sergei Skripal in the United Kingdom, three years ago this week. The Department of State has also implemented measures under Executive Order (E.O.) 13382, which targets weapons of mass destruction proliferators, as well as the Countering America's Adversaries Through Sanctions Act (CAATSA) against multiple Russian individuals and entities associated with the Russian Federation's chemical weapons program and defense and intelligence sectors. In addition, the Department will amend Section 126.1 of the International Traffic in Arms Regulations to include Russia in the list of countries subject to a policy of denial for exports of defense articles and defense services, with certain exceptions for exports to Russia in support of government space cooperation. Exports in support of commercial space cooperation, however, will be restricted following a six-month transition period.

Others of the March 2 actions were published in the Federal Register separately. On March 9, 2021, the State Department published the designation of Aleksandr Vasilievich BORTNIKOV pursuant to E.O. 13382 and E.O. 13661. 86 Fed. Reg. 13,610 (Mar. 9, 2021). On April 15, 2021, the State Department published designations of the following pursuant to E.O. 13382 (effective March 2, 2021): FEDERAL SECURITY SERVICE, STATE SCIENTIFIC RESEARCH INSTITUTE OF ORGANIC CHEMISTRY AND TECHNOLOGY, 33RD SCIENTIFIC RESEARCH AND TESTING INSTITUTE, 27TH SCIENTIFIC CENTER, MAIN INTELLIGENCE DIRECTORATE, ALEXANDER YEVGENIYEVICH MISHKIN, and ANATOLIY VLADIMIROVICH CHEPIGA. 86 Fed. Reg. 19,939 (Apr. 15, 2021).

(2) Subsequent actions

The United States imposed additional sanctions on Russia for the poisoning of Aleksey Navalny later in 2021. Section 307(b) of the CBW Act requires a decision within three months of March 2, 2021 regarding whether Russia has met certain conditions described in the law. Additional sanctions on Russia are required if these conditions are not met. Russia had not met the CBW Act's conditions and the Deputy Secretary of State decided to impose additional sanctions on Russia on August 20, 2021. 86 Fed. Reg. 50,203 (Sep. 7, 2021) (correction published, 86 Fed. Reg. 53,137 (Sep. 24, 2021)). The State Department issued a press statement regarding the additional CBW sanctions, which is excerpted below and available at https://www.state.gov/u-s-imposes-additional-costs-on-russia-for-aleksey-navalny-poisoning/. The governments of the United States and the United Kingdom also issued a joint statement on August 20, 2021, the anniversary of Mr. Navalny's poisoning. The joint statement is available at https://www.state.gov/joint-statement-on-the-anniversary-of-mr-alexey-navalnys-poisoning/.

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The United States, in concert with the United Kingdom, is imposing additional costs on the Russian Federation on the one-year anniversary of the poisoning of Russian opposition figure Aleksey Navalny with a Novichok nerve agent.

As the United Kingdom and the United States reaffirmed **[https://www.state.gov/joint-statement-on-the-anniversary-of-mr-alexey-navalnys-poisoning/],** we condemn the August 2020 assassination attempt on Mr. Navalny and subsequent actions intended to stop his efforts to criticize the Russian government, including his imprisonment in January 2021.

Our actions today – exercised by the U.S. Departments of State, the Treasury, Justice and Commerce – send a clear signal that there will be no impunity for the use of chemical weapons, including for the individuals and organizations involved. Any use of chemical weapons is unacceptable and contravenes international norms. The United States calls upon Russia to comply with its obligations under the Chemical Weapons Convention.

As part of today's actions, the Department of State is imposing a second round of sanctions on Russia under the Chemical and Biological Weapons Control and Warfare Elimination Act (CBW Act). These include a restriction on the permanent importation of firearms or ammunition manufactured or located in Russia pursuant to new or pending permit applications as well as further restrictions on nuclear and missile-related technology exports to Russia.

The Departments of State and the Treasury will also designate nine Russian individuals and four entities, including operatives involved in poisoning Mr. Navalny and entities that have developed Russia's chemical weapons capabilities.

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The Department also issued a fact sheet on the additional sanctions, which included actions under other authorities in addition to the CBW Act. The fact sheet summarizing all of these actions is excerpted below and available at https://www.state.gov/fact-sheet-united-states-imposes-additional-costs-on-russia-for-the-poisoning-of-aleksey-navalny/. Sanctions under the new E.O. 14024 are discussed further in section A.3.d, *infra*.

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CBW ACT SANCTIONS

Description of Sanctions: Pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (the CBW Act), the United States will impose a second round of sanctions on the Russian Federation over its use of a "Novichok" nerve agent in the August 2020 poisoning of Russian opposition figure Aleksey Navalny.

New sanctions imposed today under the CBW Act include:

Restrictions on the permanent imports of certain Russian firearms. New and pending permit applications for the permanent importation of firearms and ammunition manufactured or located in Russia will be subject to a policy of denial.

Additional Department of Commerce export restrictions on nuclear and missile-related goods and technology pursuant to the Export Control Reform Act of 2018.

These sanctions also include a continuation of measures imposed on March 2, 2021, as well as in 2018 and 2019 in response to the poisoning of Sergey Skripal and his daughter, along with the waivers associated with these sanctions. For information about the waivers, please see 86 FR 14804 and 84 FR 44671.

Duration and Conditions for Removal

These latest sanctions on Russia pursuant to the CBW Act will take effect upon the publication of a Federal Register notice expected on September 7, 2021, and they will remain in place for a minimum of 12 months. The sanctions can only be lifted after a 12-month period if the Executive Branch determines and certifies to Congress that Russia has met several conditions described in the CBW Act, 22 U.S.C. 5605(c), including (1) providing reliable assurances that it will not use chemical weapons in violation of international law, (2) it is not making preparations to use chemical weapons in the future, (3) it is willing to allow international inspectors to verify those assurances, and (4) it is making restitution to Mr. Navalny.

ACTIONS UNDER E.O.s 13382 AND 14024

Today, the Departments of State and the Treasury also designated numerous individuals and entities, including operatives involved in poisoning Mr. Navalny and entities that have developed Russia's chemical weapons capabilities. Together with the measures imposed under the CBW Act, these actions send a clear message that there will be accountability for the use of chemical weapons.

THE DEPARTMENT OF STATE'S ACTIONS UNDER E.O. 14024

Pursuant to the authorities in E.O. 14024 of April 15, 2021 (*Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation*), today the Department of State designated two Russian Ministry of Defense scientific institutes: the 27th Scientific Center and the 33rd Scientific Research and Testing Institute. Both entities are being re-designated pursuant to Section 1(a)(i) of E.O. 14024 because they have been determined to operate or have operated in the defense and related materiel sector of the Russian

Federation economy. The Department of State previously designated both of these entities under E.O. 13382 of June 28, 2005 (*Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters*).

The 27th Scientific Center and the 33rd Scientific Research and Testing Institute have engaged in activities to develop Russia's chemical weapons capabilities, including technologies for delivering such weapons. The 33rd Scientific Research and Testing Institute stewards Russia's Shikhany Chemical Proving Ground, where Russia conducts chemical weapons-related testing. The 27th Scientific Center has been involved with Russian chemical weapons research and testing activities.

THE DEPARTMENT OF THE TREASURY'S ACTIONS UNDER E.O. 13382 AND E.O. 14024

On March 2, 2021, the Department of State designated Russia's Federal Security Service (FSB) pursuant to E.O. 13382 for its role in the Navalny poisoning and for possessing a Novichok chemical weapon. Today, pursuant to E.O. 13382, Treasury designated the FSB Criminalistics Institute; Vladimir Bogdanov, who is Chief of the FSB's Special Technology Center; Stanislav Makshakov, who is reportedly an FSB official who was in frequent communication and coordination with FSB leadership and individuals involved in Navalny's poisoning around the time of the attack; Konstantin Kudryavtsev, who is an FSB Criminalistics Institute operative who is reported to have been a part of the core FSB group that was involved in Navalny's poisoning; Alexey Alexandrov and Ivan Osipov, who are FSB Criminalistics Institute operatives that have been reported as two of the main perpetrators of the attack on Navalny; Vladimir Panyaev, who is an FSB operative who was reported to have tailed Navalny on several occasions prior to the poisoning; and Aleksey Sedov, Chief of the FSB's Service for the Protection of the Constitutional System and the Fight against Terrorism, whose operatives have been reported to have coordinated with the members of the FSB unit involved in the Navalny poisoning.

Under E.O. 14024, Treasury also designated Kirill Vasiliev, who is the Director of the FSB Criminalistics Institute. Vasiliev was in communication with FSB Criminalistics Institute Deputy Director Stanislav Makshakov in the months preceding Navalny's poisoning, specifically during an incident believed to have been a previous poisoning attempt against Navalny. Additionally, Treasury also designated Artur Zhirov and the State Institute for Experimental Military Medicine (GNII VM), which is a scientific research organization specializing in security and defense that operates under the ultimate authority of the Russian Ministry of Defense, and which has collaborated with the 27th Scientific Center and the 33rd Scientific Research and Testing Institute. Zhirov is the former director of the 27th Scientific Center and a chemical weapons expert.

The individuals targeted today either participated in Russia's operation to assassinate or surveil Navalny. Additional information on Treasury's action is available at: https://home.treasury.gov/news/press-releases/jy0328.

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c. PEESA, E.O. 14039, and the Nord Stream 2 pipeline

On March 18, 2021, the State Department issued a press statement regarding potential sanctionable activity in connection with the Nord Stream 2 pipeline. The press

statement, available at https://www.state.gov/nord-stream-2-and-potential-sanctionable-activity/, warns that "any entity involved in the Nord Stream 2 pipeline risks U.S. sanctions and should immediately abandon work on the pipeline."

In a May 19, 2021 press statement, available at https://www.state.gov/nord-stream-2-and-european-energy-security/, Secretary Blinken announced that the State Department had submitted a report to Congress pursuant to the Protecting Europe's Energy Security Act ("PEESA"), as amended, designating for sanctions four vessels, five entities, and one individual involved in construction of the Nord Stream 2 pipeline, including Nord Stream 2 AG and the company's CEO Matthias Warnig. The press statement also indicates that the Secretary determined that "it is in the national interest of the United States to waive the application of sanctions on Nord Stream 2 AG, its CEO Matthias Warnig, and Nord Stream 2 AG's corporate officers."

In Executive Order 14039 of August 20, 2021, "Blocking Property With Respect to Certain Russian Energy Export Pipelines," President Biden determined that it was in the national interest to take additional steps to address the emergency recognized in E.O. 14024 (discussed *infra*). Those subject to blocking under E.O. 14039 are identified in Section 1: "any foreign person identified by the Secretary of State, in consultation with the Secretary of the Treasury, in a report to the Congress pursuant to section 7503(a)(1)(B) of PEESA." 86 Fed. Reg. 47,205 (Aug. 24, 2021). See *Digest 2019* at 521 regarding reporting requirements under PEESA.

In a November 22, 2021 press statement, available at https://www.state.gov/imposition-of-further-sanctions-in-connection-with-nord-stream-2/, the Department of State announced the submission to Congress of a report required by PEESA. The report designated for sanctions two vessels and one Russia-linked entity, Transadria Ltd., involved in the Nord Stream 2 pipeline. The statement announced that, as of November 22, 2021, the United States had sanctioned eight persons and identified 17 vessels as blocked property pursuant to PEESA in connection with Nord Stream 2.

d. New E.O. 14024

On April 15, 2021, the United States announced further actions to hold the Russian Government accountable for cyber intrusions, including the SolarWinds attack, as well as other malign activities. The State Department press statement outlining the actions is excerpted below and available at https://www.state.gov/holding-russia-to-account/. Further information on the actions is available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/15/fact-sheet-imposing-costs-for-harmful-foreign-activities-by-the-russian-government/ .

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* * * *

…The President is signing a new Executive Order on Russia that will broaden the scope of our sanctions authorities**.** Under this new Executive Order, the U.S. Department of the Treasury is issuing a directive prohibiting U.S. financial institutions from conducting transactions in the primary market for new ruble or non-ruble denominated bonds issued after June 14, 2021. This Executive Order also provides authority for the U.S. Government to expand sovereign debt sanctions on Russia as appropriate.

The U.S. Department of State is also expelling 10 officials from Russia's bilateral mission. In addition, the U.S. Department of the Treasury is announcing sanctions against entities and individuals involved in election interference and against companies that support the malign activities of the Russian intelligence services responsible for the SolarWinds intrusion and other recent cyber incidents. These sanctions will serve to reduce Russian resources available to carry out similar malign activities.

In addition, together with partners and allies, on March 2 the U.S. responded to Russia's attempt to poison Aleksey Navalny using a chemical weapon and his subsequent arrest and imprisonment. We remain concerned about Navalny's health and treatment in prison, and call for his unconditional release.

These actions are intended to hold Russia to account for its reckless actions. We will act firmly in response to Russian actions that cause harm to us or our allies and partners. Where possible, the United States will also seek opportunities for cooperation with Russia, with the goal of building a more stable and predictable relationship consistent with U.S. interests.

Additionally, the State Department is taking steps to bolster cybersecurity partnerships internationally, including by providing a new training course with partners on the policy and technical aspects of publicly attributing cyber incidents and by supporting trainings on responsible state behavior in cyberspace.

* * * *

The new executive order, E.O. 14024, "Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation," authorizes sanctions on the following persons, described in Section 1 of the order, excerpted below. 86 Fed. Reg. 20,249 (Apr. 19, 2021).

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* * * *

(a) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, and, with respect to subsection (a)(ii) of this section, in consultation with the Attorney General, or by the Secretary of State, in consultation with the Secretary of the Treasury, and, with respect to subsection (a)(ii) of this section, in consultation with the Attorney General:

(i) to operate or have operated in the technology sector or the defense and related materiel sector of the Russian Federation economy, or any other sector of the Russian Federation economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State;

(ii) to be responsible for or complicit in, or to have directly or indirectly engaged or attempted to engage in, any of the following for or on behalf of, or for the benefit of, directly or indirectly, the Government of the Russian Federation:

(A) malicious cyber-enabled activities;

(B) interference in a United States or other foreign government election;

(C) actions or policies that undermine democratic processes or institutions in the United States or abroad;

(D) transnational corruption;

(E) assassination, murder, or other unlawful killing of, or infliction of other bodily harm against, a United States person or a citizen or national of a United States ally or partner;

(F) activities that undermine the peace, security, political stability, or territorial integrity of the United States, its allies, or its partners; or

(G) deceptive or structured transactions or dealings to circumvent any United States sanctions, including through the use of digital currencies or assets or the use of physical assets;

(iii) to be or have been a leader, official, senior executive officer, or member of the board of directors of:

(A) the Government of the Russian Federation;

(B) an entity that has, or whose members have, engaged in any activity described in subsection (a)(ii) of this section; or

(C) an entity whose property and interests in property are blocked pursuant to this order;

(iv) to be a political subdivision, agency, or instrumentality of the Government of the Russian Federation;

(v) to be a spouse or adult child of any person whose property and interests in property are blocked pursuant to subsection (a)(ii) or (iii) of this section;

(vi) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of:

(A) any activity described in subsection (a)(ii) of this section; or

(B) any person whose property and interests in property are blocked pursuant to this order; or

(vii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, the Government of the Russian Federation or any person whose property and interests in property are blocked pursuant to this order.

(b) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, a government whose property and interests in property are blocked pursuant to chapter V of title 31 of the Code of Federal Regulations or another Executive Order, and to be:

(i) a citizen or national of the Russian Federation;

(ii) an entity organized under the laws of the Russian Federation or any jurisdiction within the Russian Federation (including foreign branches); or

(iii) a person ordinarily resident in the Russian Federation.

(c) any person determined by the Secretary of State, in consultation with the Secretary of the Treasury, to be responsible for or complicit in, or to have directly or indirectly engaged in or

attempted to engage in, cutting or disrupting gas or energy supplies to Europe, the Caucasus, or Asia, and to be:

(i) an individual who is a citizen or national of the Russian Federation; or
(ii) an entity organized under the laws of the Russian Federation or any jurisdiction within the Russian Federation (including foreign branches).

* * * *

OFAC exercised the authority granted in the new E.O. 14024, along with other authorities, on multiple occasions in 2021. On April 15, 2021, OFAC designated the following: AKTSIONERNOE OBSHCHESTVO AST, pursuant to E.O. 14024 of April 15, 2021, E.O. 13694, CAATSA, and E.O. 13382; OBSHCHESTVO S OGRANICHENNOI OTVETSTENNOSTYU NEOBIT, pursuant to E.O. 14024 of April 15, 2021, E.O. 13694, CAATSA, and E.O. 13382; AKTSIONERNOE OBSHCHESTVO POZITIV TEKNOLODZHIZ, pursuant to E.O. 14024, E.O. 13694, CAATSA, and E.O. 13382; FEDERAL STATE AUTONOMOUS INSTITUTION MILITARY INNOVATIVE TECHNOPOLIS ERA, pursuant to E.O. 14024; AKTSIONERNOE OBSHCHESTVO PASIT, pursuant to E.O. 14024; FEDERAL STATE AUTONOMOUS SCIENTIFIC ESTABLISHMENT SICENTIFIC RESEARCH INSTITUTE SPECIALIZED SECURITY COMPUTING DEVICES AND AUTOMATION, pursuant to E.O. 14024. 86 Fed. Reg. 20,601 (Apr. 20, 2021).

Also On April 15, 2021, OFAC designated the following under E.O. 14024: CENTRAL BANK OF THE RUSSIAN FEDERATION, MINISTRY OF FINANCE OF THE RUSSIAN FEDERATION, and NATIONAL WEALTH FUND OF THE RUSSIAN FEDERATION. 86 Fed. Reg. 24,691 (May 7, 2021). Also on April 15, 2021, OFAC designated Denis Valeriyevich TYURIN (associated with the Russian MAIN INTELLIGENCE DIRECTORATE), pursuant to E.O. 13694, as amended, section 224(a)(1)(B) of CAATSA, and E.O. 13382; NEWSFRONT (associated with FEDERAL SECURITY SERVICE), pursuant to E.O. 13694, as amended, section 224(a)(1)(B) of CAATSA, and E.O. 13382; IA INFOROS, OOO (associated with MAIN INTELLIGENCE DIRECTORATE), pursuant to section 1(a)(iii)(C) of E.O. 13694, as amended, section 224(a)(1)(B) of CAATSA, and E.O. 13382; and INFOROS, OOO (also linked to MAIN INTELLIGENCE DIRECTORATE), pursuant to E.O. 13694, as amended, section 224(a)(1)(B) of CAATSA, and E.O. 13382. 86 Fed. Reg. 20,595 (Apr. 20, 2021).

Also on April 15, 2021, the Acting Director of OFAC issued Directive 1 under E.O. 14024, which determined that the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation are political subdivisions, agencies, or instrumentalities of the Government of the Russian Federation, and that certain activities by U.S. financial institutions that are specified in Directive 1 involving such entities are prohibited as of June 14, 2021. 86 Fed. Reg. 35,867 (July 7, 2021).

On August 20, 2021, OFAC designated several Russian individuals and entities under various executive orders, including 14024 and 13382 (relating to WMD proliferators): Alexey Alexandrovich ALEXANDROV under E.O. 13382; Kirill Yurievich VASILIEV under E.O. 14024; Artur Aleksandrovich ZHIROV under E.O. 14024; Vladimir Mikhaylovich BOGDANOV under E.O. 13382; Konstantin KUDRYAVTSEV under E.O.

13382; Stanislav Valentinovich MAKSHAKOV under E.O. 13382; Ivan Vladimirovich OSIPOV under E.O. 13382; Vladimir Alexandrovich PANYAEV under E.O. 13382; Aleksei Semyonovich SEDOV under E.O. 13382; STATE INSTITUTE FOR EXPERIMENTAL MILITARY MEDICINE OF THE MINISTRY OF DEFENSE under E.O. 14024; and FSB CRIMINALISTICS INSTITUTE under E.O. 13382. 86 Fed. Reg. 47,735 (Aug. 26, 2021).

4. Belarus

See also discussion in Section A.11.b, *infra*, of designations pursuant to Section 7031(c) for gross violations of human rights, including designations of officials in Belarus. On January 4, 2021, OFAC published designations made in 2020 under E.O. 13405 of 2006 ("Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus"): Khazalbek Bakhtsibekavich ATABEKAU; Yuriy Henadzievich NAZARANKA; Alyaksandr Pyatrovich BARSUKOU; Yuriy Khadzymuratavich KARAEU; Alena Mikalaeuna DMUKHAYLA; Vadzim Dzmitrievich IPATAU; Dzmitriy Uladzimiravich BALABA; Ivan Uladzimiravich KUBAKOU. 86 Fed. Reg. 186 (Jan. 4, 2021).

On February 18, 2021, the State Department announced action to place visa restrictions on additional members and supporters of the Lukashenka regime for its continuing violence against peaceful protestors, activists, and journalists. The press statement making the announcement is available at https://www.state.gov/imposing-visa-restrictions-on-additional-individuals-undermining-belarusian-democracy/ and further states:

> … The February 16 raids on human rights organization Vyasna, the Belarusian Association of Journalists, and independent trade union workers, as well as the February 18 sentencing of journalists Katsiaryna Andreyeva and Darya Chultsova are particularly troublesome.
>
> Today, the U.S. Department of State took action pursuant to Presidential Proclamation (PP) 8015 to impose visa restrictions on 43 Belarusian individuals responsible for undermining Belarusian democracy, making them generally ineligible for entry into the United States. These individuals include: high-ranking justice sector officials; law enforcement leaders and rank-and-file personnel who detained and abused peaceful demonstrators; judges and prosecutors involved in sentencing peaceful protesters and journalists to prison terms; and academic administrators who threatened students for participation in peaceful protests.

In an April 19, 2021 press statement, available at https://www.state.gov/revocation-of-the-authorization-of-belarus-general-license-2g-due-to-human-rights-violations-and-abuses/, Secretary Blinken expressed the State Department's support for the Treasury Department's wind-down of General License 2G for Belarus, citing in particular human rights violations and abuses by Belarusian authorities. The press statement is excerpted below.

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* * * *

The U.S. Department of State fully supports the Department of the Treasury's announcement today on the revocation of the Belarus-related General License (GL) and implementation of a 45-day wind down of transactions. This action is a further consequence of the Belarusian authorities' flagrant disregard for human rights and Belarus' failure to comply with its obligations under international human rights law.

In 2015, the Department of the Treasury – in consultation with the Department of State – issued the GL authorizing U.S. persons to engage in certain transactions with nine sanctioned Belarusian state-owned enterprises. The GL had been renewed annually through 2020 due to notable progress by Belarusian authorities on human rights, particularly the release of all political prisoners during this time.

However, as a result of government suppression surrounding the fraudulent August 2020 Presidential elections in Belarus and its aftermath, there are more than 340 political prisoners detained in Belarus today. Given the sharply deteriorating human rights situation in Belarus, the U.S. Government determined a further extension would be inconsistent with the Belarus Democracy Act and incompatible with American values. The nine state-owned enterprises affected by this action finance and support the Lukashenka regime, facilitating its violent repression of the Belarusian people and repeated rejection of the rule of law.

Belarus' regression is exemplified by the detention of political hopefuls like Syarhey Tsikhanouski, courageous activist leaders like Maria Kalesnikava, and independent media experts like Ihar Losik – who are but three among the hundreds of Belarusians unjustly imprisoned by the Lukashenka regime for exercising their human rights and fundamental freedoms.

The United States calls on the Belarusian authorities to immediately and unconditionally release all those unjustly detained or imprisoned. Moreover, we commit to working together with the international community to further promote accountability for those responsible for human rights violations and abuses in Belarus.

Respect for human rights, the rule of law and Belarus' commitments to the Organization for Security and Co-operation in Europe remain central to improving bilateral relations.

To learn more about the GL 2H, visit https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210419 .

* * * *

On May 27, 2021, the G7 foreign ministers of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States of America and the High Representative of the European Union released a joint statement on Belarus, which follows and can be found as a State Department media note at https://www.state.gov/g7-foreign-ministers-statement-on-belarus/. See Chapter 11 for further discussion of the response to Belarus forcing flight FR4978 to land.

> We, the G7 Foreign Ministers … condemn in the strongest terms the unprecedented action by the Belarusian authorities in arresting independent

> journalist Raman Pratasevich and his companion, Sofia Sopega, after forcing flight FR4978 on which they were traveling to land in Minsk on 23 May.
>
> This action jeopardized the safety of the passengers and crew of the flight. It was also a serious attack on the rules governing civil aviation. All our countries, and our citizens, depend on every state acting responsibly in fulfilling their duties under the Chicago Convention so that civil aircraft can operate safely and securely. We call on the International Civil Aviation Organisation (ICAO) to urgently address this challenge to its rules and standards.
>
> This action also represents a serious attack on media freedom. We demand the immediate and unconditional release of Raman Pratasevich, as well as all other journalists and political prisoners held in Belarus.
>
> We will enhance our efforts, including through further sanctions as appropriate, to promote accountability for the actions of the Belarusian authorities.

On June 21, 2021, the governments of the United States of America, Canada and the United Kingdom, and the European External Action Service issued a joint statement on Belarus, available at https://www.state.gov/joint-statement-on-belarus/, and excerpted below.

> … Today, we have taken coordinated sanctions action in response to the May 23rd forced landing of a commercial Ryanair flight between two EU member states and the politically motivated arrest of journalist Raman Pratasevich and his companion Sofia Sapega, as well as to the continuing attack on human rights and fundamental freedoms. We are committed to support the long-suppressed democratic aspirations of the people of Belarus and we stand together to impose costs on the regime for its blatant disregard of international commitments.
>
> We are united in calling for the regime to end its repressive practices against its own people. We are disappointed the regime has opted to walk away from its human rights obligations, adherence to democratic principles, and engagement with the international community. We are further united in our call for the Lukashenka regime to cooperate fully with international investigations into the events of May 23rd; immediately release all political prisoners; implement all the recommendations of the independent expert mission under the Organization for Security and Cooperation in Europe's (OSCE) Moscow Mechanism; and, enter into a comprehensive and genuine political dialogue between the authorities and representatives of the democratic opposition and civil society, facilitated by the OSCE.

The State Department also issued a June 21, 2021 press statement by Secretary Blinken on holding the Lukashenka regime to account and the coordinated sanctions actions taken to respond to the forced diversion, the arrests of journalist Raman Pratasevich and Sofiya Sapega, and other repression. The press statement is available at https://www.state.gov/holding-the-lukashenka-regime-and-its-enablers-to-account/,

and excerpted below. The June measures described below and the April measures described *supra* were not the only actions pursuant to PP 8015 in 2021. The State Department took additional steps to impose visa restrictions under PP 8015 later in 2021.

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Specifically, the U.S. Department of State took action pursuant to Presidential Proclamation (PP) 8015 to impose visa restrictions on 46 Belarusian officials for their involvement in undermining or injuring institutions in Belarus, making these individuals generally ineligible for entry into the United States. These individuals hold key positions in the Presidential Administration, State Security Committee of the Republic of Belarus (Belarusian KGB), Ministry of Internal Affairs, Investigative Committee, Ministry of Information, Ministry of Sport and Tourism, State Border Committee, Ministry of Health, Constitutional Court, Prosecutor General's Office, and district courts in Minsk.

In addition, the U.S. Department of the Treasury's Office of Foreign Assets Control designated an additional 16 individuals and five entities pursuant to Executive Order 13405. The persons designated today have harmed the people of Belarus through their activities following the August 9, 2020 fraudulent presidential election and the subsequent brutal crackdown on protesters, journalists, and the political opposition or have otherwise supported Alyaksandr Lukashenka's repressive policies within Belarus and abroad.

These officials have played a significant role in blocking independent media; led politically motivated arrests, prosecutions, and sentencings of peaceful protesters, journalists, and political figures; were involved in unjustified raids on members of the opposition's headquarters and homes; and participated in the severe abuse of those unjustly detained, including reports of torture. Since the fraudulent August 9, 2020 election, the State Department has designated 155 Belarusian and Russian nationals under PP 8015.

The United States continues to support international efforts to investigate electoral irregularities in the 2020 Belarusian Presidential election and the violent crackdown and abuses that ensued. We stand with the people of Belarus in support of their fundamental freedoms.

* * * *

The June 21, 2021 OFAC designations pursuant to E.O. 13405 of 2006 ("Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus"), mentioned *supra*, include: Alyaksandr Vyachaslavavich ASTREIKA; Mikalai KARPIANKOU; Natallia Mikalaeuna EISMANT; Natalia Ivanovna KACHANAVA; Volha Lieanidawna DARASHENKA; Andrei Anatoljevich GURZHY; Siarhei Aliaksiejevich KALINOWSKI; Sviatlana Piatrowna KATSUBA; Aliaksandr Mikhajlavich LASIAKIN; Ihar Anatoljevich PLYSHEWSKI; Maryna Jurjewna RAKHMANAVA; Iryna Aliaksandrawna TSELIKAVIETS; Sergei Yevgenevich ZUBKOV; Mikhail HRYB; Andrei Ivanavich SHVED; Ivan Stanislavavich TSERTSEL. 86 Fed. Reg. 35,147 (July 1, 2021). The following entities were designated at the same time under E.O. 13405: Directorate of Internal Affairs of the

Brest Oblast Executive Committee; Internal Troops of the Ministry of Internal Affairs of the Republic of Belarus; Akrestsina Detention Center; State Security Committee of the Republic of Belarus; Main Directorate for Combating Organized Crime and Corruption of the MVD of the Republic of Belarus. *Id*.

On August 9, 2021, the President issued a new executive order, E.O. 14038, "Blocking Property of Additional Persons Contributing to the Situation in Belarus." 86 Fed. Reg. 43,905 (Aug. 11, 2021). The portion of Section 1 of E.O. 14038 follows, describing persons that may be designated.

* * * *

(i) to be or have been a leader, official, senior executive officer, or member of the board of directors of:

(A) an entity that has, or whose members have, engaged in any of the activities described in subsections (v)(A)–(E) of this section or section 1(a)(ii)(A)–(C) of Executive Order 13405; or

(B) an entity whose property and interests in property are blocked pursuant to this order or Executive Order 13405;

(ii) to be a political subdivision, agency, or instrumentality of the Government of Belarus;

(iii) to be or have been a leader or official of the Government of Belarus;

(iv) to operate or have operated in the defense and related materiel sector, security sector, energy sector, potassium chloride (potash) sector, tobacco products sector, construction sector, or transportation sector of the economy of Belarus, or any other sector of the Belarus economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State;

(v) to be responsible for or complicit in, or to have directly or indirectly engaged or attempted to engage in, any of the following:

(A) actions or policies that threaten the peace, security, stability, or territorial integrity of Belarus;

(B) actions or policies that prohibit, limit, or penalize the exercise of human rights and fundamental freedoms (including freedoms of expression, peaceful assembly, association, religion or belief, and movement) by individuals in Belarus, or that limit access to the internet or print, online, or broadcast media in Belarus;

(C) electoral fraud or other actions or policies that undermined the electoral process in a Republic of Belarus election;

(D) deceptive or structured transactions or dealings to circumvent any United States sanctions by or for or on behalf of, or for the benefit of, directly or indirectly, the Government of Belarus or any person whose property and interests in property are blocked pursuant to this order or Executive Order 13405; or

(E) public corruption related to Belarus.

(vi) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any activity described in subsections (v)(A)–(E) of this section or any person whose property and interests in property are blocked pursuant to this order; or

(vii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, the Government of Belarus or any person whose property and interests in property are blocked pursuant to this order.

* * * *

Also on August 9, 2021, the State Department issued a press statement, available at https://www.state.gov/holding-the-lukashenka-regime-to-account-on-the-anniversary-of-the-fraudulent-presidential-belarusian-election/, marking the one-year anniversary of Belarus's fraudulent presidential election by announcing new sanctions and the new E.O., discussed *supra*. The press statement is excerpted below.

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* * * *

Pursuant to a new Executive Order the President signed today, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) designated forty-four individuals and entities. These sanctions are the latest in a series of efforts demonstrating our determination to take action in the face of the increased repression and sharply deteriorating human rights situation in Belarus. OFAC targeted, among others, entities and individuals, including state-owned enterprises, government officials, and others, who support the regime, facilitate its violent repression of the Belarusian people, and violate the rule of law.

Democratic countries are stronger when they stand together. Alongside these U.S. actions, we welcome the steps taken today by the United Kingdom and Canada against the regime and those announced by the European Union on June 24. The United States further commends the ongoing close coordination with Lithuania and Poland as a demonstration of the steadfast international resolve in supporting the Belarusian people's democratic aspirations.

One year ago, the people of Belarus turned out in record numbers to give voice to their democratic aspirations and desire for change. Instead of honoring their votes, the regime fraudulently declared victory and embarked on a campaign of violence and repression. Since that time, Lukashenka has sought to cement his hold on power at the expense of the Belarusian people. Over 600 political prisoners are unjustly detained. Independent media outlets have been raided and shuttered, and Belarusian authorities are attempting to silence NGOs and vital members of civil society. Moreover, this repression does not occur solely within Belarus's borders, as Belarusians abroad also face intimidation. This repression features blatant disregard of international norms, as displayed by the brazen forced diversion of Ryanair flight 4978 for the purpose of arresting a Belarusian journalist, the dangerous attempt to intimidate the EU – in particular, our Ally Lithuania – by orchestrating irregular migrant flows on Belarus's border, and most recently the attempted forced repatriation of Belarusian Olympian Krystsyna Tsimanouskaya, who has been offered a humanitarian visa by Poland. These acts of transnational repression cannot be tolerated and must stop. The United States stands in solidarity with our Allies and partners in responding to these threats.

The United States once again calls on the Belarusian authorities to end the crackdown on members of civil society, the media, athletes, students, legal professionals and other citizens, immediately release all political prisoners, engage in a genuine dialogue with the democratic

opposition and civil society, as called for in the OSCE Expert Mission report, and hold free and fair elections under international observation. We will continue working with the international community to hold to account those responsible for human rights violations and abuses in Belarus.

* * * *

On August 9, 2021, OFAC designated the following under E.O. 13405 and E.O. 14038: Andrei Alekseevich RYBAKOV; Dzmitry SHAKUTA; Aliaksey Ivanavich ALEKSIN; Andrei Nikolayevich BUNAKOV; Mikalai Mikalaevich VARABEI; Igor Vasilyevich LYASHENKO; BELKAZTRANS; BELKAZTRANS UKRAINE; NATIONAL OLYMPIC COMMITTEE OF THE REPUBLIC OF BELARUS; SHOCK SPORTS CLUB; DEPARTMENT OF INTERNAL AFFAIRS OF THE GOMEL REGIONAL EXECUTIVE COMMITTEE; and the following under E.O. 14038: Hleb Uladzimiravich DRYL; Ihar Ryhoravich KENIUKH; Uladzimir Iosifavich LAPYR; Yauhen Andreevich SHAPETSKA; Dzmitry Iurevich HARA; Kanstantin Fiodaravich BYCHAK; Darya SHMANAI; Leanid Mikalaevich CHURO; Aleh Siarheevich HAIDUKEVICH; Siarhei Yakaulevich AZEMSHA; Oleg Stanislavovich SHANDAROVICH; Anatoly Ivanovich VASILIEV; Nebojsa KARIC; Aliaksei Mikalaevich AURAMENKA; Vyacheslav Vasilyevich KHORONEKO; Genadz Branislavavich DAVYDZKA; Artsiom Igaravich SIKORSKI; CLOSED JOINT STOCK COMPANY ABSOLUTBANK; CLOSED JOINT-STOCK COMPANY NEW OIL COMPANY; INDUSTRIAL UNITARY ENTERPRISE OIL BITUMEN PLANT; LIMITED LIABILITY COMPANY NEW OIL COMPANY EAST; NOVOPOLOTSK LIMITED LIABILITY COMPANY INTERSERVICE; OPEN JOINT-STOCK COMPANY GRODNO TOBACCO FACTORY NEMAN; LIMITED LIABILITY COMPANY BREMINO GROUP; INVESTIGATIVE COMMITTEE OF THE REPUBLIC OF BELARUS; DANA HOLDINGS LIMITED; FOREIGN LIMITED LIABILITY COMPANY DANA ASTRA; LIMITED LIABILITY COMPANY DUBAI WATER FRONT; LIMITED LIABILITY COMPANY EMIRATES BLUE SKY; BELARUSKALI OAO; LIMITED LIABILITY COMPANY INTER TOBACCO; CLOSED JOINT STOCK COMPANY ENERGO-OIL; ADDITIONAL LIABILITY COMPANY BELNEFTEGAZ. 86 Fed. Reg. 46,313 (Aug. 18, 2021).

In a December 2, 2021 press statement, available at https://www.state.gov/accountability-for-the-lukashenka-regimes-continued-acts-of-repression-and-disregard-for-international-norms/, Secretary Blinken announced coordinated multinational measures to promote accountability for the Lukashenka regime for repression and disregard for international norms. The press statement is excerpted below.

> Pursuant to Executive Orders 13405 and 14038, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) has identified three aircraft as blocked property and designated 32 individuals and entities, including Belarusian state-owned enterprises, government officials, and other persons, who support the regime and facilitate its repression. Additionally, OFAC has issued a directive prohibiting certain activities involving new debt with a maturity of greater than 90 days issued by the Belarusian Ministry of Finance or the Development Bank of the Republic of Belarus.

> Today's actions demonstrate our unwavering determination to act in the face of a brutal regime that increasingly represses Belarusians, undermines the peace and security of Europe, and continues to abuse people seeking only to live in freedom. These sanctions are also in response to the Lukashenka regime's callous exploitation of vulnerable migrants from other countries in order to orchestrate migrant smuggling along its border with EU states.
>
> The United States welcomes the steps taken today against the Lukashenka regime by our allies and partners, including the European Union, the United Kingdom, and Canada. We also commend Poland, Lithuania, and Latvia, for their response to the migrant crisis created by the Lukashenka regime on their borders.

Those designated on December 2, 2021 are: Dzmitriy Yurievich BASKAU, under E.O. 14038; Aleksandr Ivanovich ALYOKSA, under E.O. 14038; Mikhail Petrovich BEDUNKEVICH, under E.O. 14038; Denis Grigorievich CHEMODANOV, under E.O. 14038; Dmitriy Aleksandrovich KOVACH, under E.O. 14038; Oleg Valentinovich LARIN, under E.O. 14038; Andrei Iosifovich MAKAREVICH; Andrei Yevgenevich PARSHIN. See Treasury press release, available at https://home.treasury.gov/news/press-releases/jy0512.

The United States, the UK, the EU, and Canada, issued a further joint statement on their December 2, 2021 coordinated sanctions in response to the situation in Belarus, which is available at https://www.state.gov/joint-statement-on-december-2-sanctions-in-response-to-the-situation-in-belarus/. Excerpts follow from the December 2, 2021 joint statement.

> We again demand that the Lukashenka regime immediately and completely halt its orchestrating of irregular migration across its borders with the EU. Those, in Belarus or in third countries, who facilitate illegal crossing of the EU's external borders should know this comes at a substantial cost.
>
> We call for the regime to unconditionally and without delay release its almost 900 political prisoners, end its campaign of repression, and implement the recommendations of the independent expert mission under the Organization for Security and Cooperation in Europe's (OSCE) Moscow Mechanism and take meaningful action to address the concerns raised under the OSCE Vienna Mechanism. The regime should promptly enter into comprehensive and genuine political dialogue with representatives of the democratic opposition and civil society, facilitated by the OSCE, leading to new free and fair presidential elections under international observation.

5. Syria and Syria-Related Executive Orders and the Caesar Act

E.O. 13894 of 2019 authorizes sanctions on persons involved in actions that endanger civilians or lead to further deterioration of the situation in northeast Syria. See *Digest 2019* at 498-500. E.O. 13582 is entitled, "Blocking Property of the Government of Syria and Prohibiting Certain Transactions with Respect to Syria." See *Digest 2011* at 513-14.

E.O. 13573 of 2011 is entitled, "Blocking Property of Senior Officials of the Government of Syria." See *Digest* 2011 at 513. E.O. 13572 of 2011 is entitled, "Blocking Property of Certain Persons with Respect to Human Rights Abuses in Syria." See *Digest 2011* at 512-13. The Caesar Syria Civilian Protection Act of 2019 ("the Caesar Act") also provides for sanctions and visa restrictions on those who provide various types of support to the Assad regime or foreign forces associated with it. See *Digest 2019* at 497-98.

On January 15, 2021, the State Department designated the following under E.O. 13894 for their role in obstruction, disruption, or prevention of a ceasefire in northern Syria: Kifah Moulhem, Asma al-Assad, Fawaz Akhras, Sahar Otri Akhras, Firas al-Akhras, and Eyad Akhras. 86 Fed. Reg. 5311 (Jan. 19, 2021).

On January 21, 2021, the State Department published the determination under E.O. 13894 that Saqr Rustom and the National Defense Forces are responsible for or complicit in, have directly or indirectly engaged in, attempted to engage in, or financed, the obstruction, disruption, or prevention of a ceasefire in northern Syria. 86 Fed. Reg. 6405 (Jan. 21, 2021).

On May 11, 2021, OFAC determined that several persons previously designated under Syria-related programs should be removed from the SDN List: the individual JAMI JAMI (designated pursuant to E.O. 13338, "Blocking Property of Certain Persons and Prohibiting the Export of Certain Goods to Syria"); the individuals Alexander HOLLEBRAND, Paul VAN MAZIJK, and the entity STAROIL B.V. (designated pursuant to E.O. 13582). 86 Fed. Reg. 26,602 (May 14, 2021).

On July 28, 2021, Secretary Blinken announced, in a press statement available at https://www.state.gov/imposing-sanctions-in-defense-of-human-rights-in-syria/, sanctions on eight Syrian prisons, five Assad regime officials in the institutions that run those facilities, two militia groups, and two militia leaders. The press statement includes the following further information about the designations.

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* * * *

Many of the prisons designated today were highlighted in the pictures provided by Caesar, a Syrian regime defector who worked as an official photographer for the Syrian military and exposed the regime's ruthless and cruel treatment of detainees. Today's action furthers the goals of the Act named after him, the Caesar Syria Civilian Protection Act of 2019, which seeks to promote accountability for the Assad regime's abuses.

The Assad regime has detained and abused a vast number of Syrians since the start of the conflict, as has been well documented by the UN Commission of Inquiry (COI) and human rights groups. More than 14,000 detainees have reportedly died after being tortured at the hands of the Assad regime, according to the Syrian Network for Human Rights, while 130,000 Syrians are reportedly still missing or detained.

The United States is imposing sanctions on Saydnaya Military Prison pursuant to Executive Order (E.O.) 13894 for having engaged in the commission of serious human rights abuse, including torture or other cruel, inhuman, or degrading treatment or punishment and extrajudicial executions, since the start of the Syrian crisis. The United States is also designating seven

additional prisons operated by the Syrian General Intelligence Directorate and Syrian Military Intelligence for being owned or controlled by entities blocked pursuant to E.O. 13572, and five regime officials in charge of Syrian prisons.

Additionally, the United States is imposing sanctions on Saraya al-Areen, a militia affiliated with the Syrian Arab Army that participated in the 2020 offensive operation to return Idlib to regime control. This operation contributed to the mass displacement of Syrian civilians and untold human suffering. Nearly one million Syrians remain displaced from that operation and ongoing artillery attacks continue to harm civilians along the frontlines.

- The United States is also imposing sanctions on armed Syrian opposition group Ahrar al-Sharqiya, for being responsible for serious human rights abuses, including abduction and torture, as well as on two of its leaders. Ahrar al-Sharqiya is reportedly involved in looting private property from civilians and barring displaced Syrians from returning to their homes. The group has been implicated in the unlawful killing of Hevrin Khalaf, a Syrian Kurdish politician, in October 2019. Ahrar al-Sharqiya has also integrated numerous former ISIS members into its ranks. Both militias were designated today pursuant to E.O. 13894.

The world must renew its shared resolve to promote the dignity and human rights of all Syrians. We urge the international community to join our calls for a nationwide ceasefire, the immediate release of those arbitrarily detained, and for information about the fate of the missing. The Assad regime must know that these steps are critical to any lasting peace or economic prosperity in Syria.

Even as we work to make sure our sanctions do not impede humanitarian aid delivery, early recovery or humanitarian resilience programs, or COVID 19 relief, today's action makes clear that the United States will not forget the victims of human rights abuses in Syria and will use appropriate tools to target and single out those responsible, regardless of the perpetrator.

For more information on today's action, please see the Department of the Treasury's **press release** .

* * * *

Effective November 26, 2021, OFAC amended the Syrian Sanctions Regulations ("SSRs") to expand the scope of the general license authorizing nongovernmental organization ("NGO") activity in Syria. 86 Fed. Reg. 67,324 (Nov. 26, 2021). OFAC issued several sets of frequently asked questions ("FAQs") regarding the expansion of the general license for NGO activity. FAQ 884, available at https://home.treasury.gov/policy-issues/financial-sanctions/faqs/884, explains that activities authorized under SSRs are also not considered "significant" under the Caesar Act. FAQ 934, available at https://home.treasury.gov/policy-issues/financial-sanctions/faqs/934, explains that UN and U.S. government entities, including contractors and grantees, can do "early recovery" activities under existing general licenses. FAQ 937, available at https://home.treasury.gov/policy-issues/financial-sanctions/faqs/937, clarifies the scope of the expanded NGO general license. FAQ 938, available at https://home.treasury.gov/policy-issues/financial-sanctions/faqs/938, clarifies how "early recovery" fits into the expanded NGO general license.

On December 7, 2021, OFAC designated the following under E.O. 13572: Muhammad Yousef AL-HASOURI; Tawfiq Muhammad KHADOUR; Kamal AL-HASSAN; Qahtan KHALIL; and Adeeb Namer SALAMEH. 86 Fed. Reg. 71,120 (Dec. 14, 2021). The Treasury Department press release on the designations, available at https://home.treasury.gov/news/press-releases/jy0517, includes the following regarding these designations:

> OFAC is also designating two senior Syrian Air Force officers responsible for chemical weapons attacks on civilians and three senior officers in Syria's repressive security and intelligence apparatus. These senior officials and the organizations they are associated with have imprisoned hundreds of thousands of Syrians who peacefully called for change. Moreover, at least 14,000 prisoners in Syria have allegedly died as a result of torture. Today's designations are another critical step in promoting accountability for the Assad regime's abuses against Syrians."

6. Burma

On February 10, 2021, in response to the February 2, 2021, military coup in Burma, President Biden issued E.O. 14014, "Blocking Property With Respect to the Situation in Burma." 86 Fed. Reg. 9429 (Feb. 12, 2021). Excerpts follow from the order.

* * * *

I, JOSEPH R. BIDEN JR., President of the United States of America, find that the situation in and in relation to Burma, and in particular the February 1, 2021, coup, in which the military overthrew the democratically elected civilian government of Burma and unjustly arrested and detained government leaders, politicians, human rights defenders, journalists, and religious leaders, thereby rejecting the will of the people of Burma as expressed in elections held in November 2020 and undermining the country's democratic transition and rule of law, constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States. I hereby declare a national emergency to deal with that threat.

Accordingly, I hereby order:

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 foreign person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(i) to operate in the defense sector of the Burmese economy or any other sector of the Burmese economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State;

(ii) to be responsible for or complicit in, or to have directly or indirectly engaged or attempted to engage in, any of the following:

(A) actions or policies that undermine democratic processes or institutions in Burma;
(B) actions or policies that threaten the peace, security, or stability of Burma;
(C) actions or policies that prohibit, limit, or penalize the exercise of freedom of expression or assembly by people in Burma, or that limit access to print, online, or broadcast media in Burma; or
(D) the arbitrary detention or torture of any person in Burma or other serious human rights abuse in Burma;
(iii) to be or have been a leader or official of:
(A) the military or security forces of Burma, or any successor entity to any of the foregoing;
(B) the Government of Burma on or after February 2, 2021;
(C) an entity that has, or whose members have, engaged in any activity described in subsection (a)(ii) of this section relating to the leader's or official's tenure; or
(D) an entity whose property and interests in property are blocked pursuant to this order as a result of activities related to the leader's or official's tenure;
(iv) to be a political subdivision, agency, or instrumentality of the Government of Burma;
(v) to be a spouse or adult child of any person whose property and interests in property are blocked pursuant to this order;
(vi) 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 order; or
(vii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, the military or security forces of Burma or 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 before the date of this order.

* * * *

On February 22, 2021, Secretary Blinken announced the U.S. response to security force attacks on protestors in Burma in a press statement, available at https://www.state.gov/promoting-accountability-for-those-responsible-for-violence-against-protestors-in-burma/. The press statement is excerpted below.

> Today, the United States is responding by designating two additional State Administrative Council (SAC) members, Maung Maung Kyaw and Moe Myint Tun. These designations were made pursuant to Section 1(a)(iii)(A) of Executive Order (E.O.) 14014, "Blocking Property With Respect to the Situation in Burma."
>
> We call on the military and police to cease all attacks on peaceful protesters, immediately release all those unjustly detained, stop attacks on and intimidation of journalists and activists, and restore the democratically elected government. The United States will continue to work with a broad coalition of international partners to promote accountability for coup leaders and those

> responsible for this violence. We will not hesitate to take further action against those who perpetrate violence and suppress the will of the people. We will not waver in our support for the people of Burma.

The designations of Maung Maung KYAW and Moe Myint TUN were published in the Federal Register in March. 86 Fed. Reg. 12,512 (Mar. 3, 2021).

On February 11, 2021, OFAC designated the following under E.O. 14014: individuals—Ye AUNG, Min Aung HLAING, Soe HTUT, Myint SWE, Soe WIN, Sein WIN, Aung Lin DWE, Mya Tun OO, Ye Win OO, Tin Aung SAN—and entities—CANCRI GEMS & JEWELLERY CO., LTD., MYANMAR IMPERIAL JADE CO., LTD., MYANMAR RUBY ENTERPRISE. 86 Fed. Reg. 12,512 (Mar. 3, 2021). See also Treasury Department press release, available at https://home.treasury.gov/news/press-releases/jy0024#_blank ("10 individuals and three entities connected to the military apparatus responsible for the coup") and State Department press statement, available at https://www.state.gov/designating-officials-and-entities-in-connection-with-the-military-coup-in-burma/ ("the United States is responding by designating the six current and former military officers who led the coup, as well as four members of the newly established State Administrative Council and three business entities that are owned or controlled by the military.").

On March 10, 2021, OFAC designated the following pursuant to E.O. 14014: two individuals— Khin Thiri Thet MON and Aung Pyae SONE—and six entities—A & M MAHAR COMPANY LIMITED, EVERFIT COMPANY LIMITED, SEVENTH SENSE COMPANY LIMITED, SKY ONE CONSTRUCTION COMPANY LIMITED, THE YANGON GALLERY, THE YANGON RESTAURANT. 86 Fed. Reg. 14,683 (Mar. 17, 2021).

On March 22, 2021, the State Department announced additional designations under E.O. 14014 in a press statement available at https://www.state.gov/designating-officials-and-military-units-in-response-to-escalating-violence-in-burma/. The designations were published in the Federal Register on March 25 and included the following: two individuals — Than HLAING and Aung SOE—and two entities—33RD LIGHT INFANTRY DIVISION OF THE BURMESE ARMY, 77TH LIGHT INFANTRY DIVISION OF THE BURMESE ARMY. 86 Fed. Reg. 16,021 (Mar. 25, 2021) The press statement describes those designated, as well as measures taken by other countries in response to the Burmese military regime's violence:

> In response, today the United States is designating Burma's Chief of Police, Than Hlaing, and Bureau of Special Operations commander, Lieutenant General Aung Soe …. We are further designating two army units, the 33rd and 77th Light Infantry Divisions (LIDs), pursuant to E.O. 14014, for being responsible for or complicit in, or having directly or indirectly engaged or attempted to engage in, actions or policies that prohibit, limit, or penalize the exercise of freedom of expression or assembly by people in Burma. Members of the 33rd LID were among the security forces that fired live rounds into a crowd in Mandalay, and both the 33rd LID and 77th LID are part of the Burmese security forces' planned,

> systemic strategies to ramp up the use of lethal force. These designations show that this violence will not go unanswered.
>
> Our EU partners across the Atlantic have also announced new measures today to impose costs on the Burmese military regime, creating a new EU sanctions program and further designating 11 Burmese individuals associated with the coup and related violence, many of whom the United States, the United Kingdom, and Canada have sanctioned. These actions demonstrate the international community's condemnation of the regime and commitment to the people of Burma.

See also the Treasury Department's press release, available at https://home.treasury.gov/news/press-releases/jy0071#_blank.

On March 25, 2021, OFAC designated the following under E.O. 14014: MYANMAR ECONOMIC CORPORATION LIMITED, MYANMA ECONOMIC HOLDINGS PUBLIC COMPANY LIMITED. 86 Fed. Reg. 16,656 (Mar. 30, 2021). The State Department press statement announcing these designations is available at https://www.state.gov/sanctions-on-two-burmese-entities-in-connection-with-the-military-regime/ and explains:

> The United States is designating two entities linked to the coup leaders, Myanma Economic Holdings Public Company Limited (MEHL) and Myanmar Economic Corporation Limited (MEC). MEHL and MEC are the two largest military holding companies in Burma, and all shares in them are held and managed by current or former Burmese military officers, regiments, and units, and organizations led by former service members. These actions will specifically target those who led the coup, the economic interests of the military, and the funding streams supporting the Burmese military's brutal repression. They are not directed at the people of Burma.
>
> We are taking this step alongside the United Kingdom, which is announcing a similar action on MEHL today. The UK has been a close partner in our response to the coup. … In close collaboration with the UK, Canada, and other allies and partners, we continue to call on the military to cease all violence against the people of Burma, release all detainees and halt future arrests, lift martial law and the nationwide state of emergency, remove telecommunications restrictions, and restore the democratically elected government.

On April 8, 2021, OFAC designated Myanma Gems Enterprise. 86 Fed. Reg. 19,322 (Apr. 13, 2021); see also Treasury Department press release, available at https://home.treasury.gov/news/press-releases/jy0115#_blank ("Gemstones are a key economic resource for the Burmese military regime that is violently repressing … the people of Burma"), and State Department press statement, available at https://www.state.gov/imposing-sanctions-on-burmese-state-owned-enterprise/ ("military leaders participate in an ongoing gems emporium in Nay Pyi Taw, under the

auspices of Myanma Gems Enterprise. … [S]anctions … keep increasing pressure on the regime's revenue streams").

On April 21, 2021, the State Department announced in a press statement, available at https://www.state.gov/imposing-sanctions-on-two-burmese-state-owned-enterprises/, that OFAC was designating two Burmese State-owned enterprises that aid the Burmese military regime in its violent crackdown on its people: Myanma Timber Enterprise ("MTE") and Myanmar Pearl Enterprise ("MPE") were designated pursuant to E.O. 14014, as a political subdivision, agency, or instrumentality of the Government of Burma. 86 Fed. Reg. 22,102 (Apr. 26, 2021). See also the Treasury Department press release, available at https://home.treasury.gov/news/press-releases/jy0138#_blank.

Also on April 21, 2021, OFAC designated the following pursuant to E.O. 14014: sixteen individuals—Ko Ko HLAING, Hein HTET, Kaung HTET, Mahn Nyein MAUNG, Tun Aung MYINT, Tun Tun NAUNG, Than NYEIN, Thein NYUNT, Sai Lone SAING, Pwint SAN, Thein SOE, Win SHEIN, Khin Maung SWE, Yin Min THU, Thet Khaing WIN, Khin Maung YI—and one entity—STATE ADMINISTRATIVE COUNCIL. 86 Fed. Reg. 27,501 (May 20, 2021). The State Department announced these sanctions in a May 17, 2021 press statement, available at https://www.state.gov/designating-one-entity-and-16-individuals-connected-to-burmas-military-regime/.

> Today, the United States is announcing new sanctions against Burma's military regime in response to its continued violence and repression against the people of Burma, most recently in Mindat, Chin State, and its failure to take any steps to restore Burma's democratic transition. We are designating the military regime's State Administrative Council pursuant to Executive Order 14014. Additionally, we are designating four members of the SAC, nine military-appointed cabinet members, and three adult children of previously designated military officials, pursuant to the same authority. We make this announcement alongside the United Kingdom and Canada, which are taking their own steps to impose costs on the regime.

See also the Treasury Department's press release, available at https://home.treasury.gov/news/press-releases/jy0180#_blank.

On July 2, 2021, OFAC designated the following individuals pursuant to E.O. 14041: Banyar Aung MOE, Chit NAING, Aung Naing OO, Myint KYAING, Thet Thet KHINE, Saw DANIEL, Aye Nu SEIN, Kyu Kyu HLA, Thet Thet AUNG, Than Than AYE, Aung Mar MYINT, Khaing Pa Pa CHIT, Moe Htet Htet TUN, Khaing Moe MYINT, Yadanar Moe MYINT, Daw NILAR, Theit Thinzar YE, Ohn Mar MYINT, Shwe Ye Phu AUNG, Hlaing Bwar AUNG, Phyo Arkar AUNG, Than Than NWE. 86 Fed. Reg. 36,183 (July 8, 2021). The State Department press statement on the designations, available at https://www.state.gov/the-united-states-takes-further-actions-against-the-burmese-military-regime/, includes the following:

> In response to the brutal campaign of violence perpetrated by the Burmese military regime and to continue imposing costs in connection with the military

> coup, the U.S. Department of the Treasury's Office of Assets Control is designating today 22 individuals connected to the regime, pursuant to Executive Order 14014 "Blocking Property With Respect to the Situation in Burma." These include three additional State Administration Council (SAC) members and four military-appointed cabinet members, as well as 15 adult children or spouses of previously designated Burmese military officials whose financial networks have contributed to military officials' ill-gotten gains.
>
> In addition, the U.S. Department of Commerce is adding Wanbao Mining, Ltd., two of its subsidiaries, and King Royal Technologies to its Entity List. These entities provide revenue and/or other support to the Burmese military, and Wanbao Mining and its subsidiaries have long been implicated in labor rights violations and human rights abuses, including at the Letpadaung copper mine.

See also Treasury press release, available at https://home.treasury.gov/news/press-releases/jy0260#_blank, and Commerce press release, available at https://www.commerce.gov/news/press-releases/2021/07/commerce-increases-restrictions-burmese-military-adding-four-entities#_blank.

On December 10, 2021, OFAC designated the following under E.O. 14014: individuals—Maung KO, Khat Htein NAN, Saw Myint OO, Myo Swe WIN—and entities—DIRECTORATE OF DEFENSE INDUSTRIES, MYANMAR WAR VETERANS ORGANIZATION, QUARTERMASTER GENERAL OFFICE 86 Fed. Reg. 73,844 (Dec. 28, 2021).

7. Cuba

a. Designation as a State Sponsor of Terrorism ("SST")

On January 12, 2021, the Secretary of State determined, In accordance with section 6(j)(1) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), and as continued in effect by Executive Order 13222 of August 17,2001, section 620A(a) of the Foreign Assistance Act of 1961, Public Law 87–195, as amended (22 U.S.C. 2371(c)), and section 40(f) of the Arms Export Control Act, Public Law 90–629, as amended (22U.S.C. 2780(f), that the Republic of Cuba has repeatedly provided support for acts of international terrorism. 86 Fed. Reg. 6731 (Jan. 22, 2021). The press statement on the designation of Cuba as an SST is excerpted below and available at https://2017-2021.state.gov/u-s-announces-designation-of-cuba-as-a-state-sponsor-of-terrorism/index.html.

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* * * *

For decades, the Cuban government has fed, housed, and provided medical care for murderers, bombmakers, and hijackers, while many Cubans go hungry, homeless, and without basic medicine. Members of the National Liberation Army (ELN), a U.S.-designated Foreign Terrorist

Organization, traveled to Havana to conduct peace talks with the Colombian government in 2017. Citing peace negotiation protocols, Cuba has refused Colombia's requests to extradite ten ELN leaders living in Havana after the group claimed responsibility for the January 2019 bombing of a Bogota police academy that killed 22 people and injured more than 87 others.

Cuba also harbors several U.S. fugitives from justice wanted on or convicted of charges of political violence, many of whom have resided in Cuba for decades. For example, the Cuban regime has refused to return Joanne Chesimard, on the FBI's Most Wanted Terrorists List for executing New Jersey State Trooper Werner Foerster in 1973; Ishmael LaBeet, convicted of killing eight people in the U.S. Virgin Islands in 1972; Charles Lee Hill, charged with killing New Mexico state policeman Robert Rosenbloom in 1971; and others.

Cuba returns to the SST list following its broken commitment to stop supporting terrorism as a condition of its removal by the previous administration in 2015. On May 13, 2020, the State Department notified Congress that it had certified Cuba under Section 40A(a) of the Arms Export Control Act as "not cooperating fully" with U.S. counterterrorism efforts in 2019.

In addition to the support for international terrorism that is the basis for today's action, the Cuban regime engages in a range of malign behavior across the region. The Cuban intelligence and security apparatus has infiltrated Venezuela's security and military forces, assisting Nicholas Maduro to maintain his stranglehold over his people while allowing terrorist organizations to operate. The Cuban government's support for FARC dissidents and the ELN continues beyond Cuba's borders as well, and the regime's support of Maduro has created a permissive environment for international terrorists to live and thrive within Venezuela.

Today's designation subjects Cuba to sanctions that penalize persons and countries engaging in certain trade with Cuba, restricts U.S. foreign assistance, bans defense exports and sales, and imposes certain controls on exports of dual use items.

The United States will continue to support the Cuban people in their desire for a democratic government and respect for human rights, including freedom of religion, expression, and association. Until these rights and freedoms are respected, we will continue to hold the regime accountable.

* * * *

b. Other measures

See section 11, *infra* for discussion of Cuba-related designations under other sanctions programs relating to human rights abuse and corruption.

On January 1, 2021, the State Department issued a press statement by Secretary Pompeo announcing the addition to the Cuba Restricted List of Banco Financiero International S.A. ("BFI"), a commercial bank controlled by the Cuban military. The press statement, available at https://2017-2021-translations.state.gov/2021/01/01/removing-the-cuban-militarys-grip-from-cubas-banking-sector/index.html, explains:

> The Cuban military uses BFI's key role in foreign exchange to give military and state companies preferential access, secure advantageous exchange rates, and

> finance government-controlled projects that enrich the regime. The profits earned from these operations disproportionately benefit the Cuban military rather than independent Cuban entrepreneurs, furthering repression of the Cuban people and funding Cuba's interference in Venezuela.

The Department of State published an update to its List of Restricted Entities and Subentities Associated With Cuba ("Cuba Restricted List") with which direct financial transactions are generally prohibited under the Cuban Assets Control Regulations ("CACR") on January 8, 2021. 86 Fed. Reg. 1561 (Jan. 8, 2021).

On April 13, 2021, OFAC removed Juan M. CRUZ and Jose GUTIERREZ REYES, who had previously been designated under the Cuban Assets Control Regulations, from the SDN List. 86 Fed. Reg. 20,433 (Apr. 19, 2021).

On November 30, 2021, Secretary Blinken announced visa restrictions on nine Cuban officials in response to the Cuban regime's crackdown on peaceful demonstrators on November 15. The press statement, available at https://www.state.gov/announcement-of-visa-restrictions-against-cuban-officials/, explains:

> The Department implemented these targeted actions pursuant to Presidential Proclamation 5377, which suspends nonimmigrant entry into the United States of officers and employees of the Cuban government. These nine individuals include high-ranking members of the Ministries of the Interior and the Revolutionary Armed Forces.
>
> In the days preceding November 15, the Cuban regime bullied activists with government-sponsored mobs, confined journalists and opposition members to their homes, revoked journalists' credentials to suppress freedom of the press, and arbitrarily detained Cuban citizens who attempted to peacefully protest. The designated individuals today took action to deny Cubans their rights to free expression and peaceful assembly. The rights to freedom of expression and peaceful assembly are universal.

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")

The Iran, North Korea, and Syria Nonproliferation Act ("INKSNA") authorizes the imposition of sanction on 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. The sanctions, which are authorized under Section 3 of INKSNA, include restrictions on U.S. government procurement, U.S. government assistance, U.S. government sales, and exports, for a period of two years.

On January 13, 2021, the U.S. Government applied the measures authorized in Section 3 of INKSNA against the following foreign persons (and their successors, sub-units, or subsidiaries): Ningbo Vet Energy Technology Co., Ltd. (China); Ningbo Zhongjun International Trade Co., Ltd. ("NBZJ") (China); Rim Ryong Nam [DPRK Munitions Industry Department (MID) Official] (North Korean individual in China). 86 Fed. Reg. 6730 (Jan. 22, 2021).

On July 29, 2021, the U.S. Government applied the measures authorized in Section 3 of INKSNA against the following foreign persons (and their successors, sub-units, or subsidiaries): Asa'ib Ahl al-Haq (AAH) (Iraq); Kata'ib Hezbollah (Iraq); Asia-Invest LLC (Russia); Charter Green Light Moscow (CGLM) (Russia); NPP Pulsar LLC (Russia); Ayman Al Sabbagh Trading (Syria); Lebanese Hizballah (Syria); Wael Issa Trading Establishment (Syria). 86 Fed. Reg. 43,717 (Aug. 10, 2021).

9. Terrorism

a. 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. 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). For background on E.O. 13224, see 66 Fed. Reg. 49,079 (Sept. 25, 2001); see also *Digest 2001* at 881–93 and *Digest 2007* at 155–58.

In a December 22, 2021 press statement, available at https://www.state.gov/issuance-of-additional-general-licenses-and-guidance-in-support-of-assistance-to-afghanistan/, Secretary Blinken announced that the United States was taking steps, consistent with UN Security Council Resolution 2615 (adopted that day), to authorize humanitarian assistance and other support for the Afghan people as a carveout from the Afghanistan/Taliban sanctions regime under Resolution 1988 (2011) that continues to be in force. The press statement describes the actions taken by the Treasury Department to issue three General Licenses ("GLs"). Further information on the GLs is available in the Treasury press statement at https://home.treasury.gov/news/press-releases/jy0545.

b. U.S. targeted financial sanctions

(1) Department of State designations

See separate discussion in section 13.h, *infra*, of actions regarding Colombia. In 2021, numerous entities and individuals (including their known aliases) were designated pursuant to State Department authorities in 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/.

On January 12, 2021, Secretary Pompeo announced the designations of Iran-based al-Qa'ida leaders Muhammad Abbatay (also known as Abd al-Rahman al-Maghrebi), Sultan Yusuf Hasan al-'Arif, Isma'il Fu'ad Rasul Ahmed, Fuad Ahmad Nuri Ali al-Shakhan, and Niamat Hama Rahim Hama Sharif under E.O. 13224. 86 Fed. Reg. 3229 (Jan. 14, 2021) (Muhammad Abbatay); 86 Fed. Reg. 3228 (Jan. 14, 2021) (Sultan Yusuf Hasan al-'Arif); 86 Fed. Reg. 3226 (Jan. 14, 2021) (Fuad Ahmad Nuri Ali al-Shakhan); 86 Fed. Reg. 3226 (Jan. 14, 2021) (Isma'il Fu'ad Rasul Ahmed); 86 Fed. Reg. 7331 (Jan. 27, 2021) (Niamat Hama Rahim Hama Sharif). See press statement, available at https://2017-2021.state.gov/united-states-takes-action-to-counter-iranian-support-for-al-qaida/index.html.

On January 12, 2021, Secretary Pompeo designated Ansarallah and Abdul Malik al-Houthi, Abd al-Khaliq Badr al-Din al-Houthi, and Abdulla Yahya al Hakim under E.O. 13224. 86 Fed. Reg. 5308 (Jan. 19, 2021). On February 11, 2021, Secretary Blinken revoked the E.O. 13224 designations of Ansarallah, Abdul Malik al-Houthi, Abd al-Khaliq Badr al-Din al- Houthi, Abdullah Yahya al Hakim, and their respective aliases. 86 Fed. Reg. 9568 (Feb. 16, 2021). See *infra* for discussion of other sanctions programs relating to Yemen.

On January 13, 2021, the State Department designated Abd al-Aziz Malluh Mirjirash al-Muhammadawi—also known as Abu Fadak—pursuant to E.O. 13224. On January 19, 2021, the State Department published the designation of al-Muhammadawi. 86 Fed. Reg. 5306 (Jan. 19, 2021). The State Department media note on the designation, available at https://2017-2021-translations.state.gov/2021/01/13/terrorist-designation-of-abd-al-aziz-malluh-mirjirash-al-muhammadawi/index.html, , includes the following:

> Muhammadawi is the former secretary general of Kata'ib Hizballah (KH), a U.S.-designated Foreign Terrorist Organization and SDGT. KH, established in 2006, is an Iran-backed terrorist organization that seeks to advance Iran's malign agenda in the region and has claimed responsibility for numerous terrorist attacks in Iraq, including improvised explosive device attacks, indirect fire attacks, rocket-propelled grenade attacks, and sniper operations. In addition, KH has reportedly been involved in recent and widespread theft of Iraqi state resources and the killing, abduction, and torture of peaceful protesters and activists in Iraq.
>
> Muhammadawi is separately working in conjunction with Iran's Islamic Revolutionary Guard Corps – Qods Force to reshape official Iraqi state security institutions away from their true purpose of defending the Iraqi state and

> fighting ISIS, to instead support Iran's malign activities, including the defense of the Assad regime in Syria. Iran-backed elements, including those in which Muhammadawi now plays a leadership role, have previously been involved in sectarian violence, including the abductions of hundreds of men from areas liberated from ISIS control. These individuals remain missing to this day. Additionally, groups with which Muhammadawi is affiliated have established fictitious cover names to hide their culpability for ongoing attacks against Iraqi government facilities and foreign diplomatic facilities.

On January 14, 2021, the State Department amended the designation of Lashkar i Jhangvi as under E.O. 13224 to include the following new aliases: Lashkar e Jhangvi al-Alami, Lashkar e Jhangvi al-Almi, and LeJ al-Alami. 86 Fed. Reg. 3228 (Jan. 14, 2021).

On January 19, 2021, the December 22, 2020 designations of Yahya al-Sayyid Ibrahim Musa and Alaa Ali Ali Mohammed Al-Samahi under E.O. 13224 were published. 86 Fed. Reg. 5310 (Jan. 19, 2021).

On March 1, 2021, the State Department designated Abu Yasir Hassan pursuant to E.O. 13224. 86 Fed. Reg. 13,960 (Mar. 11, 2021). Also on March 1, 2021, the State Department designated Islamic State of Iraq and Syria-Democratic Republic of the Congo ("ISIS–DRC") under E.O. 13224. 86 Fed. Reg. 13,953 (Mar. 11, 2021). The State Department also designated Islamic State of Iraq and Syria-Mozambique on March 1, 2021. 86 Fed. Reg. 13,956 (Mar. 11, 2021). And Seka Musa Baluku, leader of ISIS-DRC, was also designated under E.O. 13224 on March 1, 2021. 86 Fed. Reg. 13,958 (Mar. 11, 2021). In a March 10, 2021 media note, available at https://www.state.gov/state-department-terrorist-designations-of-isis-affiliates-and-leaders-in-the-democratic-republic-of-the-congo-and-mozambique/, the State Department announced the designations under E.O. 13224 of ISIS-DRC and ISIS-Mozambique along with respective leaders of those organizations, Seka Musa Baluku and Abu Yasir Hassan. The media note provides the following background on the designations:

> ISIS-DRC, also known as the Allied Democratic Forces (ADF) and Madina at Tauheed Wau Mujahedeen, among other names, is responsible for many attacks across North Kivu and Ituri Provinces in eastern DRC. Under the leadership of Seka Musa Baluku, ISIS-DRC has been notorious in this region for its brutal violence against Congolese citizens and regional military forces, with attacks killing over 849 civilians in 2020 alone, according to United Nations reporting on the ADF. The ADF was previously sanctioned by the U.S. Department of the Treasury and the United Nations under the UN Security Council's DRC sanctions regime in 2014 for its violence and atrocities. The U.S. Department of the Treasury also sanctioned six ADF members, including leader Seka Musa Baluku, in 2019 under the Global Magnitsky sanctions program for their roles in serious human rights abuse, with a subsequent United Nations sanctions listing for Baluku in early 2020 under the DRC sanctions program.
>
> ISIS-Mozambique, also known as Ansar al-Sunna (and locally as al-Shabaab in Mozambique), among other names, reportedly pledged allegiance to

> ISIS as early as April 2018, and was acknowledged by ISIS-Core as an affiliate in August 2019. Since October 2017, ISIS-Mozambique, led by Abu Yasir Hassan, has killed more than 1,300 civilians, and it is estimated that more than 2,300 civilians, security force members, and suspected ISIS-Mozambique militants have been killed since the terrorist group began its violent extremist insurgency. The group was responsible for orchestrating a series of large scale and sophisticated attacks resulting in the capture of the strategic port of Mocimboa da Praia, Cabo Delgado Province. ISIS-Mozambique's attacks have caused the displacement of nearly 670,000 persons within northern Mozambique.

On May 19, 2021, the State Department designated Yusuf al-Madani under E.O. 13224. 86 Fed. Reg. 28,183 (May 25, 2021).

On June 28, 2021, the State Department designated Ousmane Illiassou Djibo, also known as Petit Chapori, under E.O. 13224. The press statement on the designation, available at https://www.state.gov/state-department-terrorist-designation-of-ousmane-illiassou-djibo/, includes the following:

> Ousmane Illiassou Djibo, a native Nigerien, is an Islamic State of Iraq and Syria in the Greater Sahara (ISIS-GS) leader operating in the Menaka Region of Mali. Djibo is a close collaborator and key lieutenant of ISIS-GS leader, Adnan Abu Walid al-Sahrawi. Djibo directed subordinate ISIS-GS members to develop a network to kidnap or attack westerners in Niger and surrounding areas. Djibo has also taken part in numerous assaults on local forces. He led ISIS-GS fighters in the July 1, 2019 attack on the Nigerien Armed Forces (FAN) base in Inates, Tillaberi Region, Niger, and also provided the order for ISIS-GS fighters to take six Nigerien soldiers hostage during an ambush on Nigerien soldiers near Tongo Tongo on May 14, 2019.

On August 6, 2021, Secretary Blinken announced the designation of five terrorist leaders in Africa under E.O. 13224: Bonomade Machude Omar, Sidan ag Hitta, Salem ould Breihmatt, Ali Mohamed Rage, and Abdikadir Mohamed Abdikadir. 86 Fed. Reg. 44,466 (Aug. 12, 2021) (Rage, Abdikadir, Omar); 86 Fed. Reg. 44,465 (Aug. 12, 2021) (Hitta, Breihmatt). The press statement, available at https://www.state.gov/designations-of-isis-mozambique-jnim-and-al-shabaab-leaders/, includes the following information about the designations.

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* * * *

- Bonomade Machude Omar, also known as Abu Sulayfa Muhammad and Ibn Omar, leads the Military and External Affairs Departments for ISIS-Mozambique and serves as the senior commander and lead coordinator for all attacks conducted by the group in northern Mozambique, as well as the lead facilitator and communications conduit for the group. During the March 2021 attack on Palma, Omar led one group of fighters while

Abu Yasir Hassan, the leader of ISIS-Mozambique, led another group of fighters, and Omar also led the attack on the Amarula Hotel in Palma. Omar has been responsible for attacks in Cabo Delgado Province, Mozambique, and Mtwara Region, Tanzania.

- Sidan Ag Hitta, also known as Abu Qarwani and Abu Abdelhakim al-Kidali, is a senior leader and commander responsible for the Kidal Region in Mali within Jama'at Nasr al-Islam wal Muslimin (JNIM). Hitta was among the group responsible for the January 20, 2019, attack on the MINUSMA base in Aguelhoc, Kidal Region, Mali. He was also responsible for hostages in the Kidal Region.
- Salem ould Breihmatt, also known as Abu Hamza al-Shanqitiand Hamza al-Mauritani, is a JNIM senior leader and emir of Arbinda and Serma in the Mopti Region of Mali. He is also charged with the oversight of JNIM in Burkina Faso and is an explosives expert and instructor.
- Ali Mohamed Rage, also known as Ali Dheere, is al-Shabaab's spokesman and a senior leader of the group. He replaced Sheikh Mukhtar Robowas al-Shabaab's top spokesman in May 2009. Rage has been involved in attack planning that has targeted areas in Kenya and Somalia.
- Abdikadir Mohamed Abdikadir, also known as Ikrima, is a facilitator and operational planner. As of November 2019, Abdikadir was an al-Shabaab senior leader and served as the Head of Operations and Logistics. Abdikadir had also directed previous attack planning for al-Shabaab.

* * * *

On August 9, 2021, the Secretary of State designated ISIL Khorasan ("ISIS-K") under E.O. 13224. 86 Fed. Reg. 68,294 (Dec. 1, 2021). On November 12, 2021, the State Department designated Sanaullah Ghafari, Sultan Aziz Azam, and Maulawi Rajab under E.O. 13224. 86 Fed. Reg. 68,292 (Dec. 1, 2021). On November 22, 2021, in a State Department press statement, Secretary Blinken announced further action against ISIS-K. The statement, available at https://www.state.gov/taking-action-against-isis-k/, includes the following identification of those the State Department designated under E.O. 13224:

Sanaullah Ghafari, also known as Shahab al-Muhajir, is ISIS-K's current overall emir. He was appointed by the ISIS core to lead ISIS-K in June 2020. Ghafari is responsible for approving all ISIS-K operations throughout Afghanistan and arranging funding to conduct operations.
Sultan Aziz Azam, also known as Sultan Aziz, has held the position of ISIS-K spokesperson since ISIS-K first came to Afghanistan.
Maulawi Rajab, also known as Maulawi Rajab Salahudin, is a senior leader of ISIS-K in Kabul Province, Afghanistan. Rajab plans ISIS-K's attacks and operations and commands ISIS-K groups conducting attacks in Kabul.

The press statement also notes the Department of the Treasury is designating **Ismatullah Khalozai** pursuant to E.O. 13224, as amended. "Khalozai has been an international financial facilitator for ISIS-K and has carried out missions for senior ISIS leadership."

(2) OFAC designations

OFAC designated numerous individuals (including their known aliases) and entities pursuant to Executive Order 13224, as amended, during 2021. 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 Specially Designated Global Terrorists pursuant to the order.

In the first quarter of 2021, OFAC designated several individuals and entities pursuant to E.O. 13224. The designation of SHANGHAI SAINT LOGISTICS LIMITED, linked to Mahan Air, was published in February. 86 Fed. Reg. 8988 (Feb. 10, 2021).

In the second quarter of 2021, OFAC designated several individuals and entities pursuant to E.O. 13224. The following individuals were designated on May 11: Ibrahim Ali Daher (Daher) (chief of Hizballah's Central Finance Unit); Ahmad Mohamad Yazbeck (Yazbeck); Abbas Hassan Gharib (Gharib); Wahid Mahmud Subayti (Subayti); Mostafa Habib Harb (Harb); Ezzat Youssef Akar (Akar); and Hasan Chehadeh Othman (Othman). 86 Fed. Reg. 26,775 (May 17, 2021); see also Treasury Department press release, available at https://home.treasury.gov/news/press-releases/jy0170#_blank and State Department press statement, available at https://www.state.gov/the-united-states-impedes-hizballah-financing-by-sanctioning-seven-individuals/. On May 17, 2021, OFAC designated three individuals and one entity affiliated with ISIS pursuant to E.O. 13224: Ibrahim Ali 'Awad AL-FAY, Idris 'Ali 'Awwad AL-FAY, Alaa KHANFURAH, and AL FAY COMPANY. 86 Fed. Reg. 28,438 (May 26, 2021); see also State Department press statement, available at https://www.state.gov/the-united-states-designates-isis-financial-facilitators/ (ISIS financial facilitators were designated in conjunction with the 14th meeting of the Counter ISIS Finance Group). On May 20, 2021, the State Department announced in a press statement, available at https://www.state.gov/the-united-states-designates-houthi-militants/, designations of two senior leaders of Houthi forces in Yemen: Muhammad Abd Al-Karim al-Ghamari pursuant to E.O. 13611 and Yusuf al-Madani pursuant to E.O. 13224. 86 Fed. Reg. 28,681 (May 27, 2021) (Muhammad Abd Al-Karim AL–GHAMARI). The Treasury press release on these sanctions is available at https://home.treasury.gov/news/press-releases/jy0191 . Seven individuals—Sa'id Ahmad Muhammad AL-JAMAL, Hani 'Abd-al-Majid Muhammad AS'AD, Jami' 'Ali MUHAMMAD, Manoj SABHARWAL, Talib 'Ali Husayn Al-Ahmad AL-RAWI, Abdi Nasir Ali MAHAMUD, Abdul Jalil MALLAH—and four entities—ADOON GENERAL TRADING FZE; ADOON GENERAL TRADING GIDA SANAYI VE TICARET ANONIM SIRKETI; ADOON GENERAL TRADING L.L.C.; and SWAID AND SONS FOR EXCHANGE CO were designated. 86 Fed. Reg. 31,822 (June 15, 2021); see also June 10, 2021 press statement, available at https://www.state.gov/u-s-sanctions-international-network-enriching-houthis-in-yemen/, in which Secretary Blinken announced designations under E.O. 13224 of an international network enriching Houthis in Yemen, led by Sa'id Ahmad Muhammad al-Jamal:

> Those in al-Jamal's network of front companies and intermediaries sell commodities, such as Iranian petroleum, throughout the Middle East and

> beyond and channel a significant portion of the revenue to the Houthis in Yemen. …
>
> The 11 other individuals, companies, and vessel sanctioned today play key roles in this illicit network, including Hani 'Abd-al-Majid Muhammad As'ad, a Yemeni accountant who has facilitated financial transfers to the Houthis, and Jami' 'Ali Muhammad, a Houthi and IRGC-QF associate who helped al-Jamal procure vessels, facilitate shipments of fuel, and transfer funds for the benefit of the Houthis.

See also Treasury press release, available at https://home.treasury.gov/news/press-releases/jy0221.

In the third quarter of 2021, OFAC designated additional entities and individuals under E.O. 13224, including the following: Hassan al-Shaban and Farrukh Furkatovitch Fayzimatov (two al-Qa'ida-linked financial facilitators). 86 Fed. Reg 46,087 (Aug.17, 2021); see also Treasury Department press release, available at https://home.treasury.gov/news/press-releases/jy0293#_blank, and State Department press statement at https://www.state.gov/designation-of-al-qaida-linked-financial-facilitators/. In a September 17, 2021 press statement, available at https://www.state.gov/the-united-states-imposes-sanctions-on-international-networks-supporting-terrorism/, the State Department announced sanctions under E.O. 13224 on:

> Lebanon- and Kuwait-based members of a financial network that funds Hizballah, as well as members of an international network of financial facilitators and front companies that operate in support of Hizballah and Iran's Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF). Together, these networks have laundered tens of millions of dollars through regional financial systems and conducted currency exchange operations and trade in gold and electronics for the benefit of both Hizballah and the IRGC-QF. This action is being taken pursuant to the counterterrorism authority within Executive Order 13224, as amended.

The Department of the Treasury's press release, available at https://home.treasury.gov/news/press-releases/jy0362, identifies the financiers in Kuwait and Lebanon as Hasib Muhammad Hadwan, Ali al-Sha'ir ,Talib Husayn 'Ali Jarak Ismai'l, Jamal Husayn 'Abd 'Ali 'Abd-al-Rahim al-Shatti, Ali Qasir, Omid Yazdanparast, Mohammad Ali Damirchilu, Samaneh Damirchilu, Mohammad Reza Kazemi, Mostafa Puriya, Hossein Asadollah, Hemera Infotech FZCO, Morteza Minaye Hashemi, Yan Su Xuan and Song Jing, PCA Xiang Gang Limited, Damineh Optic Limited, China 49 Group Co., Limited, Taiwan Be Charm Trading Co., Limited, and Black Drop Intl Co., Victory Somo Group (HK) Limited and Yummy Be Charm Trading (HK) Limited. On September 16, 2021, OFAC designated the following under E.O. 13224: Soner GURLEYEN, Cebrail GUZEL, Nurettin MUSLIHAN, Majdi Muhammad Muhammad SALIM, Muhammad Nasr al-Din AL–GHAZLANI. 86 Fed. Reg. 52,739 (Sep. 22, 2021). See State Department press statement, available at https://www.state.gov/designation-of-

al-qaida-supporters/ (designation of five al-Qa'ida supporters operating in Turkey) and Treasury Department press release, available at https://home.treasury.gov/news/press-releases/jy0358. On September 17, 2021, OFAC designated the following four individuals linked to Hizballah under E.O. 13224: Ali AL-SHA'IR, Jamal Husayn 'Abd 'Ali 'Abd-al-Rahim AL-SHATTI, Hasib Muhammad HADWAN, Talib Husayn Ali Jarak ISMAIL. 86 Fed. Reg. 52,740 (Sep. 22, 2021). On September 29, 2021, OFAC designated seven individuals and one entity under E.O. 13224: Ali Reda Hassan AL BANAI; Yahya Muhammad AL-'ABD-AL-MUHSIN; Abd al-Muayyid AL-BANAI; Sulaiman AL-BANAI; Majdi Fa'iz AL-USTADZ; 'Ali Ridha Qasabi LARI; 'Abd Al-Rahman 'Abd Al-Nabi SHAMS; and ALDAR PROPERTIES. 86 Fed. Reg. 55,112 (Oct. 5, 2021).

OFAC designated additional individuals and entities pursuant to E.O. 13224 in the fourth quarter of 2020. On October 29, 2021, OFAC designated four individuals—Saeed AGHAJANI, Mohammad Ebrahim ZARGAR TEHRANI, Yousef ABOUTALEBI, Abdollah MEHRABI—and two entities—KIMIA PART SIVAN COMPANY LLC and OJE PARVAZ MADONAFAR COMPANY. 86 Fed. Reg. 60,738 (Nov. 3, 2021). OFAC also designated Ismatullah KHALOZAI (86 Fed. Reg. 67,795 (Nov. 29, 2021)); Talib Husayn Ali Jarak ISMAIL (or ISMAEL) (86 Fed. Reg. 68,531 (Dec. 2, 2021)); see also October 29, 2021 State Department press statement, available at https://www.state.gov/designation-of-six-targets-involved-in-irans-destabilizing-unmanned-aerial-vehicle-activities/ and Treasury Department press release, available at https://home.treasury.gov/news/press-releases/jy0443 (Iran-based Kimia Part Sivan Company, Mohammad Ebrahim Zargar Tehrani, and Brigadier General Saeed Aghajani were designated for their links to Iran's Islamic Revolutionary Guard Corps ("IRGC") unmanned aerial vehicle ("UAV") activities; see also December 22, 2021 press statement, available at https://www.state.gov/designation-of-al-qaida-network-in-brazil/ and Treasury press release, available at https://home.treasury.gov/news/press-releases/jy0546#_blank (designations of Haytham Ahmad Shukri Ahmad Al-Maghrabi, Mohamed Sherif Mohamed Awadd; Ahmad Al-Khatib; as well as Awadd and Al-Khatib's companies; all providing support for al-Qaeda in Brazil).

(3) OFAC removals

On November 22, 2021, OFAC, in consultation with the Secretary of State, determined that the following individuals are no longer subject to the blocking provisions of E.O. 13224: Ibn Al-Shaykh AL-LIBI, George HABBASH, Mufti Rashid Ahmad LADEHYANOY, Shaykh SAI'ID, Tohir YULDASHEV. 86 Fed. Reg. 67,789 (Nov. 29, 2021).

c. Annual certification regarding cooperation in U.S. antiterrorism efforts

See Chapter 3 for discussion of the Secretary of State's 2020 determination regarding countries not cooperating fully with U.S. antiterrorism efforts.

10. Cyber Activity and Election Interference

a. New Executive Orders

On June 3, 2021, President Biden issued E.O. 14032, "Addressing the Threat From Securities Investments That Finance Certain Companies of the People's Republic of China." 86 Fed. Reg. 30,145 (June 7, 2021). Excerpts follow from E.O. 14032.

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* * * *

I, JOSEPH R. BIDEN JR., President of the United States of America, find that additional steps are necessary to address the national emergency declared in Executive Order 13959 of November 12, 2020 (Addressing the Threat From Securities Investments That Finance Communist Chinese Military Companies), including the threat posed by the military-industrial complex of the People's Republic of China (PRC) and its involvement in military, intelligence, and security research and development programs, and weapons and related equipment production under the PRC's Military-Civil Fusion strategy. In addition, I find that the use of Chinese surveillance technology outside the PRC and the development or use of Chinese surveillance technology to facilitate repression or serious human rights abuse constitute un- usual and extraordinary threats, which have their source in whole or substantial part outside the United States, to the national security, foreign policy, and economy of the United States, and I hereby expand the scope of the national emergency declared in Executive Order 13959 to address those threats.

Accordingly, I hereby order as follows:

Section 1. Sections 1 through 5 of Executive Order 13959, as amended by Executive Order 13974 of January 13, 2021 (Amending Executive Order 13959—Addressing the Threat From Securities Investments That Finance Communist Chinese Military Companies), are hereby replaced and superseded in their entirety to read as follows:

''**Section 1**. (a) The following activities by a United States person are prohibited: the purchase or sale of any publicly traded securities, or any publicly traded securities that are derivative of such securities or are designed to provide investment exposure to such securities, of any person listed in the Annex to this order or of any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, and, as the Secretary of the Treasury deems appropriate, the Secretary of Defense:

(i) to operate or have operated in the defense and related materiel sector or the surveillance technology sector of the economy of the PRC; or

(ii) to own or control, or to be owned or controlled by, directly or indirectly, a person who operates or has operated in any sector described in subsection (a)(i) of this section, or a person who is listed in the Annex to this order or who has otherwise been determined to be subject to the prohibitions in subsection (a) of this section.

* * * *

On June 9, 2021, President Biden issued E.O. 14034, entitled "Protecting Americans' Sensitive Data from Foreign Adversaries." 86 Fed. Reg. 31,423 (June 11, 2021). Excerpts follow from the new E.O. 14034.

* * * *

I, JOSEPH R. BIDEN JR., President of the United States of America, find that it is appropriate to elaborate upon measures to address the national emergency with respect to the information and communications technology and services supply chain that was declared in Executive Order 13873 of May 15, 2019 (Securing the Information and Communications Technology and Services Supply Chain). Specifically, the increased use in the United States of certain connected software applications designed, developed, manufactured, or supplied by persons owned or controlled by, or subject to the jurisdiction or direction of, a foreign adversary, which the Secretary of Commerce acting pursuant to Executive Order 13873 has defined to include the People's Republic of China, among others, continues to threaten the national security, foreign policy, and economy of the United States. The Federal Government should evaluate these threats through rigorous, evidence-based analysis and should address any unacceptable or undue risks consistent with overall national security, foreign policy, and economic objectives, including the preservation and demonstration of America's core values and fundamental freedoms.

By operating on United States information and communications technology devices, including personal electronic devices such as smartphones, tablets, and computers, connected software applications can access and capture vast swaths of information from users, including United States persons' personal information and proprietary business information. This data collection threatens to provide foreign adversaries with access to that information. Foreign adversary access to large repositories of United States persons' data also presents a significant risk.

In evaluating the risks of a connected software application, several factors should be considered. Consistent with the criteria established in Executive Order 13873, and in addition to the criteria set forth in implementing regulations, potential indicators of risk relating to connected software applications include: ownership, control, or management by persons that support a foreign adversary's military, intelligence, or proliferation activities; use of the connected software application to conduct surveillance that enables espionage, including through a foreign adversary's access to sensitive or confidential government or business information, or sensitive personal data; ownership, control, or management of connected software applications by persons subject to coercion or cooption by a foreign adversary; ownership, control, or management of connected software applications by persons involved in malicious cyber activities; a lack of thorough and reliable third- party auditing of connected software applications; the scope and sensitivity of the data collected; the number and sensitivity of the users of the connected software application; and the extent to which identified risks have been or can be addressed by independently verifiable measures.

The ongoing emergency declared in Executive Order 13873 arises from a variety of factors, including the continuing effort of foreign adversaries to steal or otherwise obtain United States persons' data. That continuing effort by foreign adversaries constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.

To address this threat, the United States must act to protect against the risks associated with connected software applications that are designed, developed, manufactured, or supplied by persons owned or controlled by, or subject to the jurisdiction or direction of, a foreign adversary. Additionally, the United States seeks to promote accountability for persons who engage in serious human rights abuse. If persons who own, control, or manage connected software applications engage in serious human rights abuse or otherwise facilitate such abuse, the United States may impose consequences on those persons in action separate from this order.

Accordingly, it is hereby ordered that:

Section 1. *Revocation of Presidential Actions.* The following orders are revoked: Executive Order 13942 of August 6, 2020 (Addressing the Threat Posed by TikTok, and Taking Additional Steps To Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain); Executive Order 13943 of August 6, 2020 (Addressing the Threat Posed by WeChat, and Taking Additional Steps To Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain); and Executive Order 13971 of January 5, 2021 (Addressing the Threat Posed by Applications and Other Software Developed or Controlled by Chinese Companies).

Sec. 2. *Implementation.* (a) The Director of the Office of Management and Budget and the heads of executive departments and agencies (agencies) shall promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing Executive Orders 13942, 13943, or 13971, as appropriate and consistent with applicable law, including the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* In addition, any personnel positions, committees, task forces, or other entities established pursuant to Executive Orders 13942, 13943, or 13971 shall be abolished, as appropriate and consistent with applicable law.

(b) Not later than 120 days after the date of this order, the Secretary of Commerce, in consultation with the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Health and Human Services, the Secretary of Homeland Security, the Director of National Intelligence, and the heads of other agencies as the Secretary of Commerce deems appropriate, shall provide a report to the Assistant to the President and National Security Advisor with recommendations to protect against harm from the unrestricted sale of, transfer of, or access to United States persons' sensitive data, including personally identifiable information, personal health information, and genetic information, and harm from access to large data repositories by persons owned or controlled by, or subject to the jurisdiction or direction of, a foreign adversary. Not later than 60 days after the date of this order, the Director of National Intelligence shall provide threat assessments, and the Secretary of Homeland Security shall provide vulnerability assessments, to the Secretary of Commerce to support development of the report required by this subsection.

(c) Not later than 180 days after the date of this order, the Secretary of Commerce, in consultation with the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of the Office of Management and Budget, and the heads of other agencies as the Secretary of Commerce deems appropriate, shall provide a report to the Assistant to the President and National Security Advisor recommending additional executive and legislative actions to address the risk associated with connected software applications that are designed, developed, manufactured, or supplied by persons owned or controlled by, or subject to the jurisdiction or direction of, a foreign adversary.

(d) The Secretary of Commerce shall evaluate on a continuing basis transactions involving connected software applications that may pose an undue risk of sabotage or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of information and communications technology or services in the United States; pose an undue risk of catastrophic effects on the security or resiliency of the critical infrastructure or digital economy of the United States; or otherwise pose an unacceptable risk to the national security of the United States or the security and safety of United States persons. Based on the evaluation, the Secretary of Commerce shall take appropriate action in accordance with Executive Order 13873 and its implementing regulations.

* * * *

b. 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. Executive Order 13757 of December 28, 2016, ''Taking Additional Steps to Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities,'' amended E.O. 13694.

On September 21, 2021, OFAC designated one entity under E.O. 13694, as amended: SUEX OTC, S.R.O. 86 Fed. Reg. 53,147 (Sept. 24, 2021).

On November 8, 2021, OFAC designated two individuals and five entities under E.O. 13694, as amended: individuals—Yaroslav VASINSKYI and Yevgeniy Igorevich POLYANIN—and entities—CHATEX, CHATEXTECH SIA, HIGHTRADE FINANCE LTD, IZIBITS OU, and POLYANIN EVGENII IGOREVICH IP. 86 Fed. Reg. 62,881 (Nov. 12, 2021).

c. Entity List

On November 3, 2021, the U.S. Government added four foreign companies to the Entity List for acting contrary to the national security or foreign policy interests of the United States: Candiru, NSO Group, Computer Security Initiative Consultancy PTE ("COSEINC"), and Positive Technologies. 86 Fed. Reg. 60,759 (Nov. 4, 2021). See State Department media note, available at https://www.state.gov/the-united-states-adds-foreign-companies-to-entity-list-for-malicious-cyber-activities/. The media note provides the following background on the additions.

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These additions follow an October 2021 interim final rule published by the Department of Commerce establishing controls of certain items that can be used for malicious cyber activities; that rule implements decisions taken by the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies.

NSO Group and Candiru were added to the Entity List based on a determination that they developed and supplied spyware to foreign governments that used this tool to maliciously target government officials, journalists, businesspeople, activists, academics, and embassy workers.

Positive Technologies and COSEINC were added to the Entity List based on a determination that they misuse and traffic cyber tools that are used to gain unauthorized access to information systems in ways that are contrary to the national security or foreign policy of the United States, threatening the privacy and security of individuals and organizations worldwide.

As part of its commitment to put human rights at the center of U.S. foreign policy, the Biden-Harris Administration is working to stop the proliferation and misuse of digital tools used for repression. This effort is aimed at improving citizens' digital security, combating cyber threats, and mitigating unlawful surveillance.

The Entity List is a tool used by the Department of Commerce Bureau of Industry and Security (BIS) to restrict the export, re-export, and in-country transfer of items subject to the Export Administration Regulations (EAR) to persons – individuals, organizations, and/or companies – reasonably believed to be involved, have been involved, or pose a significant risk to being or becoming involved, in activities contrary to the national security or foreign policy interests of the United States.

* * * *

d. Election Interference

E.O. 13848 of 2018, entitled "Imposing Certain Sanctions in the Event of Foreign Interference in a United States Election," authorizes certain sanctions and has been used to designate multiple individuals and entities linked to the Internet Research Agency.

On January 11, 2021, OFAC designated the following pursuant to E.O. 13838: individuals—Oleksandr ONYSHCHENKO; Andrii TELIZHENKO; Dmytro Volodymyrovich KOVALCHUK; Anton Oleksandrovych SIMONENKO; Petro Anatoliyovich ZHURAVEL; Oleksandr DUBINSKY; Konstantin KULYK—and entities—ERA-MEDIA TOV; INFORMATSIYNE AGENSTVO ONLI N'YUZ TOV; NABULEAKS; and SKEPTIK TOV. 86 Fed. Reg. 4177 (Jan. 15, 2021). See also State Department press statement, available at https://ru.usembassy.gov/sanctioning-russia-linked-disinformation-network-for-its-involvement-in-attempts-to-influence-u-s-election/, which includes the following description of those designated:

> seven individuals and four entities that are part of a Russia-linked foreign influence network associated with Andrii Derkach, who was designated on September 10, 2020, pursuant to Executive Order (E.O.) 13848 for his attempt to influence the 2020 U.S. Presidential election. Derkach, a member of the Ukrainian parliament, has been an active Russian agent for more than a decade, maintaining close connections with Russian intelligence services. Former Ukraine Government officials Konstantin Kulyk, Oleksandr Onyshchenko, Andriy Telizhenko, and current member of the Ukrainian parliament Oleksandr Dubinsky, have publicly appeared with or affiliated themselves with Derkach

through the coordinated dissemination and promotion of fraudulent or unsubstantiated allegations involving a U.S. political candidate.

On April 15, 2021, OFAC designated 15 individuals and 13 entities pursuant to E.O. 13848 (some were simultaneously designated pursuant to other authorities): individuals—Alexei Alexeyevich GROMOV (also E.O. 13661); Alexander Aleksandrovich MALKEVICH (also E.O. 13661 and E.O. 13694, as amended by E.O. 13757); Kirill Konstantinovich SHCHERBAKOV (also E.O. 13661 and E.O. 13694, as amended); Artem Nikolaevich STEPANOV (also E.O. 13661 and E.O. 13694, as amended); Mariya Evgenevna ZUEVA (also E.O. 13661 and E.O. 13694, as amended); Shahzad AHMED (also E.O. 13694); Syed Johar HASNAIN (also E.O. 13694); Muhammad Khizar HAYAT (also E.O. 13694); Mujtaba Ali RAZA (also E.O. 13694); Syed Ali RAZA (also E.O. 13694); Mohsin RAZA (also E.O. 13694); Yulia Andreevna AFANASYEVA (also E.O. 13661 and E.O. 13694, as amended); Pyotr Aleksandrovich BYCHKOV (also E.O. 13661 and E.O. 13694, as amended); Konstantin Viktorovich KILIMNIK (also E.O. 13660); Taras Kirillovich PRIBYSHIN (also E.O. 13661 and E.O. 13694, as amended)—and entities--
THE FOUNDATION FOR NATIONAL VALUES PROTECTION (also E.O. 13694, as amended, and E.O. 13661); OOO ALKON (also E.O. 13694, as amended, and E.O. 13661); OOO YUNIDZHET (also E.O. 13694); LIKE WISE (also E.O. 13694, as amended); MKSOFTTECH (also E.O. 13694, as amended); SECONDEYE SOLUTION (also E.O. 13694, as amended); THE OXYTECH (also E.O. 13694, as amended); SOUTHFRONT (also E.O. 13694, as amended, and E.O. 13382); THE STRATEGIC CULTURE FOUNDATION; ASSOCIATION FOR FREE RESEARCH AND INTERNATIONAL COOPERATION (also E.O. 13694, as amended, and E.O. 13661); INTERNATIONAL ANTICRISIS CENTER (also E.O. 13694, as amended, and E.O. 13661); and TRANS LOGISTIK, OOO (also E.O. 13694, as amended, and E.O. 13661). 86 Fed. Reg. 20,595 (Apr. 20, 2021).

On November 18, 2021, the State Department announced, in a media note available at https://www.state.gov/designation-of-iranian-cyber-actors-for-attempting-to-influence-the-2020-u-s-presidential-election/, that the United States had designated six Iranian individuals and one Iranian entity, pursuant to E.O. 13848, for their roles in attempting to influence the 2020 U.S. presidential election. See also the Department of the Treasury's press release, available at https://home.treasury.gov/news/press-releases/jy0494#_blank (those designated were Iranian cyber company Emennet Pasargad, company manager Mohammad Bagher Shirinkar (Shirinkar), company employees Seyyed Mohammad Hosein Musa Kazemi (Kazemi) and Sajjad Kashian (Kashian) and company board members Mostafa Sarmadi, Seyyed Mehdi Hashemi Toghroljerdi, and Hosein Akbari Nodeh).

11. The Global Magnitsky Sanctions Program and Other Measures Aimed at Corruption and Human Rights Violations and Abuses

a. 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 January 8, 2021, OFAC designated Falih AL–FAYYADH pursuant to E.O. 13818. 86 Fed. Reg. 3232 (Jan. 14, 2021). The State Department press statement on Al-Fayyadh, chairman of the Iraqi Popular Mobilization Commission ("PMC") and former national security advisor to the Iraqi prime minister, is available at https://2017-2021.state.gov/designation-of-iraqi-militia-leader-in-connection-with-serious-human-rights-abuse/index.html, and includes the following:

> During protests beginning in October 2019, Iran-aligned PMC forces attacked Iraqi civilians protesting against corruption, unemployment, economic stagnation, poor public services, and Iranian interference in Iraq's domestic affairs.
>
> Al-Fayyadh was the head of the PMC when its forces fired live ammunition at protesters resulting in the deaths of Iraqi civilians. Al-Fayyadh was also a member of the Islamic Revolutionary Guard Force Qods Force (IRGC-QF) supported crisis cell that included previously sanctioned militia leaders Qais al-Khazali and Hussein Falah al-Lami, as well as the now-deceased IRGC-QF commander Qasem Soleimani and PMC deputy leader Abu Mahdi al-Muhandis.

On January 15, 2021, OFAC designated Lazaro Alberto ALVAREZ CASAS and the Cuban MINISTRY OF INTERIOR ("MININT") pursuant to E.O. 13818. 86 Fed. Reg. 6969 (Jan. 25, 2021). The January 15, 2021 State Department press statement on the designations is available at https://2017-2021.state.gov/united-states-places-global-magnitsky-sanctions-on-the-cuban-ministry-of-interior-and-its-minister/index.html, and includes the following:

> MININT is designated for being responsible for, complicit in, or to have directly or indirectly engaged in, serious human rights abuse. As minister of MININT, Álvarez Casas is also designated for being or having been a leader or official of an

> entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse.
>
> Specialized units of MININT's state security branch are responsible for monitoring political activity, and Cuba's police support these security units by arresting persons of interest to MININT. In September 2019, Cuban dissident Jose Daniel Ferrer was held in a MININT-controlled prison in Cuba, where he reported being beaten, abused, and held in isolation. Ferrer received no medical attention while in prison and was not allowed to read or write.
>
> Ferrer's case is just one example of the systematic and daily abuse that the regime's Interior Ministry inflicts on the Cuban people. Today, the Cuban regime holds more than 100 political prisoners and Ministry officials have overseen the torture of many of those detainees. Álvarez Casas, in his role as the vice minister of MININT before his promotion to his current position in November 2020, is complicit in harassing and surveilling journalists, dissidents, activists, and members of civil society groups, including most recently the members of the peaceful San Isidro Movement.

On February 25, 2021, OFAC designated one individual, Ahmad Hassan AL ASIRI, and one entity, RAPID INTERVENTION FORCE, pursuant to E.O. 13818. 86 Fed. Reg. 13,440 (Mar. 8, 2021).

On March 22, 2021, OFAC designated the following individuals for activity in Xinjiang under E.O. 13818: Mingguo CHEN; Jenzheng WANG. 86 Fed. Reg. 16,275 (Mar. 26, 2021). See discussion in Section 2.a, *supra*.

On April 26, 2021, the United States designated Guatemalan officials, Gustavo Alejos Cambara and Felipe Alejos Lorenzana, pursuant to E.O. 13818 for their role in corruption. 86 Fed. Reg. 23,488 (May 3, 2021). The State Department press statement, available at https://www.state.gov/the-united-states-sanctions-guatemalan-officials-for-corruption/, notes coordinated action by the United Kingdom, and also includes the following:

> Gustavo Alejos and Felipe Alejos sought to interfere with the judicial selection process for appointing magistrates to Guatemala's Supreme Court of Justice (CSJ) and Court of Appeals. Gustavo Alejos served as chief of staff for the 2008-2012 Alvaro Colom presidential administration, and Felipe Alejos is an elected delegate to the Congress of the Republic of Guatemala for the 2020-2024 term. Together, they reportedly facilitated payments to congressional representatives and judges in an attempt to influence the selection process for magistrates to both courts and to secure favorable judicial rulings that would protect Gustavo Alejos—as well as CSJ judges —from current and future corruption prosecutions.

On June 2, 2021 OFAC designated the following under E.O. 13818: individuals—Vassil Kroumov BOJKOV; Delyan Slavchev PEEVSKI; Ilko Dimitrov ZHELYAZKOV and entities—DECART OOD; DIGITAL SERVICES EAD; DOMINO GAMES OOD; EDE 2 EOOD;

EUROBET OOD; EUROBET PARTNERS OOD; EUROBET TRADING EOOD; EUROFOOTBALL OOD; EUROSADRUZHIE OOD; GALENIT INVEST AD; LOTTERY DISTRIBUTIONS OOD; MELIORA ACADEMICA EOOD; ML BUILD EAD; MOSTSTROY IZTOK AD; NATIONAL LOTTERY AD; NATIONAL LOTTERY OOD; NOVE DEVELOPMENT EOOD; NOVE INTERNAL EOOD; NUMERICAL GAMES OOD; PROPERTY-VB OOD; REX LOTO AD; TRANS NOVE OOD; VABO SYSTEMS EOOD; VABO-2005 EOOD; VATO 2002 EOOD; ADLER BG AD; EFBET PARTNERS OOD; EUROGROUP ENGINEERING EAD; EVROBET-RUMANIA EOOD; GAMES UNLIMITED OOD; INTERNEWS 98 OOD; LOTTERY BG OOD; NOVE PARTNERS OOD; OLD GAMES EOOD; PRIM BG EAD; SIGURO EOOD; VA BO COMPANY EOOD; VABO 2008 EOOD; VABO 2012 EOOD; VABO 2017 OOD; VABO MANAGEMENT EOOD; VB MANAGEMENT EOOD; VERTEX PROPERTIES EOOD; VIHROGONIKA AD; ANCIENT HERITAGE AD; BUL PARTNERS TRAVEL OOD; BULGARIAN SUMMER; BULLET TRADE OOD; CARITEX LUCKY AD; CSKA BASKETBALL CLUB; KIRSTIANO GR 53 JSC AD; NOVE-AD-HOLDING AD; PARKSTROY-SOFIA OOD; PUBLISHING HOUSE SPORT LTD; SIZIF V OOD; THRACE FOUNDATION; TRAKIA-PAPIR 96 OOD; VABO INTERNAL AD; BM SYSTEMS EAD; INT INVEST EOOD; INT LTD EOOD; INTRUST PLAC EAD; INTTRAFIK EOOD; REAL ESTATES INT LTD EOOD. 86 Fed. Reg. 30,517 (June 8, 2021).

On July 22, 2021, OFAC designated one individual, Alvaro LOPEZ MIERA, and one entity, BRIGADA ESPECIAL NACIONAL DEL MINISTERIO DEL INTERIOR, pursuant to E.O. 13818. 86 Fed. Reg. 40,232 (July 27, 2021).

On July 30, 2021, the State Department announced sanctions under E.O. 13818 on the Cuban Revolutionary National Police (Policía Nacional Revolucionaria, "PNR") and its leaders, Director Oscar Callejas Valcárcel and Deputy Director Eddy Sierra Arias, in response to Cuban security forces' violent suppression of peaceful protesters. See State Department press statement, available at https://www.state.gov/sanctioning-cuban-police-in-response-to-violent-repression-of-peaceful-protests/.

In an August 13, 2021 press statement, available at https://www.state.gov/sanctioning-cuban-officials-in-response-to-violence-against-peaceful-protestors/, the State Department announced further sanctions under E.O. 13818 in response to the violence against peaceful protestors in Cuba. The following were designated: Romárico Vidal Sotomayor García, chief of the Political Directorate of the Cuban Ministry of the Interior ("MININT"); Pedro Orlando Martínez Fernández, chief of the Political Directorate of the Cuban National Revolutionary Police ("PNR"); and the Tropas de Prevención ("TDP") of the Cuban Ministry of Revolutionary Armed Forces ("MINFAR").

In an August 19, 2021 press statement, available at https://www.state.gov/sanctioning-cuban-officials-in-response-to-violence-against-peaceful-protestors-2/, the State Department announced sanctions on Cuban military and security leaders under E.O. 13818, in response to the Cuban regime's violent suppression of freedoms of expression and peaceful assembly following protests on and after July 11. Those designated are: Andres Laureano Gonzalez Brito, Chief of the Central Army under the Ministry of the Revolutionary Armed Forces ("MINFAR"); Roberto Legra Sotolongo, Deputy Chief of the General Staff and Chief of the Directorate

of Operations under MINFAR; and Abelardo Jimenez Gonzalez, Chief of the Directorate of Penitentiary Establishments of the Cuban Ministry of the Interior ("MININT").

In an August 23, 2021 press statement, the State Department announced the designation under E.O. 13818 of the Eritrean Defense Forces ("EDF") Chief of Staff General Filipos Woldeyohannes ("Filipos") in connection with serious human rights abuse committed during the ongoing conflict in Ethiopia. 86 Fed. Reg. 49,092 (Sept. 1, 2021). The press statement, available at https://www.state.gov/sanctioning-eritrean-military-leader-in-connection-with-human-rights-abuse-in-ethiopia/ also includes the following:

> Under Filipos' command, EDF troops have raped, tortured, and executed civilians in Ethiopia. Internally Displaced Persons (IDPs) have described a systematic effort by the EDF to inflict as much harm on the ethnic Tigrayan population as possible in the areas the EDF controls. Eritrean troops have forcibly displaced civilians and ransacked businesses; IDPs spoke of a "scorched earth" policy intended to prevent civilians from returning home.

On August 24, 2021, OFAC designated the following pursuant to E.O. 13818: three individuals—Khalil Ahmad HIJAZI, Kassem Mohamad HIJAZI, Liz Paola DOLDAN GONZALEZ—and five entities—ESPANA INFORMATICA S.A., APOLO INFORMATICA S.A., EMPRENDIMIENTOS INMOBILIARIOS MISIONES S.A., MUNDO INFORMATICO PARAGUAY S.A., MOBILE ZONE INTERNATIONAL IMPORT–EXPORT S.R.L. 86 Fed. Reg. 49,598 (Sept. 3, 2021).

On November 10, 2021, OFAC designated Phirun CHAU and Vinh TEA under E.O. 13818. 86 Fed. Reg. 66,618 (Nov. 23, 2021). See *supra* for the press statement on Chau and Tea's designation under Section 7031(c).

On December 7, 2021, OFAC designated Abel KANDIHO under E.O. 13818. 86 Fed. Reg. 71,120 (Dec. 14, 2021).

In a December 6, 2021 press statement, available at https://www.state.gov/designation-of-targets-linked-to-corruption-by-dan-gertler-in-the-democratic-republic-of-the-congo/, the State Department announced the designation under E.O. 13818 of Alain Mukonda for providing support to sanctioned billionaire Dan Gertler as well as 12 entities linked to Mukonda, or companies associated with him, in the Democratic Republic of the Congo and Gibraltar. 86 Fed. Reg. 71,546 (Dec. 16, 2021) (listing Mukonda and the following entities: 1. VENTORA GLOBAL SERVICES, 2. VENTORA MINING S.A.S.U., 3. ASHDALE SETTLEMENT GERCO SAS, 4. GEMINI S.A.S.U., 5. KALTONA LIMITED SASU, 6. KINTALEG LIMITED, 7. MULTREE LIMITED SASU, 8. OPERA, 9. PALATINA SARLU, 10. ROSEHILL DRC SASU, 11. WOODFORD ENTERPRISES LIMITED SASU, 12. WOODHAVEN DRC SASU).

On December 8, 2021, the United States imposed sanctions on 16 individuals and 24 entities from several countries in Europe and the Western Hemisphere pursuant to E.O. 13818. The State Department press statement on the designations, of individuals and corruption networks linked to transnational organized crime, is available at https://www.state.gov/designation-of-corruption-networks-linked-to-transnational-

organized-crime/. The Treasury Department press release is available at https://home.treasury.gov/news/press-releases/jy0519#_blank.

OFAC determined on December 8, 2021 that NAUTIKACENTAR D.O.O. met one or more of the criteria under Executive Order 13818 but removed Nautikacentar from the SDN list on December 20, 2021, after determining that circumstances no longer warrant the inclusion. 86 Fed. Reg. 73,096 (Dec. 23, 2021).

On December 8, 2021, OFAC designated the following under E.O. 13818: 16 individuals—Milan Rajko RADOJCIC (Serbia/Kosovo); Zharko Jovan VESELINOVIC (Serbia/Kosovo); Osiris LUNA MEZA (El Salvador); Carlos Amilcar MARROQUIN CHICA (El Salvador); Alma Yanira MEZA OLIVARES (El Salvador); Zvonk VESELINOVIC (Serbia/Kosovo); Andrija Zheljko BOJIC (Kosovo); Zeljko BOJIC (Kosovo); Milan MIHAJLOVIC (Serbia); Sinisa NEDELJKOVIC (Kosovo/Serbia); Radovan RADIC (Serbia); Miljojko RADISAVLJEVIC (Serbia); Miljan RADISAVLJEVIC (Serbia); Marko ROSIC (Serbia); Radule STEVIC (Serbia); and Srdjan Milivoje VULOVIC (Kosovo)—and 23 entities—BETONJERKA DOO ALEKSINAC; CIVIJA KOMERC; DOLLY BELL DOO BEOGRAD–NOVI BEOGRAD; DOO BABUDOVAC BRNJAK; DOO MM KOM INTER BLUE DONJI JASENOVIK; DOO RAD 028 ZVECAN; FARMA IZVORI B.I.; FERARI PREDUZEEE ZA USLUGE I PROMET POLOVNIM VOZILIMA SH.A.; GARAC INZENJERING OOD; INKOP DOO CUPRIJA; MARKOM METAL COMMERCE DOO ZVECAN; METAL–ROBNA KUCA; NAUTIKACENTAR D.O.O.; NOVI PAZAR–PUT D.O.O. NOVI PAZAR; P.P. BABUDOVAC B.I.; P.P.ROBNA KUCA METAL B.I.; RAD D.O.O.; RADOVAN RADIC B.I.; RADULE STEVIC B.I.; ROBNA KUCA METAL D.O.O.; S.Z.T.R. PRIZMA B.I.; SINISA NEDELJKOVIC B.I.; SINISA NEDELJKOVIC I.B.; ZARKO VESELINOVIC B.I.; and S.T.R. KRISTAL. 86 Fed. Reg. 73,097 (Dec. 23, 2021).

On December 9, 2021, OFAC designated the following under E.O. 13818: Individuals—Prince Yormie JOHNSON (Liberia); Martha Carolina RECINOS DE BERNAL (El Salvador); Manuel Victor MARTINEZ OLIVET (Guatemala); Leopoldino FRAGOSO DO NASCIMENTO (Angola); Andriy Volodymyrovych PORTNOV (Ukraine); Luisa de Fatima GIOVETTY (Angola); and Manuel Helder VIEIRA DIAS (Angola)—and entities—COCHAN HOLDINGS LLC; COCHAN S.A.; GENI NOVAS TECNOLOGIAS S.A.; GENI SARL; ANDRIY PORTNOV FUND; BAIA CONSULTING LIMITED; ARC RESOURCES CORPORATION LTD; and WINNERS CONSTRUCTION COMPANY LIMITED. 86 Fed. Reg. 73,091 (Dec. 23, 2021).

On December 10, 2021, OFAC designated the following under E.O. 13818: individuals—Erken TUNIYAZ, Tofayel Mustafa SORWAR, Shohrat ZAKIR, Benazir AHMED, Mohammad Jahangir ALAM, Chowdhury Abdullah AL-MAMUN, Khan Mohammad AZAD, Mohammad Anwar Latif KHAN—and entity—Rapid Action Battalion. 86 Fed. Reg. 73,844 (Dec. 28, 2021).

b. 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 foreign government officials 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 2021 pursuant to 7031(c). See Chapter 1 of this *Digest* for discussion of litigation challenging designations under 7031(c).

On February 25, 2021, the State Department announced the designation of former Prosecutor General Dobroslav Trnka of the Slovak Republic, under Section 7031(d), due to his involvement in significant corruption. See press statement, available at https://www.state.gov/designation-of-former-prosecutor-general-dobroslav-trnka-of-the-slovak-republic-for-involvement-in-significant-corruption/. In addition to former Prosecutor General Trnka, the Department designated his son, Jakub Trnka.

On March 5, 2021, the State Department announced the designation of oligarch and former Ukrainian public official Ihor Kolomoyskyy under Section 7031(c), due to his involvement in significant corruption. See press statement, available at https://www.state.gov/public-designation-of-oligarch-and-former-ukrainian-public-official-ihor-kolomoyskyy-due-to-involvement-in-significant-corruption/. The Department also designated the following members of Ihor Kolomoyskyy's immediate family: his wife, Iryna Kolomoyska, his daughter, Angelika Kolomoyska, and his son, Israel Zvi Kolomoyskyy. The press statement elaborates:

> In his official capacity as a Governor of Ukraine's Dnipropetrovsk Oblast from 2014 to 2015, Kolomoyskyy was involved in corrupt acts that undermined rule of law and the Ukrainian public's faith in their government's democratic institutions and public processes, including using his political influence and official power for his personal benefit. While this designation is based on acts during his time in office, I also want to express concern about Kolomoyskyy's current and ongoing efforts to undermine Ukraine's democratic processes and institutions, which pose a serious threat to its future.

On March 9, 2021, the Secretary of State announced the designation of Islamic Revolutionary Guard Corps ("IRGC") interrogators Ali Hemmatian and Masoud Safdari, and their immediate family members, pursuant to Section 7031(c) for their involvement in GVHR. The press statement making the announcement, available at https://www.state.gov/designation-of-iranian-officials-due-to-involvement-in-gross-violations-of-human-rights/, specifies that these individuals were involved in "the torture and/or cruel, inhuman, or degrading treatment or punishment (CIDTP) of political prisoners and persons detained during protests in 2019 and 2020 in Iran."

On April 6, 2021, the Secretary of State announced the designation under Section 7031(c) of Ulises Rolando Quintana Maldonado, a representative in the Paraguayan legislature's lower house, due to his involvement in significant corruption. See press statement, available at https://www.state.gov/designation-of-representative-in-paraguayan-congress-for-involvement-in-significant-corruption/ (also designating his wife, Mirtha Beatriz Esperanza Fariña Velausteguiz).

On May 12, 2021, the Department designated Yu Hui, former Office Director of the so-called "Central Leading Group on Preventing and Dealing with Heretical

Religions" of Chengdu, Sichuan Province, pursuant to Section 7031(c). See press statement, available at https://www.state.gov/designation-of-chinese-communist-party-official-due-to-involvement-in-gross-violations-of-human-rights/ ("designated for his involvement in gross violations of human rights, namely the arbitrary detention of Falun Gong practitioners for their spiritual beliefs.")

On May 19, 2021, the Department designated Sali Berisha, formerly president prime minister, and member of parliament of Albania, under Section 7031(c) due to his involvement in significant corruption. See press statement, available at https://www.state.gov/public-designation-of-albanian-sali-berisha-due-to-involvement-in-significant-corruption/. His spouse, Liri Berisha, his son, Shkelzen Berisha, and his daughter, Argita Berisha Malltezi, were also designated.

On June 2, 2021, the State Department announced, in a media note available at https://www.state.gov/public-designation-of-five-bulgarian-public-officials-due-to-involvement-in-significant-corruption/, the designation of five Bulgarian public officials under Section 7031(c), due to involvement in significant corruption: Alexander Manolev, Petar Haralampiev, Krasimir Tomov, and Delyan Slavchev Peevski, as well as current Bulgarian public official Ilko Dimitrov Zhelyazkov. The media note includes the simultaneous designation of Peevski, Zhelyazkov and Bulgarian oligarch Vassil Bojkov, along with 64 entities owned and controlled by Bojkov and Peevski, pursuant to Executive Order 13818. Also designated under 7031(c) are Manolev's wife, Nadya Manoleva, and his children, Alexa, Joanna, and Dimitar; Haralampiev's wife and son, Veselka Haralampieva and Pavel Haralampiev; Peevski's minor son and daughter; and Zhelyazkov's daughters Vania Ilkova Zhelyazkova and Roza Ilkova Zhelyazkova.

On June 15, 2021, the State Department announced, in a press statement available at https://www.state.gov/public-designation-of-former-namibian-public-officials-for-involvement-in-significant-corruption/, the Section 7031(c) designation of former Namibian government officials Bernhardt Esau and Sakeus Shanghala, due to their involvement in significant corruption. Also designated are the following members of Bernhardt Esau's family: his wife, Swamma Esau, and his son, Philippus Esau.

On June 17, 2021, the State Department announced the designation of Guatemalan Congressperson Boris España Cáceres, under Section 7031(c) for significant corruption, as well as his spouse, Liliana Maria Umaña Lemus de España; his daughter, Karol Andrea España Umaña; and his minor child. See press statement, available at https://www.state.gov/designation-of-republic-of-guatemala-congressperson-boris-espana-caceres-due-to-involvement-in-significant-corruption/.

On July 20, 2021, the Department announced the 7031(c) designation of former Honduran President Porfirio "Pepe" Lobo Sosa and former First Lady Rosa Elena Bonilla Avila for involvement in significant corruption. See press statement, available at https://www.state.gov/designations-of-former-honduran-president-porfirio-pepe-lobo-sosa-and-former-first-lady-rosa-elena-bonilla-avila-for-involvement-in-significant-corruption/. The designation also includes their son, Fabio Porfirio Lobo; their daughter, Ambar Naydee Lobo Bonilla; and the Lobos' minor child.

> While in office, President Lobo accepted bribes from the narco-trafficking organization Los Cachiros in exchange for political favors. As First Lady, Rosa Lobo engaged in significant corruption through fraud and misappropriation of public funds for her personal benefit. While their corrupt acts undermined the stability of Honduras' democratic institutions, former President Lobo has not yet been convicted and Rosa Lobo has been released from prison awaiting a retrial.

On November 10, 2021, the State Department announced the designation under Section 7031(c) of Chau Phirun ("Chau"), Director-General of the Defense Ministry's Material and Technical Services Department, and Tea Vinh ("Tea"), Royal Cambodian Navy Commander, due to their involvement in significant corruption. See press statement, available at https://www.state.gov/public-designation-of-cambodian-officials-due-to-involvement-in-significant-corruption/. Also designated are Chau Pirith, son of Chau; Chau Puleak, son of Chau; Kan Chantrea, spouse of Tea; Tier Leakhena, daughter of Tea; and Tea Sokha, son of Tea. Chau and Tea were also designated pursuant to E.O. 13818 (Global Magnitsky program). The press statement provides the following additional information:

> In 2020 and 2021, Chau conspired to profit from activities regarding the construction and updating of Ream Naval Base facilities. Additionally, Chau and other Cambodian government officials likely conspired to inflate the cost of facilities at Ream Naval Base and personally benefit from the proceeds.

On December 9, 2021, the State Department announced multiple designations under Section 7031(c) of individuals involved in significant corruption. The press statement is excerpted below and available at https://www.state.gov/elevating-anti-corruption-leadership-and-promoting-accountability-for-corrupt-actors/.

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The Department of State is designating the following individuals for their involvement in significant corruption:

Carlos Julián Bermeo Casas, a former prosecutor within the Colombian Jurisdicción Especial para la Paz (JEP), for engaging in significant corruption by accepting a monetary bribe in exchange for obstructing the extradition to the United States of a suspected narco-trafficker. As part of this action, Bermeo's spouse, Nohora Fernanda Giron Cifuentes, and minor child are also designated.

Manuel Víctor Martínez Olivet, the former Director of the Santa Rosa Health Area in Guatemala, for corrupt activities through the misappropriation of state assets and fraud related to government purchases. As part of this action, Olivet's spouse, Yohanna Massiel Duarte Aguliar, and minor child are also designated. Olivet was also designated by the Department of the Treasury under Global Magnitsky for his role in corruption.

Nestor Moncada Lau, a national security advisor to the Nicaraguan Ortega-Murillo regime, for engaging in significant corruption by accepting a monetary bribe in exchange for using his control over the Nicaraguan tax and customs authorities to enable and perpetuate an import and customs fraud scheme to enrich members of the Ortega-Murillo regime. Moncada's spouse, Lydia Vargas de Moncada, and children Claudia Vanessa Moncada Solis, Ernesto David Moncada Solis, Allan Roberto Moncada Vargas, Nestor Jose Moncada Vargas, and Lidia Mercedes Moncada Vargas are also designated under this action. Nestor Moncada Lau was also designated by the Department of the Treasury in 2018 for his role in corruption in support of the Ortega-Murillo regime.

Martha Carolina Recinos de Bernal, current Chief of Cabinet in El Salvador, for engaging in significant corruption by misusing public funds for personal benefit and participating in a money laundering scheme. As part of this action, her husband Efren Arnoldo Bernal Chevez and her son German Alfredo Bernal Recinos are also designated. Recinos was also designated by the Department of the Treasury under Global Magnitsky for her role in corruption.

Osiris Luna Meza, Vice Minister of Justice and Bureau of Prisons Director and Carlos Amilcar Marroquin Chica, Director of Tejido Social (Social Cohesion), in El Salvador, for involvement in significant corruption by misappropriating public funds and interfering in public processes for personal profit. Marroquin and Luna were also designated by the Department of the Treasury under Global Magnitsky for their role in corruption.

Prince Yormie Johnson, current senator in Liberia, for his role in significant corruption through engagements involving millions of dollars in bribery and pay-for-play funding schemes. His spouse, Ameria Bovidee Johnson, and child, Blessing Johnson, are also covered as part of this action. Prince Yormie Johnson was also designated by the Department of the Treasury under Global Magnitsky for his role in corruption.

Leopoldo Fragoso do Nascimento, "Dino," former head of communications for Angolan President, and Manuel Helder Vieira Dias, "Kopelipa," former Angolan General, for their involvement in significant corruption through the embezzlement and misappropriation of billions of dollars in state funds for personal benefit. As part of this action, Nascimento's spouse, Amelia Maria Coelho da Cruz Nascimento, and Dias's spouse, Luisa de Fatima Giovetty, and children Lidiane Rafaela Giovetty and Carlos de Ancieto G Vieira Dias Junior are also designated. Nascimento, Manuelo Dias, and Luisa Dias were also designated by the Department of the Treasury under Global Magnitsky for their role in corruption.

Isabel dos Santos, former Chair of an Angolan state-owned enterprise, for her involvement in significant corruption by misappropriating public funds for her personal benefit. Oleksandr Tupytskyi, the former Chairman of the Constitutional Court of Ukraine, for significant corrupt acts to include the acceptance of a monetary bribe while serving in the Ukrainian judiciary. Tupytskyi's spouse, Olga Tupytska, was also designated as part of this action.

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On December 10, 2021, the State Department announced multiple designations under Section 7031(c) of individuals involved in GVHR. The press statement is excerpted below and available at https://www.state.gov/the-united-states-promotes-accountability-for-human-rights-violations-and-abuses/. On December 10, 2021, the State Department also announced multiple designations under Section 7031(c) of individuals involved in significant corruption. See press statement, available at

https://www.state.gov/public-designation-of-former-maltese-public-officials-konrad-mizzi-and-keith-schembri-due-to-involvement-in-significant-corruption/.

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The United States appreciates the coordinated actions taken today by the United Kingdom and Canada under their respective sanctions programs to target Burmese military actors responsible for violence and repression. We also welcome the close coordination with the EU, UK, and Canada last week on our strongest sanctions package to date on Belarus, which jointly imposes costs on the Lukashenka regime for its continued repression of the Belarusian people. The United States looks forward to continuing our partnerships with allies, partners, and civil society alike in defending human rights and promoting accountability and good governance.

In further recognition of Human Rights Day 2021, the Department is designating 12 officials of foreign governments under Section 7031(c) …

The Department of State is designating under Section 7031(c) the following individuals for their involvement in gross violations of human rights:

Abel Kandiho, Major General and head of the Chieftancy of Military Intelligence within the Uganda Peoples' Defence Forces, for his involvement in a gross violation of human rights, namely torture. Kandiho was also designated this week by the Department of the Treasury under the Global Magnitsky sanctions program in connection with serious human rights abuse.

Shohrat Zakir, **Erken Tuniyaz**, **Hu Lianhe**, and **Chen Mingguo**, current and former senior PRC officials in Xinjiang, China for their involvement in gross violations of human rights, namely arbitrary detention of Uyghurs, who are predominantly Muslim, and members of other ethnic and religious minority groups in Xinjiang. **Shohrat Zakir** and **Erken Tuniyaz** were also designated today by the Department of the Treasury under the Global Magnitsky sanctions program in connection with serious human rights abuse.

Ihar Kenyukh and **Yauheni Shapetska**, heads of the notorious Akrestsina Detention Center in Minsk, Belarus, for their involvement in gross violations of human rights, namely the torture and/or cruel, inhumane, or degrading treatment or punishment of detainees in the aftermath of the fraudulent August 9, 2020 presidential election.

Benazir Ahmed, current Inspector General of the Bangladesh Police and former Director General of Bangladesh's Rapid Action Battalion (RAB), and **Miftah Uddin Ahmed**, Lieutenant Colonel and former commanding officer of RAB Unit 7, for their involvement in a gross violation of human rights, namely the May 2018 extrajudicial killing of Teknaf City Municipal Councilor Ekramul Haque in Teknaf, Cox's Bazar District, Bangladesh. The RAB, Benazir Ahmed, and five other officials were also designated today by the Department of the Treasury under the Global Magnitsky sanctions program in connection with serious human rights abuse.

Chandana Hettiarachchi, a Sri Lankan naval intelligence officer, for his involvement in gross violations of human rights, namely, the flagrant denial of the right to liberty of at least eight "Trincomalee 11" victims, from 2008 to 2009. **Sunil Ratnayake**, a former Staff Sergeant in the Sri Lanka Army, for his involvement in gross violations of human rights, namely the extrajudicial killings of at least eight Tamil villagers in December 2000. The designation of

these two Sri Lankan individuals is not the only action we are taking in support of accountability for gross violations of human rights in Sri Lanka.

Mario Plutarco Marin Torres, a former governor of Puebla, Mexico, for his involvement in a gross violation of human rights in Mexico, namely, the arbitrary detention of journalist and human rights defender Lydia Cacho in December 2005. We commend Mexican authorities for arresting Marin Torres in February on torture charges.

Additionally, the Department of the Treasury's Office of Foreign Assets Control is imposing sanctions on 15 individuals and 10 entities including for roles in serious human rights abuse and repression across several countries. A complete list of the Department of Treasury's additional actions can be found here https://home.treasury.gov/news/press-releases/jy0526 . These designations underscore our support for human rights and commitment to promoting accountability for human rights abusers and violators the world over.

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On December 22, 2021, the State Department announced the designation under Section 7031(c) of former Maltese public officials Konrad Mizzi and Keith Schembri due to involvement in significant corruption. Also designated under 7031(c) are Mizzi's wife, Sai Mizzi Liang, and his two minor children; Schembri's wife, Josette Schembri Vella, his daughter Juliana Schembri Vella, and his minor child. See press statement, available at https://www.state.gov/public-designation-of-former-maltese-public-officials-konrad-mizzi-and-keith-schembri-due-to-involvement-in-significant-corruption/.

c. Visa restrictions relating to corruption and undermining democracy] in Guatemala, Honduras, and El Salvador

On July 1, 2021, the U.S. government issued a list of individuals who have knowingly engaged in acts that undermine democratic processes or institutions, engaged in significant corruption, or obstructed investigations into such acts of corruption in Guatemala, Honduras, and El Salvador, in accordance with section 353 of the United States-Northern Triangle Enhanced Engagement Act ("the Act"). See State Department press statement, available at https://www.state.gov/u-s-releases-section-353-list-of-corrupt-and-undemocratic-actors-for-guatemala-honduras-and-el-salvador/. Section 353 generally requires that listed individuals are ineligible for visas and admission to the United States. The full report is available at https://www.state.gov/reports/section-353-corrupt-and-undemocratic-actors-report/.

On August 4, 2021, Secretary Blinken announced in a press statement, available at https://www.state.gov/u-s-visa-actions-supporting-democracy-and-combatting-corruption-in-guatemala-honduras-and-el-salvador/, a new visa restriction policy targeting corruption in Guatemala, Honduras, and El Salvador. The press statement quoted the following from the U.S. strategy to address the root causes of migration, announced by Vice President Harris on July 29:

> *Governance challenges, including widespread corruption, undercut progress on economic opportunity, protection of human rights, and civilian security. Private companies cite corruption as an impediment to investment. Weak democratic institutions, coupled with rampant impunity, have lowered citizens' trust in their governments and the independence of judicial systems. Contested elections and opaque government decision-making have led to violence.*

The new visa restriction policy under Section 212(a)(3)(C) of the Immigration and Nationality Act effects government officials and other individuals believed to be responsible for, or complicit in, undermining democracy or the rule of law in Guatemala, Honduras, and El Salvador.

On June 30, 2021, the State Department identified the individuals listed below pursuant to the Act. 86 Fed. Reg. 36,174 (July 8, 2021):

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El Salvador

Walter René Araujo Morales, former member and president of the Supreme Electoral Tribunal, undermined democratic processes or institutions by calling for insurrection against the Legislative Assembly and repeatedly threatening political candidates.

Pablo Salvador Anliker Infante, former Minister of Agriculture, engaged in significant corruption by misappropriating public funds for his personal benefit.

Conan Tonathiu Castro Ramírez, current legal advisor to the president, undermined democratic processes or institutions by assisting in the inappropriate removal of five Supreme Court Magistrates and the Attorney General.

Óscar Rolando Castro, Minister of Labor, obstructed investigations into corruption and undermined democratic processes or institutions in efforts to damage his political opponents.

Osiris Luna Meza, Vice Minister of Security and Director of Prisons, has engaged in significant corruption related to government contracts and bribery during his term in office.

José Luis Merino, former vice minister for foreign investment and development financing, engaged in significant corruption during his term in office through bribery. He also participated in a money laundering scheme.

Ezequiel Milla Guerra, former mayor of La Union, engaged in significant corruption by abusing his authority as mayor in the sale of Perico Island to agents of the People's Republic of China in exchange for personal benefit.

José Aquiles Enrique Rais López engaged in significant corruption and undermined democratic processes or institutions by bribing public officials.

Martha Carolina Recinos de Bernal, current Chief of Cabinet, engaged in significant corruption by misusing public funds for personal benefit. She also participated in a significant money laundering scheme.

Carlos Armando Reyes Ramos, current member of the Legislative Assembly, obstructed investigations into corruption by inappropriately influencing the Supreme Court Magistrate selection process.

Othon Sigfrido Reyes Morales, former legislator from the FMLN party of El Salvador, engaged in significant corruption during his term in office through fraud and misuse of public funds.

Rogelio Eduardo Rivas Polanco, former minister of security and justice, engaged in significant corruption by misappropriating public funds for personal benefit.

Adolfo Salume Artinano, engaged in significant corruption and undermined democratic processes and institutions by bribing a Supreme Court Magistrate to avoid paying a fine.

Luis Guillermo Wellman Carpio, current Magistrate of Supreme Electoral Tribunal, undermined democratic processes or institutions by causing serious and unnecessary delays in election preparations and results tabulation for his personal benefit and allowing Chinese malign influence during the Salvadoran elections.

Guatemala

Gustavo Adolfo Alejos Cambara, former Guatemalan presidential chief of staff, engaged in significant corruption by facilitating payments to congressional representatives and judges on Guatemala's Supreme Court of Justice (CSJ) in order to inappropriately influence the judicial selection process for magistrates to the CSJ and Court of Appeals and secure his future release from prison and the dismissal of corruption charges. He is designated under the Global Magnitsky sanctions program and Section 7031(c) for involvement in significant corruption.

Felipe Alejos Lorenzana, former first secretary of the Guatemalan Congress, has engaged in significant corruption. While acting in his official capacity, Mr. Alejos was involved in corrupt acts to enrich himself, while also seriously harming U.S. businesses' international economic activity. He is designated under the Global Magnitsky sanctions program and Section 7031(c) for involvement in significant corruption.

Delia Bac Alvarado, former congressional representative, engaged in significant corruption through her misuse of public funds for personal benefit. She is designated under Section 7031(c) for involvement in significant corruption.

Florencio Carrascoza Gamez, current mayor of Joyabaj, undermined democratic processes or institutions by intimidating and unjustly imprisoning political opponents.

Alvaro Colom Caballeros, former president, engaged in significant corruption when he participated in fraud and embezzlement involving a new bus system in Guatemala City known as Transurbano.

Manuel Duarte Barrera, currently on the Supreme Court, has undermined democratic processes or institutions by abusing his authority to inappropriately influence and manipulate the appointment of judges to high court positions.

Boris Roberto Espana Caceres, current congressional representative in the Guatemalan Congress, engaged in significant corruption when he participated in influence peddling and bribery.

Mario Amilcar Estrada Orellana, former congressional representative, engaged in significant corruption and was sentenced by U.S. courts for seeking millions from Mexico's Sinaloa Cartel to finance political campaigns.

Raul Amilcar Falla Ovalle, a lawyer for the nongovernmental organization (NGO) Fundacion Contra el Terrorismo (Foundation Against Terrorism—FCT), attempted to delay or obstruct criminal proceedings against former military officials who had committed acts of violence, harassment, or intimidation against governmental and nongovernmental corruption investigators.

Moises Eduardo Galindo Ruiz, an attorney with the NGO FCT, attempted to delay or obstruct criminal proceedings against former military officials who had committed acts of violence, harassment, or intimidation against governmental and nongovernmental corruption investigators, as well as the work of the Special Prosecutor's Office Against Impunity (FECI).

Juan Carlos Godinez Rodriguez, lawyer and former member of a congressional commission in charge of selecting Supreme Court magistrates, undermined democratic processes or institutions by abusing his authority to inappropriately influence and manipulate the appointment of judges to high court positions.

Gustavo Adolfo Herrera Castillo, political operative and businessman, undermined democratic processes or institutions by abusing his authority to inappropriately influence and manipulate the appointment of judges to high court positions.

Ricardo Rafael Mendez Ruiz Valdez, the founder and legal representative of the NGO FCT, attempted to delay or obstruct criminal proceedings against former military officials who had committed acts of violence, harassment, or intimidation against governmental and nongovernmental corruption investigators.

Mynor Mauricio Moto Morataya, selected in January 2021 to fill a vacant seat on the country's Constitutional Court, undermined processes or institutions and engaged in significant corruption when he obstructed justice and received bribes in return for a favorable legal decision.

Alejandro Jorge Sinbaldi Aparicio, former minister of communications, infrastructure, and housing, engaged in significant corruption when he participated in bribery and illegal electoral financing, and the laundering of the proceeds of corruption for personal gain. He is designated under Section 7031(c) for involvement in significant corruption.

Guillermo Estuardo de Jesus Sosa Rodriguez, former vice minister of communications, engaged in significant corruption when he participated in bribery schemes, including involvement in a criminal structure that pressured, collected, and deposited bribes from state contractors in exchange for personal benefits.

Blanca Aida Stalling Davila, former Supreme Court Justice, engaged in significant corruption by participating in bribery schemes and inappropriately influencing the judicial branch. She is designated under Section 7031(c) for involvement in significant corruption.

Elder de Jesús Súchite Vargas, former minister of culture, engaged in significant corruption related to government contracts and influence peddling for personal gain.

Jorge Estuardo Vargas Morales, current congressional representative, engaged in significant corruption and undermined democratic processes or institutions when he engaged in bribery, coercion, and influence peddling.

Nester Mauricio Vasquez Pimentel, currently on the Supreme Court, has undermined democratic processes or institutions by abusing his authority to inappropriately influence and manipulate the appointment of judges to high court positions.

Honduras

Gustavo Alberto Perez, current congressional representative, has engaged in significant corruption. He was indicted in the Arca Abierta MACCIH-investigated corruption case for embezzling $800,000 from various government agencies.

Marco Antonio Bogran Corrales, former director of INVEST-H, engaged in significant corruption by misappropriating public funds during the COVID-19 pandemic.

Rosa Elena Bonilla de Lobo, former first lady, engaged in significant corruption through fraud and misappropriation of public funds.

Augusto Domingo Cruz Asensio, former member of congress, engaged in significant corruption by misappropriating funds from the public Generacion employment program to personal accounts.

Jose Celin Discua Elvir, current congressional representative, engaged in significant corruption when he misappropriated funds from the Secretariat of Agriculture to political campaigns.

Rodolfo Irias Navas, current congressional representative, engaged in significant corruption when he misappropriated funds from the Secretariat of Agriculture to political campaigns.

Eleazar Alexander Juarez Sarabia, former member of congress, engaged in significant corruption by misappropriating funds from a public pest control program in his home department of Valle to his personal accounts.

Jose Porfirio "Pepe" Lobo Sosa, former president of Honduras, engaged in significant corruption while president when he accepted bribes from the narco-trafficking organization Los Cachiros in exchange for political favors.

Gladys Aurora Lopez, member of the Honduran National Congress Executive Board, engaged in significant corruption. He was indicted in the Arca Abierta MACCIH-investigated corruption case for embezzling $800,000 from various government agencies.

Miguel Edgardo Martinez Pineda, current congressional representative engaged in significant corruption. He was indicted in the Pandora MACCIH corruption case in June 2018 for misappropriating $12.5 million in public funds from the Secretariat of Agriculture to political campaigns for personal gain.

Sara Ismela Medina Galo, member of congress, obstructed investigations into corruption in her role as Secretary of Congress.

Oscar Najera, current congressional representative, engaged in significant corruption related to the Cachiros narcotrafficking organization. He was designated under Section 7031(c) for involvement in significant corruption.

Hector Enrique Padilla Hernandez, former member of congress, engaged in significant corruption by misappropriating funds from the publicly funded Limpieza de Solares y Calles development project in his home department of Choluteca to his personal accounts.

Milton Jesus Puerto Oseguera, current congressional representative, engaged in significant corruption. He was indicted in the Arca Abierta MACCIH-investigated corruption case for embezzling $800,000 from various government agencies.

Audelia Rodriguez Rodrigo, current member of congress, engaged in significant corruption by misappropriating funds from the publicly funded Limpieza de Solares y Calles development project to her personal accounts.

Dennys Antonio Sanchez Fernandez, current member of congress, engaged in significant corruption by misappropriating funds from a public pest control program in his home department of Santa Barbara to his personal accounts.

Elvin Ernesto Santo Ordonez, current congressional representative, engaged in significant corruption when he misappropriated funds from the Secretariat of Agriculture to political campaigns.

Juan Carlos Valenzuela Molina, current congressional representative. He was indicted in the Arca Abierta MACCIH-investigated corruption case for embezzling $800,000 from various government agencies.

Elden Vasquez, current congressional representative, engaged in significant corruption through the misappropriation of $12.5 million from the Secretariat of Agriculture to political campaigns for his personal gain. He was indicted in the Pandora MACCIH-investigated corruption case in June 2018.

Welsy Milena Vasquez Lopez, current congressional representative, engaged in significant corruption including embezzlement and misappropriation of public funds for personal gain. He was indicted in the Arca Abierta MACCIH-investigated corruption case for embezzling $800,000 from various government agencies.

Roman Villeda Aguilar, member of congress, obstructed investigations into corruption, which resulted in the dismissal of an embezzlement case against several congressman who were under investigation for redirecting money to a fake NGO.

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On September 20, 2021, the State Department added seven individuals to the United States' Undemocratic and Corrupt Actors list, under section 353 of the United States-Northern Triangle Enhanced Engagement Act. 86 Fed. Reg. 53,384 (Sept. 27, 2021). See press statement, available at https://www.state.gov/united-states-announces-actions-against-seven-central-american-officials-for-undermining-democracy-and-obstructing-investigations-into-acts-of-corruption/. The press statement conveys the list transmitted to Congress as follows:

> El Salvador
> Elsy Dueñas De Aviles, Oscar Alberto López Jerez, Hector Nahun Martinez Garcia, Jose Angel Perez Chacon, and Luis Javier Suárez Magaña, current Magistrates of the Constitutional Chamber of the Supreme Court, undermined democratic processes or institutions by accepting direct appointments to the Chamber by the Legislative Assembly, in a process that appears to have contravened the Salvadoran constitution. The previous five Magistrates were abruptly removed without legitimate cause following the May 1 seating of the newly elected Legislative Assembly. After being installed, the new Magistrates declared their installation by the Legislative Assembly to have been constitutional. The Magistrates undermined democratic processes or institutions by approving a controversial interpretation of the Constitution authorizing re-election of the President despite an express prohibition in the Constitution forbidding consecutive terms of the Presidency.
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> Guatemala
> Maria Consuelo Porras Argueta De Porres, current Attorney General of Guatemala, obstructed investigations into acts of corruption by interfering with criminal investigations. Porras' pattern of obstruction included ordering prosecutors in Guatemala's Public Ministry (MP) to ignore cases based on political considerations and actively undermining investigations carried out by the Special Prosecutor Against Impunity, including by firing its lead prosecutor,

> Juan Francisco Sandoval, and transferring and firing prosecutors who investigate corruption. Angel Arnoldo Pineda Avila, current Secretary General of the MP, obstructed investigations into acts of corruption by interfering in anticorruption probes. The MP has opened a probe into allegations that Pineda interfered in an anticorruption investigation. Pineda is alleged to have tipped off investigative targets about cases being built against them.

d. Corruption-related sanctions regime in the United Kingdom

In an April 26, 2021 press statement available at https://www.state.gov/on-the-united-kingdoms-establishment-of-a-global-anti-corruption-sanctions-regime/, Secretary Blinken welcomed the United Kingdom's establishing a Global Anti-Corruption Sanctions Regime. His statement noted that the UK's new regime "complements ongoing U.S. initiatives, enhancing our ability to cooperate and coordinate on comparable human rights and corruption sanctions programs, such as the U.S. Global Magnitsky sanctions program."

12. Transnational Organized Crime and Global Drug Trade

On April 7, 2021, OFAC designated the following under E.O. 13581, as amended by E.O. 13863, relating to transnational criminal organizations: Abid Ali KHAN, Shakeel KARIM, Redi Hussein Khal GUL, Choudry Ikram WARAICH and ABID ALI KHAN TRANSNATIONAL CRIMINAL ORGANIZATION, and FRIENDS TRAVEL INN PRIVATE LIMITED. 86 Fed. Reg. 19,082 (Apr. 12, 2021).

In a December 15, 2021 press statement, Secretary Blinken announced measures to disrupt transnational criminal organizations engaged in drug and firearms trafficking, human trafficking, migrant smuggling, cybercrime, and money laundering, among other illicit activities. The press statement is available at https://www.state.gov/combating-transnational-crime-and-imposing-sanctions-on-persons-involved-in-the-global-illicit-drug-trade/, and excerpted below.

> For years, the United States has been in the grips of the worst drug epidemic in its history, driven by overdose deaths involving heroin and illicitly manufactured fentanyl and an increase in methamphetamine availability. Transnational criminal organizations are largely responsible for bringing these drugs and related violence to our communities. To counter this threat to the American people, President Biden has signed two new Executive Orders (E.O.) declaring a national emergency to deal with this epidemic and another formally establishing the U.S. Council on Transnational Organized Crime (USCTOC).
>
> With these E.O.s, the President is taking decisive action to combat transnational criminal organizations. The USCTOC will leverage the resources of the Department of State and five other key departments and agencies to combat transnational organized crime more effectively, just as we are modernizing and expanding our ability to target drug trafficking organizations, their enablers, and

financial facilitators. The Department of the Treasury's first designations under this new E.O. will help disrupt the global supply chain and the financial networks that enable synthetic opioids and precursor chemicals to reach the United States while also disrupting the flow of opioids domestically.

On December 15, 2021, President Biden issued E.O. 14059, "Imposing Sanctions on Foreign Persons Involved in the Global Illicit Drug Trade." 86 Fed. Reg. 71,549 (Dec. 17, 2021). Executive Order 14060 of December 15, 2021, "Establishing the United States Council on Transnational Organized Crime," issued at the same time. 86 Fed. Reg. 71,793 (Dec. 20, 2021). Excerpts follow from E.O. 14059.

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I, JOSEPH R. BIDEN JR., President of the United States of America, find that the trafficking into the United States of illicit drugs, including fentanyl and other synthetic opioids, is causing the deaths of tens of thousands of Americans annually, as well as countless more non-fatal overdoses with their own tragic human toll. Drug cartels, transnational criminal organizations, and their facilitators are the primary sources of illicit drugs and precursor chemicals that fuel the current opioid epidemic, as well as drug-related violence that harms our communities. I find that international drug trafficking—including the illicit production, global sale, and widespread distribution of illegal drugs; the rise of extremely potent drugs such as fentanyl and other synthetic opioids; as well as the growing role of Internet-based drug sales—constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. This serious threat requires our country to modernize and update our response to drug trafficking. I hereby declare a national emergency to deal with that threat.

Accordingly, I hereby order:

Section 1. (a) The Secretary of the Treasury is authorized to impose any of the sanctions described in section 2 of this order on any foreign person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and the Secretary of Homeland Security:

(i) to have engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production; or

(ii) to have knowingly received any property or interest in property that the foreign person knows:

(A) constitutes or is derived from proceeds of activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production; or

(B) was used or intended to be used to commit or to facilitate activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

(b) The Secretary of the Treasury is authorized to impose any of the sanctions described in section 2 of this order on any foreign person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and the Secretary of Homeland Security:

(i) to have provided, or attempted to provide, financial, material, or technological support for, or goods or services in support of:

(A) any activity or transaction described in subsection (a)(i) of this section; or

(B) any sanctioned person;

(ii) to be or have been a leader or official of any sanctioned person or of any foreign person that has engaged in any activity or transaction described in subsection (a)(i) of this section; or

(iii) to be owned, controlled, or directed by, or to have acted or purported to act for or on behalf of, directly or indirectly, any sanctioned person.

(c) The Secretary of the Treasury is authorized to impose any of the sanctions described in section 2 of this order consistent with the requirements of section 7212 of the FSA (21 U.S.C. 2312) on any foreign person determined by the President, or by the Secretary of the Treasury pursuant to authority delegated by the President and in accordance with the terms of such delegation, to be subject to sanctions pursuant to section 7212 of the FSA.

Sec. 2. When the Secretary of the Treasury, in accordance with the terms of section 1 of this order, has determined that a foreign person meets any of the criteria in section 1(a)–(c) of this order, the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and the Secretary of Homeland Security, is authorized to select one or more of the sanctions set forth in subsections (a)(i)–(vi) of this section to impose on that foreign person.

(a) The Secretary of the Treasury shall take the following actions as necessary to implement the selected sanctions:

(i) block all property and interests in property of the sanctioned person 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, and provide that such property and interests in property may not be transferred, paid, exported, withdrawn, or otherwise dealt in;

(ii) prohibit any transfers of credit or payments between financial institutions, or by, through, or to any financial institution, to the extent that such transfers or payments are subject to the jurisdiction of the United States and involve any interest of the sanctioned person;

(iii) prohibit any United States financial institution from making loans or providing credit to the sanctioned person;

(iv) prohibit any transactions in foreign exchange that are subject to the jurisdiction of the United States and in which the sanctioned person has any interest;

(v) prohibit any United States person from investing in or purchasing significant amounts of equity or debt instruments of the sanctioned person; or

(vi) impose on the principal executive officer or officers of the sanctioned person, or on persons performing similar functions and with similar authorities as such officer or officers, any of the sanctions described in subsections (a)(i)–(v) of this section that are applicable.

(b) The heads of the relevant executive departments and agencies, in consultation with the Secretary of the Treasury, shall take the following actions as necessary and appropriate to implement the sanctions selected by the Secretary of the Treasury:

(i) with respect to a sanctioned person that is a financial institution:

(A) the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York shall not designate, and shall rescind any prior designation of, the sanctioned person as a primary dealer in United States Government debt instruments; and

(B) the sanctioned person shall not serve as an agent of the United States Government or serve as a repository for United States Government funds;

(ii) actions required to ensure that executive departments and agencies shall not procure, or enter into a contract for the procurement of, any goods or services from the sanctioned person;

(iii) actions required to suspend entry into the United States of any noncit- izen whom the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and the Secretary of Homeland Security, determines is a leader, official, senior executive officer, or director of, or a shareholder with a controlling interest in, the sanctioned person; or

(iv) actions required to impose on the principal executive officer or officers of the sanctioned person, or on persons performing similar functions and with similar authorities as such officer or officers, any of the sanctions described in subsections (b)(i)–(iii) of this section that are applicable.

* * * *

On December 15, 2021, OFAC designated one individual—Chuen FAT YIP—under E.O. 14059. 86 Fed. Reg, 72,307 (Dec. 21, 2021). OFAC also designated the following entities under E.O. 14059 at the same time: GUERREROS UNIDOS, HEBEI ATUN TRADING CO., LTD., HEBEI HUANHAO BIOTECHNOLOGY CO., LTD., LOS ROJOS, PRIMEIRO COMANDO DA CAPITAL, SHANGHAI CISHUN FINE CHEMICAL CO, LTD., WUHAN YUANCHENG GONGCHUANG TECHNOLOGY CO., LTD. *Id.*

13. Other Visa Restrictions, Sanctions, and Measures

a. Venezuela

On January 21, 2021, OFAC issued a Federal Register notice including the names of two individuals, designated under E.O. 13692 ("Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela"), as amended by E.O 13857, on December 30, 2020: Lorena Carolina CORNIELLES RUIZ, and Ramon Antonio TORRES ESPINOZA. 86 Fed. Reg. 6416 (Jan. 21, 2021).

On December 1, 2021, OFAC designated three individuals under E.O. 13692, as amended: Hugo Armando CARVAJAL BARRIOS, Amilcar Jesus FIGUEROA SALAZAR, and Henry de Jesus RANGEL SILVA. 86 Fed. Reg. 69,368 (Dec. 7, 2021).

On January 19, 2021, OFAC designated the following under E.O. 13850 ("Blocking Property of Additional Persons Contributing to the Situation in Venezuela"), as amended by E.O. 13857: Philipp Paul Vartan APIKIAN; Alessandro BAZZONI; Francisco Javier D'AGOSTINO CASADO; 82 ELM REALTY LLC; AMG S.A.S. DI ALESSANDRO BAZZONI & C.; CATALINA HOLDINGS CORP.; D'AGOSTINO & COMPANY, LTD; ELEMENT CAPITAL ADVISORS LTD; ELEMENTO SOLUTIONS LIMITED; JAMBANYANI SAFARIS; SERIGRAPHICLAB DI BAZZONI ALESSANDRO; SWISSOIL TRADING SA; FIDES SHIP MANAGEMENT LLC; INSTITUTO NACIONAL DE LOS ESPACIOS ACUATICOS E INSULARES; RUSTANKER LLC. 86 Fed. Reg. 7458 (Jan. 28, 2021).

On January 19, 2021, Secretary Pompeo announced further U.S. actions against Venezuelan oil transactions in a press statement, available at https://2017-2021.state.gov/the-united-states-takes-further-action-against-enablers-of-venezuelan-oil-transactions-including-sanctions-evasion-network/index.html, excerpted below.

> The United States has sanctioned three individuals and 11 entities for their ties to a network helping Nicolas Maduro and his illegitimate regime evade U.S. sanctions on Venezuela's oil sector. This action builds on previous sanctions targeting individuals and entities involved in a sanctions-evasion scheme benefitting the illegitimate Maduro regime and Petroleos de Venezuela, S.A. (PdVSA), which the regime uses as its primary conduit for corruption to exploit and profit from Venezuela's natural resources. The principal actors in the evasion network include Alessandro Bazzoni, Francisco Javier D'Agostino Casado, Philipp Paul Vartan Apikian, Elemento Ltd, and Swissoil Trading SA.
>
> Additionally, OFAC is designating three companies located in Russia, Ukraine, and Venezuela, and identifying as blocked property six vessels that have recently been involved in the lifting and transport of Venezuelan oil. This action aims to increase pressure on international shipping entities to disengage from the Venezuelan oil sector and further limit the illegitimate Maduro regime's options for selling oil.

b. "Khashoggi Ban" related to Transnational Repression

On February 26, 2021, the State Department announced, in a press statement available at https://www.state.gov/accountability-for-the-murder-of-jamal-khashoggi/, a new visa restriction policy for individuals who,

> acting on behalf of a foreign government, are believed to have been directly engaged in serious, extraterritorial counter-dissident activities, including those that suppress, harass, surveil, threaten, or harm journalists, activists, or other persons perceived to be dissidents for their work, or who engage in such activities with respect to the families or other close associates of such persons.

The new policy was announced on the same day the Biden-Harris Administration submitted an unclassified report to Congress on the killing of Jamal Khashoggi and was named the "Khashoggi Ban." Initial visa restrictions under the new policy were imposed on "76 Saudi individuals believed to have been engaged in threatening dissidents overseas, including but not limited to the Khashoggi killing." The policy will include a review of individuals subject to the Khashoggi Ban for designation under Section 7031(c) as well. See discussion *supra* of Section 7031(c).

c. Ethiopia

See discussion in section 11.a, *supra*, of the designation under the Global Magnitsky sanctions program of an individual in connection with human rights abuse in Ethiopia. On May 23, 2021, Secretary Blinken announced a new INA 212(a)(3)(C) visa restriction policy in response to the crisis in the Tigray region of Ethiopia. The press statement,

available at https://www.state.gov/united-states-actions-to-press-for-the-resolution-of-the-crisis-in-the-tigray-region-of-ethiopia/, explains:

> Today, I am announcing a visa restriction policy under Section 212(a)(3)(C) of the Immigration and Nationality Act on the issuance of visas for any current or former Ethiopian or Eritrean government officials, members of the security forces, or other individuals—to include Amhara regional and irregular forces and members of the Tigray People's Liberation Front (TPLF)—responsible for, or complicit in, undermining resolution of the crisis in Tigray. This includes those who have conducted wrongful violence or other abuses against people in the Tigray region of Ethiopia, as well as those who have hindered access of humanitarian assistance to those in the region. Immediate family members of such persons may also be subject to these restrictions. Should those responsible for undermining a resolution of the crisis in Tigray fail to reverse course, they should anticipate further actions from the United States and the international community. We call on other governments to join us in taking these actions.

On September 17, 2021, President Biden issued E.O. 14046, "Imposing Sanctions on Certain Persons With Respect to the Humanitarian and Human Rights Crisis in Ethiopia." 86 Fed. Reg. 52,389 (Sept. 21, 2021). Excepts follow from the order. *See also* September 17, 2021 Department press statement, available at https://www.state.gov/issuance-of-new-executive-order-establishing-sanctions-related-to-the-crisis-in-ethiopia/ (the order authorizes, inter alia, "sanctions on individuals and entities in connection with the conflict, including those responsible for threatening peace and stability, obstructing humanitarian access or progress toward a ceasefire, or committing serious human rights abuses.").

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I, JOSEPH R. BIDEN JR., President of the United States of America, find that the situation in and in relation to northern Ethiopia, which has been marked by activities that threaten the peace, security, and stability of Ethiopia and the greater Horn of Africa region—in particular, widespread violence, atrocities, and serious human rights abuse, including those involving ethnic- based violence, rape and other forms of gender-based violence, and obstruction of humanitarian operations—constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States. I hereby declare a national emergency to deal with that threat.

The widespread humanitarian crisis precipitated by the violent conflict in northern Ethiopia has left millions of people in need of humanitarian assistance and has placed an entire region on the brink of famine. While maintaining pressure on those persons responsible for the crisis, the United States will seek to ensure that appropriate personal remittances to non-blocked persons and humanitarian assistance to at-risk populations can flow to Ethiopia and the greater Horn of Africa region through legitimate and transparent channels, including governments,

international organizations, and non-profit organizations. The United States supports ongoing international efforts to promote a negotiated ceasefire and political resolution of this crisis, to ensure the withdrawal of Eritrean forces from Ethiopia, and to promote the unity, territorial integrity, and stability of Ethiopia.

Accordingly, I hereby order:

Section 1. The Secretary of the Treasury is authorized to impose any of the sanctions described in section 2(a) of this order on any foreign 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 or attempted to engage in, any of the following:

(i) actions or policies that threaten the peace, security, or stability of Ethiopia, or that have the purpose or effect of expanding or extending the crisis in northern Ethiopia or obstructing a ceasefire or a peace process;

(ii) corruption or serious human rights abuse in or with respect to northern Ethiopia;

(iii) the obstruction of the delivery or distribution of, or access to, humanitarian assistance in or with respect to northern Ethiopia, including attacks on humanitarian aid personnel or humanitarian projects;

(iv) the targeting of civilians through the commission of acts of violence in or with respect to northern Ethiopia, including involving abduction, forced displacement, or attacks on schools, hospitals, religious sites, or locations where civilians are seeking refuge, or any conduct that would constitute a violation of international humanitarian law;

(v) planning, directing, or committing attacks in or with respect to northern Ethiopia against United Nations or associated personnel or African Union or associated personnel;

(vi) actions or policies that undermine democratic processes or institutions in Ethiopia; or

(vii) actions or policies that undermine the territorial integrity of Ethiopia;

(b) to be a military or security force that operates or has operated in northern Ethiopia on or after November 1, 2020;

(c) to be an entity, including any government entity or a political party, that has engaged in, or whose members have engaged in, activities that have contributed to the crisis in northern Ethiopia or have obstructed a ceasefire or peace process to resolve such crisis;

(d) to be a political subdivision, agency, or instrumentality of the Government of Ethiopia, the Government of Eritrea or its ruling People's Front for Democracy and Justice, the Tigray People's Liberation Front, the Amhara regional government, or the Amhara regional or irregular forces;

(e) to be a spouse or adult child of any sanctioned person;

(f) to be or have been a leader, official, senior executive officer, or member of the board of directors of any of the following, where the leader, official, senior executive officer, or director is responsible for or complicit in, or who has directly or indirectly engaged or attempted to engage in, any activity contributing to the crisis in northern Ethiopia:

(i) an entity, including a government entity or a military or security force, operating in northern Ethiopia during the tenure of the leader, official, senior executive officer, or director;

(ii) an entity that has, or whose members have, engaged in any activity contributing to the crisis in northern Ethiopia or obstructing a ceasefire or a peace process to resolve such crisis during the tenure of the leader, official, senior executive officer, or director; or

(iii) the Government of Ethiopia, the Government of Eritrea or its ruling People's Front for Democracy and Justice, the Tigray People's Liberation Front, the Amhara regional government, or the Amhara regional or irregular forces, on or after November 1, 2020;

(g) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any sanctioned person; or

(h) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any sanctioned person.

* * * *

Effective November 1, 2021, the State Department updated ITAR § 126.1, consistent with the Secretary's May 2021 announcement of restrictions on security assistance to Ethiopia, by subjecting Ethiopia to a policy of denial for licenses or other approvals for exports of defense articles or defense services to or for the armed forces, police, intelligence, or other internal security forces of either Ethiopia or Eritrea. 86 Fed. Reg. 60,165 (Nov. 1, 2021).

On November 12, 2021, the State Department announced designations of six persons under E.O. 14046 in a press statement, available at https://www.state.gov/imposing-sanctions-in-connection-with-the-conflict-in-ethiopia/. The Treasury press release, available at https://home.treasury.gov/news/press-releases/jy0478#_blank, identifies the individuals and entities designated: the Eritrean Defense Force, the People's Front for Democracy and Justice, Abraha Kassa Nemariam, Hidri Trust, Hagos Ghebrehiwet W Kidan, and Red Sea Trading Corporation.

d. Burundi

On November 18, 2021, the President revoked E.O. 13712 of November 22, 2015, "Blocking Property of Certain Persons Contributing to the Situation in Burundi" via an order terminating the "Emergency With Respect To the Situation in Burundi." E.O. 14,054 of November 18, 2021, "Termination of Emergency With Respect to the Situation in Burundi" was published on November 19, 2021. 86 Fed. Reg. 66,149 (Nov. 19, 2021). As a result, the following persons were removed from the SDN List: Gervais NDIRAKOBUCA, Marius NGENDABANKA, Leonard NGENDAKUMANA, Joseph NIYONZIMA, Edouard NSHIMIRIMANA, Ignace SIBOMANA, Alexis SINDUHIJE. 86 Fed. Reg. 66,617 (Nov. 23, 2021). See also November 18, 2021 State Department press statement, available at https://www.state.gov/termination-of-burundi-sanctions-program/, excerpted below.

> This decision reflects the changed circumstances in Burundi and President Ndayishimiye's pursuit of reforms across multiple sectors over the past year.
>
> The United States acknowledges the transition of power following Burundian elections in 2020 and reforms being pursued across multiple sectors. We recognize the progress made by President Ndayishimiye on

addressing trafficking in persons, economic reforms, and combatting corruption and encourage continued progress. Today's action underscores that U.S. sanctions are responsive to changes in circumstance and may be lifted following positive steps.

e. Yemen

On March 2, 2021, OFAC designated two individuals pursuant to E.O. 13611 of 2012, "Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen": Ahmad AL-HAMZI and Mansur AL-SA'ADI. 86 Fed. Reg. 13,787 (Mar. 10, 2021). On March 2, 2021, Secretary Blinken discussed these designations in a press statement, available at https://www.state.gov/designation-of-two-ansarallah-leaders-in-yemen/, and excerpted below.

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Ansarallah, sometimes referred to as the Houthis, plays a significant role in the conflict in Yemen and exacerbates the dire humanitarian plight of the Yemeni people. The war has destabilized the country, displaced four million Yemenis since the beginning of the conflict, and unleashed one of the world's worst humanitarian crises.

We strongly condemn Ansarallah's continued assault on Marib and their attacks in the region, including a complex attack on February 27, which threatened civilian areas with several UAVS and a missile attack on Riyadh. Again, on March 1 Ansarallah attacked the Saudi city of Jazan and injured five civilians.

Today, the United States is taking action to respond to this behavior. We are designating two Ansarallah leaders pursuant to Executive Order 13611, "Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen," Mansur Al-Sa'adi and Ahmad Ali Ahsan al-Hamzi. These senior Ansarallah leaders have used their positions – as Naval Forces Chief of Staff and Commander of the Air Force and Air Defense Forces, respectively – to procure weapons from Iran and to oversee attacks threatening civilians and maritime infrastructure.

Iran's involvement in Yemen fans the flames of the conflict, threatening greater escalation, miscalculation, and regional instability. Ansarallah uses Iranian weapons, intelligence, training, and support to conduct attacks threatening civilian targets and infrastructure in Yemen and Saudi Arabia.

The United States has made clear our commitment to promoting accountability for Ansarallah's malign and aggressive actions, which include exacerbating conflict in Yemen, attacking our partners in the region, kidnapping and torturing civilians, preventing humanitarian aid access, repressing the Yemeni people in areas they control, and orchestrating deadly attacks beyond Yemen's borders.

We will ensure Saudi Arabia and our regional partners have the tools they need to defend themselves, including against threats emanating from Yemen that are carried out with weapons and support from Iran. At the same time, the United States is working diligently at senior levels alongside the United Nations and others to bring an end to this conflict. We urge all parties to

work in good faith towards a lasting political solution, the only way to end the conflict, and address the terrible humanitarian crisis faced by the people of Yemen.

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In a November 19, 2021 press statement, available at https://www.state.gov/designation-of-houthi-official-in-yemen/, Secretary Blinken announced the designation of Saleh Mesfer Alshaer, commander of a Houthi-controlled military logistics organization, under E.O. 13611. The UN Security Council Yemen Sanctions Committee designated Alshaer on November 9, 2021. As summarized in the press statement:

> Alshaer heads the Houthis' "judicial guard" and is a key figure in Houthi efforts to seize assets from their opposition. The Houthis' so-called "Specialized Criminal Court" in Sana'a has appointed Alshaer as the "judicial custodian" of those funds and assets. Alshaer's associates have appropriated more than half the revenues from multiple hospitals in Sana'a, exacerbating Yemen's dire health crisis. Alshaer also serves as a senior officer and commander of the logistics support authority for the Houthi forces, and he has assisted the Houthis in acquiring smuggled weapons.

In a December 23, 2021 press statement, the State Department addressed the illegal flow of weapons from Iran to Yemen. The press statement is excerpted below and available at https://www.state.gov/illegal-iranian-flow-of-weapons-to-yemen/. The U.S. Naval Forces Central Command's press release on the seizure of weapons originating from Iran is available at https://www.dvidshub.net/news/411792/us-navy-seizes-1400-assault-rifles-during-illicit-weapons-interdiction.

> On December 20, the United States Navy 5th Fleet seized upwards of 1,400 AK-47 assault rifles and 226,600 rounds of ammunition from a vessel originating from Iran. This ship was on a route historically used to illegally smuggle weapons to the Houthis in Yemen. The smuggling of arms from Iran to the Houthis represents a flagrant violation of the UN targeted arms embargo and is yet another example of how malign Iranian activity is prolonging the war in Yemen. Iran's support for armed groups throughout the region threatens international and regional security, our forces, our diplomatic personnel and citizens in the region, as well as our partners in the region and elsewhere.
>
> This Administration is committed to countering this threat from Iran. The U.S. seized dozens of anti-tank guided missiles, thousands of assault rifles, and hundreds of machine guns and rocket-propelled grenade launchers from similar vessels in both May and February of this year.
>
> The illegal flow of weapons to Yemen is enabling the brutal Houthi offensive against Marib, increasing the suffering of civilians. Further fighting –

> whether in Marib or elsewhere – will only bring more suffering. The Yemeni parties must reach a political settlement together to end the war.

f. Nicaragua

On November 27, 2018, the President issued E.O. 13851, "Blocking Property of Certain Persons Contributing to the Situation in Nicaragua."

In a June 9, 2021 press statement, available at https://www.state.gov/announcing-sanctions-on-the-ortega-regime-in-response-to-arbitrary-detentions-and-other-undemocratic-moves/, Secretary Blinken announced sanctions on several members of the Ortega regime for their complicity in cracking down on civil society, journalists, and opposition candidates. 86 Fed. Reg. 32,714 (June 22, 2021). The State Department press statement refers to sanctions by Treasury on:

> an advisor and daughter of Daniel Ortega and Rosario Murillo, Camila Antonia Ortega Murillo, who is also the coordinator of the National Commission for the Creative Economy; Leonardo Ovidio Reyes Ramirez, the President of the Central Bank of Nicaragua; Julio Modesto Rodriguez Balladares, a military general and executive director of the military's pension and investment fund; and Edwin Ramon Castro Rivera, a National Assembly Deputy.

On July 12, 2021, the State Department announced visa restrictions on 100 Nicaraguans. See press statement, available at https://www.state.gov/the-united-states-restricts-visas-of-100-nicaraguans-affiliated-with-ortega-murillo-regime/. The press statement explains:

> The Department of State has imposed visa restrictions on 100 members of the Nicaraguan National Assembly and Nicaraguan judicial system, including prosecutors and judges, as well as some of their family members. The Department has revoked any U.S. visas held by these individuals.
>
> In the context of Nicaragua, the Department's visa restriction policy applies to Nicaraguans believed to be responsible for, or complicit in, undermining democracy, including those with responsibility for, or complicity in, the suppression of peaceful protests or abuse of human rights, and the immediate family members of such persons. Specifically, those targeted in today's action helped to enable the Ortega-Murillo regime's attacks on democracy and human rights, including by:
>
> - Arresting 26 political opponents and pro-democracy actors, including six presidential contenders, student activists, private sector leaders, and other political actors;
> - Passing repressive laws, including electoral legislation, a "cybercrimes" law, a "foreign agents" law, and a "sovereignty" law, which have all served to restrict and criminalize speech, dissent, and political participation;
> - Seeking to harass and silence civil society and independent media; and
> - Undermining democratic institutions and processes in Nicaragua.

> These visa revocations demonstrate that the United States will promote accountability not only for regime leaders but also for officials who enable the regime's assaults on democracy and human rights. The United States will continue to use the diplomatic and economic tools at our disposal to push for the release of political prisoners and to support Nicaraguans' calls for greater freedom, accountability, and free and fair elections.

On August 6, 2021, the State Department announced visa restrictions on 50 immediate family members of Nicaraguan National Assembly representatives and Nicaraguan prosecutors and judges. See press statement, available at https://www.state.gov/the-united-states-restricts-visas-of-50-additional-nicaraguan-individuals-affiliated-with-ortega-murillo-regime/. The Department had previously announced visa restrictions against 100 Nicaraguan legislators, judges, prosecutors, and family members of those officials on July 12, 2021. Such measures are authorized for those responsible for, or complicit in, undermining democracy, including those with responsibility for, or complicity in, the suppression of peaceful protests or abuse of human rights, and the immediate family members of such persons.

In an August 20, 2021 press statement, available at https://www.state.gov/the-united-states-takes-action-to-restrict-visas-of-election-officials-and-party-members-complicit-in-ortega-murillo-governments-assault-on-democracy/, the State Department announced the imposition of visa restrictions on 19 Nicaraguan election officials and political party officials who have enabled the Ortega-Murillo government's attack on democracy. The press statement elaborates:

> For the past three months, President Daniel Ortega and his wife, Vice President Rosario Murillo, have intimidated anyone opposed to their efforts to entrench their power in Nicaragua, including through the arrest of dozens of political candidates, journalists, student and business leaders, NGO workers, and human rights advocates, and through the disqualification of any candidate seeking to run against them in the November 7 elections. This anti-democratic campaign included the August 6 disqualification by the Supreme Electoral Council of the last remaining genuine opposition party, based upon a request made by the Constitutionalist Liberal Party (PLC). As the Secretary said August 7, due to the government's undemocratic and authoritarian actions, Nicaragua's electoral process and its eventual results have lost all credibility.
>
> Today's action follows the Secretary's announcements on July 12 and August 5 that imposed visa restrictions on 150 Nicaraguan judges, prosecutors, and family members of those officials under a visa restriction policy that applies to Nicaraguans and their immediate family members believed to be responsible for, or complicit in, undermining democracy, including those with responsibility for, or complicity in, human rights abuses such as suppression of peaceful protests. With today's action, we underscore our commitment to promoting accountability for all those complicit in the Ortega-Murillo government's assault on democracy. They are not welcome in the United States.

On November 15, 2021, OFAC designated the following under E.O. 13851: individuals—Luis Angel MONTENEGRO ESPINOZA, Sadrach ZELEDON ROCHA, Leonidas Nicolas CENTENO RIVERA, Francisco Ramon VALENZUELA BLANDON, Jose Adrian CHAVARRIA MONTENEGRO, Rodolfo Francisco LOPEZ GUTIERREZ, Jose Antonio CASTANEDA MENDEZ, Mohamed Mohamed FARRARA LASHTAR, Salvador MANSELL CASTRILLO De Los Pipitos—and the entity—MINISTERIO PUBLICO DE NICARAGUA. 86 Fed. Reg. 66,387 (Nov. 22, 2021). See State Department press statement, available at https://www.state.gov/new-sanctions-following-sham-elections-in-nicaragua/ (designations were a response to the November sham election in Nicaragua, following months of repression including imprisonment of presidential candidates and opposition members); see also U.S. Department of the Treasury press release, available at https://home.treasury.gov/news/press-releases/jy0481.

On November 16, 2021, President Biden issued Proclamation 10309, "Suspension of Entry as Immigrants and Nonimmigrants of Persons Responsible for Policies or Actions That Threaten Democracy in Nicaragua." 86 Fed. Reg. 64,797 (Nov. 19, 2021). Excerpts follow from the proclamation. The visa restrictions apply to, *inter alia*, members of the Government of Nicaragua, mayors, Nicaragua's security services, the Nicaraguan penitentiary administration, the Nicaraguan judiciary, and government ministries, as well as their agents and family members.

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In light of the importance to the United States of fostering democratic processes and institutions in Nicaragua to help the Nicaraguan people achieve their aspirations for democracy, and given the suppression of human rights and democracy in Nicaragua, I have determined that it is in the interest of the United States to restrict and suspend the entry into the United States, as immigrants and nonimmigrants, of members of the Government of Nicaragua, led by President Daniel Ortega, including his spouse and Vice President Rosario Murillo, and others described in this proclamation who formulate, implement, or benefit from policies or actions that undermine or injure democratic institutions or impede the return to democracy in Nicaragua.

The repressive and abusive acts of the Ortega government and those who support it compel the United States to act. The Ortega government's crackdown on opposition leaders, civil society leaders, and journalists in preparation for the November 2021 Nicaraguan presidential and legislative elections harms the institutions and processes essential to a functioning democracy. The Ortega government's undemocratic, authoritarian actions have crippled the electoral process and stripped away the right of Nicaraguan citizens to choose their leaders in free and fair elections.

The Ortega government's detention of and denial of fair trial guarantees to peaceful protesters, civil society leaders, private sector leaders, student leaders, political leaders, journalists, and presidential candidates in Nicaragua stifles political discourse and the democratic process. Police and prison authorities contribute to the repressive climate the Ortega government promotes by carrying out politically motivated arrests and detentions of individuals exercising

their human rights and holding political prisoners incommunicado, without access to lawyers, family members, and needed medical care. Family members and the media have reported that some prisoners have lost significant weight in detention, cannot walk unassisted, have been held in solitary confinement, and are subjected to frequent, extensive interrogations. The physical and psychological abuse of political prisoners at the hands of police and prison authorities is intolerable and cannot stand.

The Ortega government controls multiple security services, including non-uniformed, armed, and masked parapolice, who abuse persons to further the Ortega government's authoritarian agenda, including by harassing, threatening, and committing violence against those opposed to the government. Members of the Nicaraguan National Police (NNP), along with violent mobs of pro-government supporters also controlled by government actors, have attacked religious institutions in retaliation for their support for political and religious leaders.

Municipal officials, acting on direct orders from the Ortega government, have directed violence against pro-democracy protesters in their communities and other local actors opposed to the government. For example, mayors and mayors' offices loyal to the Ortega government have organized and channeled state funds to parapolice groups engaged in violent repression. These municipal officials wield enormous political power and discretionary budget authority, conferred upon them from the highest levels of the Ortega government. The climate of fear established and perpetuated by these municipal officials has diminished the possibility of free and fair elections and undermined democracy in Nicaragua.

The judiciary has failed the Nicaraguan people by aiding and abetting the Ortega government's use of politically motivated charges to lock up political prisoners. By stacking the judiciary with government-controlled judges and prosecutors, the Ortega government has abused the justice system to silence critics. Authorities have held many political prisoners incommunicado for months, without access to their lawyers, and with no knowledge of the spurious charges presented against them.

The widespread impunity for crimes committed against opposition actors; the persistent corruption practiced by Nicaraguan government officials in the performance of public functions that has eroded democratic institutions; and the continued failure of President Daniel Ortega, Vice President Rosario Murillo, Nicaraguan government officials, and others to support the rule of law, human rights, and other principles of high priority to the United States demand a forceful response.

* * * *

g. Balkans

On June 8, 2021, the State Department announced in a press statement by Secretary Blinken, available at https://www.state.gov/the-stability-and-security-of-the-western-balkans/, that President Biden had issued a new E.O. to expand and modernize the Western Balkans sanctions regime by, among other things, including references to the 2018 Prespa Agreement and the International Residual Mechanism for Criminal Tribunals. The press statement goes on:

> Additionally, the new E.O. provides for sanctions against persons whose actions destabilize the region by undermining democratic institutions and the rule of law or by violating human rights. …
>
> The E.O. also authorizes the imposition of sanctions on individuals and entities responsible for corruption in the region, including misappropriation of public assets, expropriation of private assets for personal gain or political purposes, or bribery. All property and interests in property of persons designated pursuant to this E.O. that are or come within the United States or the possession or control of U.S. persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them. …

Executive Order 14033 of June 8, 2021, "Blocking Property and Suspending Entry Into the United States of Certain Persons Contributing to the Destabilizing Situation in the Western Balkans," was published in the Federal Register on June 10, 2021 and is excerpted below. 86 Fed. Reg. 31,079 (June 10, 2021).

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* * * *

… I hereby order:

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, actions or policies that threaten the peace, security, stability, or territorial integrity of any area or state in the Western Balkans;

(ii) to be responsible for or complicit in, or to have directly or indirectly engaged in, actions or policies that undermine democratic processes or institutions in the Western Balkans;

(iii) to be responsible for or complicit in, or to have directly or indirectly engaged in, a violation of, or an act that has obstructed or threatened the implementation of, any regional security, peace, cooperation, or mutual recognition agreement or framework or accountability mechanism related to the Western Balkans, including the Prespa Agreement of 2018; the Ohrid Framework Agreement of 2001; United Nations Security Council Resolution 1244; the Dayton Accords; or the Conclusions of the Peace Implementation Conference Council held in London in December 1995, including the decisions or conclusions of the High Representative, the Peace Implementation Council, or its Steering Board; or the International Criminal Tribunal for the former Yugoslavia, or, with respect to the former Yugoslavia, the International Residual Mechanism for Criminal Tribunals;

(iv) to be responsible for or complicit in, or to have directly or indirectly engaged in, serious human rights abuse in the Western Balkans;

(v) to be responsible for or complicit in, or to have directly or indirectly engaged in, corruption related to the Western Balkans, including corruption by, on behalf of, or otherwise

related to a government in the Western Balkans, or a current or former government official at any level of govern- ment in the Western Balkans, such as the misappropriation of public assets, expropriation of private assets for personal gain or political purposes, or bribery;

(vi) 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 order; or

(vii) 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.

* * * *

On September 2, 2021 OFAC determined that circumstances no longer warrant the inclusion of the following individuals on the SDN List under E.O. 13219 of June 26, 2001, "Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans," as amended: Momcilo KRAJISNIK, Jovan DJOGO, and Dragan NIKOLIC. 86 Fed. Reg. 50,430 (Sept. 8, 2021).

h. Colombia

On November 18, 2021, the Secretary of State designated the Revolutionary Armed Forces of Colombia-People's Army, also known as FARC-EP under E.O. 13224, along with its leaders: Nestor Gregorio Vera Fernandez; Miguel Santanilla Botache; and Euclides Espana Caicedo (and their known aliases). 86 Fed. Reg. 68,293 (Dec. 1, 2021). Also on November 18, 2021, the Secretary of State designated Segunda Marquetalia, and its leaders: Luciano Marin Arango; Hernan Dario Velasquez Saldarriaga; and Henry Castellanos Garzon, under E.O. 13224. 86 Fed. Reg. 68,294 (Dec. 1, 2021).

In a November 30, 2021 press statement, available at https://www.state.gov/revocation-of-the-terrorist-designations-of-the-revolutionary-armed-forces-of-colombia-farc-and-additional-terrorist-designations/, the Secretary explained that the revocation of the designation of the Revolutionary Forces of Colombia ("FARC") as a Specially Designated Global Terrorist ("SDGT") pursuant to E.O. 13224, as amended, accompanied the designations of Revolutionary Armed Forces of Colombia-People's Army ("FARC-EP") and Segunda Marquetalia, under E.O. 13224, as amended. The press statement is excerpted below.

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* * * *

Following a 2016 Peace Accord with the Colombian government, the FARC formally dissolved and disarmed. It no longer exists as a unified organization that engages in terrorism or terrorist activity or has the capability or intent to do so.

The decision to revoke the designation does not change the posture with regards to any charges or potential charges in the United States against former leaders of the FARC, including

for narcotrafficking, nor does it remove the stain of the decision by Colombia's Special Jurisdiction of Peace, which found their actions to be crimes against humanity. However, it will facilitate the ability of the United States to better support implementation of the 2016 accord, including by working with demobilized combatants.

The designation of FARC-EP and Segunda Marquetalia is directed at those who refused to demobilize and those who are engaged in terrorist activity. In August 2019, former FARC commanders, including Luciano Marin Arango, alias Ivan Marquez, created Segunda Marquetalia after abandoning the 2016 Peace Accord. Since then, Segunda Marquetalia has engaged in terrorist activity and is responsible for the killings of former FARC members and community leaders. Segunda Marquetalia has also engaged in mass destruction, assassination, hostage-taking, including the kidnapping and holding for ransom of government employees. Segunda Marquetalia is also responsible for the attempted killings of political leaders.

Luciano Marin Arango, alias Ivan Marquez, is the founder and overall leader of Segunda Marquetalia.

Hernan Dario Velasquez Saldarriaga, alias El Paisa, is a senior commander in Segunda Marquetalia and serves as the group's military commander.

Henry Castellanos Garzon, alias Romana, is a senior leader in Segunda Marquetalia with military operations responsibilities.

Using the moniker of the former FARC and led by Nestor Gregorio Vera Fernandez, alias Ivan Mordisco, and Miguel Santanilla Botache, alias Gentil Duarte, the Revolutionary Armed Forces of Colombia – People's Army (FARC-EP) is responsible for the vast majority of the armed attacks attributed to FARC dissident elements since 2019. FARC-EP has also been responsible for the killing of political candidates and former FARC members, and the kidnapping of a political operative.

Nestor Gregorio Vera Fernandez, alias Ivan Mordisco, is the commander and overall leader of FARC-EP.

Miguel Santanilla Botache, alias Gentil Duarte, is a commander in FARC-EP and deputy to Nestor Gregorio Vera Fernandez.

Euclides Espana Caicedo, alias Jhon Fredey Henao Munoz, alias Jhonier, is the most senior commander of multiple units of the FARC-EP organization in important territorial areas.

* * * *

i. Central African Republic

On December 17, 2021, OFAC designated Ali DARASSA under E.O. 13667, "Blocking Property of Certain Persons Contributing to the Conflict in the Central African Republic," for being a leader of an entity, including any armed group, that has, or whose members have, engaged in the targeting of women, children, or any civilians through the commission of acts of violence (including killing, maiming, torture, or rape or other sexual violence), abduction, forced displacement, or attacks on schools, hospitals, religious sites, or locations where civilians are seeking refuge, or through conduct that would constitute a serious abuse or violation of human rights or a violation of international humanitarian law. 86 Fed. Reg. 73,095 (Dec. 23, 2021). Secretary Blinken

discussed the designation in a December 17, 2021 press statement, available at https://www.state.gov/imposing-sanctions-on-car-militia-leader/:

> The United States is designating Ali Darassa, the leader of the Central African Republic (CAR)-based militia group Union for Peace in the Central African Republic (UPC), pursuant to Executive Order 13667, in connection with serious human rights abuses.
>
> The UPC uses killings, kidnapping, and other violence to achieve its goals. For example, on November 15, 2018, UPC members attacked an internally displaced persons camp in Alindao, resulting in the deaths of a number of individuals. In another incident, on March 15, 2020, four people were reportedly detained and tortured in Mboki under the orders of the UPC.
>
> Darassa's decision to abandon the country's 2019 Peace Agreement further threatens the peace and stability of the country and has resulted in additional human rights abuses as well as exacerbated Central Africans' suffering. We urge UPC and all parties to the conflict to heed President Touadera's October 15 ceasefire declaration, immediately halt combat operations, and begin the dialogue for peaceful political solutions.

The Department of the Treasury's press release on Darassa is available at https://home.treasury.gov/news/press-releases/jy0539#_blank.

j. Democratic Republic of Congo

E.O. 13413 of 2006 is entitled, "Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of the Congo," and was amended by E.O. 13671 of 2014 ("Taking Additional Steps to Address the National Emergency With Respect to the Conflict in the Democratic Republic of the Congo").

On March 8, 2021, the Department of the Treasury, in consultation with the Department of State, revoked a license that was issued to Dan Gertler on January 15, 2021, after he had previously been designated under multiple U.S. sanctions authorities for engaging in corruption in the Democratic Republic of the Congo ("DRC"). See State Department press statement, available at https://www.state.gov/revocation-of-license-granted-for-dan-gertler/.

On December 13, 2021, the State Department announced visa restrictions on wildlife traffickers in the DRC. The press statement, available at https://www.state.gov/u-s-imposes-visa-restrictions-on-wildlife-traffickers-in-the-democratic-republic-of-congo-drc/, follows.

> The Department of State is disrupting wildlife trafficking networks by imposing visa restrictions on eight nationals from the Democratic Republic of the Congo (DRC). These actions under section 212(a)(3)(C) of the Immigration and Nationality Act (INA), which targets wildlife and timber traffickers who are believed to be, or have been, complicit in or involved in trafficking in wildlife,

> wildlife parts, or products. Wildlife trafficking is a serious transnational crime that threatens national security, economic prosperity, the rule of law, long-standing conservation efforts, and human health through the spread of zoonotic disease. The DRC is a major hub for trafficked wildlife and wildlife products moving from Africa to Asia and the Middle East. This includes vast quantities of ivory and pangolin scales, as well as rhino horn, and endangered live animals such as chimpanzees, gorillas, and African grey parrots.
>
> This visa restriction policy is designed to further disrupt the movements and business of transnational criminal organizations involved in wildlife and timber trafficking by making it harder for them to smuggle illegal wildlife and timber. We are sending a clear message that wildlife and timber traffickers are not welcome in the United States. The United States is committed to working with DRC government authorities and the Congolese Institute for the Conservation of Nature (ICCN) to disrupt trafficking networks and combat wildlife trafficking globally.

k. Tanzania

On January 19, 2021, the State Department announced visa restrictions on Tanzanian officials responsible for or complicit in undermining Tanzania's October 28, 2020, general elections. State Department press statement, available at https://2017-2021.state.gov/visa-restrictions-on-tanzanians-for-undermining-the-democratic-process-and-human-rights/index.html.

l. Cambodia

On November 10, 2021, the State Department announced in a press statement, available at https://www.state.gov/business-advisory-and-gsp-assessment-for-cambodia/, that, along with the Treasury and Commerce departments, it was issuing a business advisory on corrupt business practices, criminal activities, and human rights abuses in Cambodia. The press statement describes the advisory as follows:

> This advisory addresses two primary areas of exposure for U.S. companies in Cambodia:
>
> Illicit financial activities and related risks in the financial, real estate, casino, and infrastructure sectors; and
>
> Entanglements with Cambodian entities involved in trafficking in persons, wildlife and narcotics trafficking, and related risks in some areas of the manufacturing and timber sectors.

The full business advisory is available at https://www.state.gov/cambodia-business-advisory-on-high-risk-investments-and-interactions/.

m. Libya

On October 26, 2021, OFAC designated Osama Al Kuni IBRAHIM pursuant to E.O. 13726 of 2016, "Blocking Property and Suspending Entry into the United States of Persons Contributing to the Situation in Libya." 86 Fed. Reg. 60,739 (Nov. 3, 2021). The State Department press statement on this designation is available at https://www.state.gov/imposing-sanctions-on-a-libyan-individual-for-serious-human-rights-abuses/ and includes the following:

> The United States is designating Libyan national Osama Al Kuni Ibrahim pursuant to Executive Order 13726, based on his involvement in serious human rights abuses against migrants in Libya. Ibrahim is the de facto manager of a migrant detention center in Zawiyah, Libya, where he or individuals under his direction have carried out horrific abuses against migrants, including killings, sexual violence, and beatings.

The Department of the Treasury's press release on the designation is available at https://home.treasury.gov/news/press-releases/jy0437.

On December 21, 2021, OFAC determined that circumstances no longer warrant the inclusion of the following person on the SDN List under E.O. 13726: Rodrick GRECH. 86 Fed. Reg. 73,842 (Dec. 28, 2021).

n. Lebanon

In a July 30, 2021 media note, available at https://www.state.gov/joint-statement-by-secretary-of-state-antony-j-blinken-and-treasury-secretary-janet-l-yellen-welcoming-the-eu-sanctions-regime-on-lebanon/, the State Department issued a joint statement by Secretary Blinken and U.S. Secretary of the Treasury Janet L. Yellen, welcoming the EU sanctions regime regarding Lebanon. The joint statement says:

> The United States welcomes the EU's adoption today of a new sanctions regime to promote accountability and reform in Lebanon. As an increasing number of Lebanese suffer from the country's worsening economic crisis, it is critical that Lebanese leaders heed their people's repeated calls for an end to widespread corruption and government inaction and form a government that can initiate the reforms critical to address the country's dire situation.
>
> Sanctions are intended, among other things, to compel changes in behavior, and promote accountability for corrupt actors and leaders who have engaged in malign behavior. We welcome the EU's use of this powerful tool to promote accountability on a global scale. The United States looks forward to future cooperation with the EU in our shared efforts.

On October 28, 2021, OFAC designated three individuals pursuant to E.O. 13441 of August 1, 2007, "Blocking Property of Persons Undermining the Sovereignty of

Lebanon or Its Democratic Processes and Institutions": Jamil SAYYED, Dany KHOURY, and Jihad AL-ARAB. 86 Fed. Reg. 61,849 (Nov. 8, 2021). The Treasury Department press release on the designations is available at https://home.treasury.gov/news/press-releases/jy0440. The State Department press statement on the October 28, 2021 actions is available at https://www.state.gov/sanctions-on-individuals-undermining-the-rule-of-law-in-lebanon/ and includes the following:

> The United States is designating three Lebanese individuals who have participated in corrupt acts or exploited an official position to benefit themselves. Acts like this have caused the Lebanese people to bear the brunt of a devastating economic crisis brought about by corruption and government mismanagement. Jihad Al-Arab and Dany Khoury have used their close personal connections to political elites to reap the benefits of government contracts while failing to meaningfully fulfill those contracts' terms. Jamil Sayyed, a member of Lebanon's Parliament, used his position to skirt domestic banking policies, and as a result was able to transfer a substantial amount of currency to overseas investments in order to enrich himself. Their actions undermined the rule of law and principles of good governance. Today's action is being taken pursuant to Executive Order 13441.

o. South Sudan

On May 28, 2021, the United States submitted for the record its explanation of vote on the adoption of a UN Security Council resolution on South Sudan sanctions. The U.S. statement is available at https://usun.usmission.gov/explanation-of-vote-on-the-adoption-of-a-un-security-council-resolution-on-south-sudan-sanctions/ and excerpted below.

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* * * *

In less than two months, South Sudan will celebrate the tenth anniversary of its independence. July 9, 2011 marked a milestone in the aspirations of the South Sudanese for greater stability and prosperity for all its people. Much more needs to be done to achieve these goals. The resolution the Council adopted today to renew the UN sanctions regime for South Sudan, to include an arms embargo and targeted measures, and the mandate of the Panel of Experts, continues to play a critical role in decreasing conflict and promoting peace.

The United States thanks members of the Security Council for their constructive engagement on this resolution including on the creation of benchmarks that can guide the Council in reviewing sanctions measures. We hope these benchmarks encourage South Sudan's Revitalised Transitional Government of National Unity to make important progress on implementing the peace agreement, and ultimately ending the conflict that has been so devastating for South Sudan.

The United States welcomes progress in South Sudan's peace process and we encourage South Sudan's leaders to build on recent efforts to reconstitute the Transitional National Legislative Assembly. Implementation of security sector reforms are essential, including the establishment of a unified command structure and redeployment of trained, unified forces.

We continue to recognize the dedicated diplomacy of the region, which is working to build peace in South Sudan. The role of the African Union, IGAD, and other regional players has been and will remain essential.

We urge South Sudan's leaders to remain focused on addressing the urgent humanitarian needs of their people, respecting human rights, and ensuring accountability, including for sexual and gender-based violence. Too many people – especially women and children – continue to suffer from ongoing violence. This resolution works to safeguard their rights, as we retain the ability to designate individuals and entities for human rights violations and abuses and to deter efforts of spoilers to the peace process.

The United States looks forward to continuing its close cooperation with the Security Council, South Sudan, the UN, and other stakeholders in support of peace, stability, justice, and development in South Sudan.

* * * *

p. Cameroon

In a June 7, 2021 press statement, available at https://www.state.gov/announcement-of-visa-restrictions-on-those-undermining-the-peaceful-resolution-of-the-crisis-in-the-anglophone-regions-of-cameroon/, the State Department announced visa restrictions on those undermining the peaceful resolution of the crisis in the Northwest and Southwest regions of Cameroon. The press statement includes the following:

> The United States is deeply concerned by the continued violence in the Anglophone regions of Cameroon. We continue to call for both the Cameroonian government and separatist armed groups to end the violence and engage in a dialogue without preconditions to peacefully resolve the crisis. It is important that children can attend school and that humanitarian aid can be delivered. We urge all relevant stakeholders in Cameroon and in the diaspora to engage constructively and seek a peaceful resolution to the crisis.
>
> We condemn those who undermine peace through engaging in or inciting violence, human rights violations and abuses, and threats against advocates for peace or humanitarian workers.
>
> I am establishing a policy imposing visa restrictions on individuals who are believed to be responsible for, or complicit in, undermining the peaceful resolution of the crisis in the Anglophone regions of Cameroon. …

q. Uganda

In an April 16, 2021 press statement, available at https://www.state.gov/imposing-visa-restrictions-on-ugandans-for-undermining-the-democratic-process/, the State

Department announced visa restrictions on those undermining the democratic process in Uganda. The press statement further explains:

> The Government of Uganda's actions during the recent electoral process undermined democracy and respect for human rights. Today I am announcing visa restrictions on those believed to be responsible for, or complicit in, undermining the democratic process in Uganda, including during the country's January 14 general elections and the campaign period that preceded it.
>
> The Government of Uganda's actions represent a continued downward trajectory for the country's democracy and respect for human rights as recognized and protected by Uganda's constitution. Opposition candidates were routinely harassed, arrested, and held illegally without charge. Ugandan security forces were responsible for the deaths and injuries of dozens of innocent bystanders and opposition supporters, as well as violence against journalists that occurred before, during, and after the elections. Civil society organizations and activists working to support electoral institutions and transparent electoral processes have been targeted with harassment, intimidation, arrest, deportation, and spurious legal charges and denial of bank account access. The government limited accreditation for international and local election observers and civil society, but those who were able to observe the process noted widespread irregularities before, during, and after the election, which have undermined its credibility. This electoral process was neither free nor fair. Nevertheless, we continue to urge all parties to renounce violence and respect freedoms of expression, assembly, and movement.
>
> The Government of Uganda must significantly improve its record and hold accountable those responsible for flawed election conduct, violence, and intimidation. The U.S. Government will continue to evaluate additional actions against individuals complicit in undermining democracy and human rights in Uganda, as well as their immediate family members. The United States also emphasizes that we strongly support the Ugandan people, and we remain committed to working together to advance democracy and mutual prosperity for both our countries.

See also discussion in Section A.11, *supra*, of the designation of Ugandan Abel Kandiho.

r. North Korea

On December 10, 2021, OFAC made the following designations pursuant to E.O. 13687 and E.O. 13722, which target the Government of the Democratic People's Republic of Korea ("DPRK") and the Workers' Party of Korea and certain conduct related to labor: individuals: Hezheng LU, Yong Gil RI, and Dmitriy Yurevich SOIN; and entities: CENTRAL PUBLIC PROSECUTORS OFFICE, EUROPEAN INSTITUTE JUSTO, MOXING CARTOON, NINGS

CARTOON STUDIO, SEK STUDIO, and SHANGHAI HONGMAN CARTOON AND ANIMATION DESIGN STUDIO. 86 Fed. Reg. 73,844 (Dec. 28, 2021).

s. ***Iraq***

On April 30, 2021, OFAC determined that the following individual should be removed from the SDN List, where he had been listed pursuant to E.O. 13350 regarding Iraq: Anas Malik Dohan AL–HASSAN. 86 Fed. Reg. 24,692 (May 7, 2021).

B. EXPORT CONTROLS

1. Debarments

On June 4, 2021, the U.S. Department of State provided notice of seven persons statutorily debarred for having been convicted of violating, or conspiring to violate, the Arms Export Control Act (22 U.S.C. 2751, *et seq.*). This action, pursuant to section 127.7(b) of the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120-130), was taken by the Department's Office of Defense Trade Controls Compliance in the Bureau of Political-Military Affairs, in conjunction with the Department of Justice, Homeland Security Investigations, and the Federal Bureau of Investigation, based on the criminal convictions of the seven persons by a court of the United States. 86 Fed. Reg. 30,074 (June 4, 2021). The persons are:

(1) Danso, Ronald Adjei; September 15, 2020; District of Utah; 2:19–cr–00184–JNP; November 1968.
(2) Higuera, Julian Alonso; September 24, 2020; District of Arizona; 4:16–cr–00437– RM–DTF; October 1990.
(3) Li, Qingshan; June 12, 2020; Southern District of California; 3:19–cr–02564–CAB; February 1985.
(4) Park, Si Mong; September 14, 2020; District of the District of Columbia; 1:17–cr–00228–RC; September 1970.
(5) Rubio, Maritza; June 6, 2019; District of Arizona; 4:17–cr–02027–CKJ–EJM; February 1979.
(6) Sun, Wei; November 18, 2020; District of Arizona; 4:19–cr–00472–RM–JR; December 1971.
(7) Williams, Randy Lew; March 3, 2021; Western District of Oklahoma; 5:20–cr–00106–JD; August 1963.

See also State Department media note, available at https://www.state.gov/u-s-department-of-state-debars-seven-persons-for-violating-or-conspiring-to-violate-the-arms-export-control-act/

2. Administrative Settlements

In a May 3, 2021 media note, available at https://www.state.gov/u-s-department-of-state-concludes-13-million-settlement-of-alleged-export-violations-by-honeywell-international-inc/, the State Department announced the conclusion of a $13 million settlement of alleged export violations by Honeywell International, Inc. Unauthorized exports at issue include ITAR-controlled technical data for manufacturing castings and finished parts for multiple aircraft, gas turbine engines, and military electronics to and/or within Canada, Ireland, Mexico, the People's Republic of China, and Taiwan. The media note states:

> Under the terms of the 36-month Consent Agreement, Honeywell will pay a civil penalty of $13 million. The Department has agreed to suspend $5 million of this amount on the condition that the funds will be used for Department-approved Consent Agreement remedial compliance measures to strengthen Honeywell's compliance program. In addition, for an initial period of at least 18 months, an external Special Compliance Officer will be engaged by Honeywell to oversee the Consent Agreement, which will also require the company to conduct one external audit of its compliance program during the Agreement term as well as implement additional compliance measures.

In an August 9, 2021 media note, available at https://www.state.gov/u-s-department-of-state-concludes-6-6-million-settlement-of-alleged-export-violations-by-keysight-technologies-inc/, the State Department announced an administrative settlement with Keysight Technologies, Inc. ("Keysight") of Santa Rosa, California, regarding alleged violations of the Arms Export Control Act ("AECA"), 22 U.S.C. § 2751 *et seq*., and the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. Parts 120-130. The unauthorized exports in the case included software used for testing radar equipment on fixed or mobile platforms. The media note summarizes the agreement as follows:

> Under the terms of the 36-month Consent Agreement, Keysight will pay a civil penalty of $6,600,000. The Department has agreed to suspend $2,500,000 of this amount on the condition that the funds will be used for Department-approved Consent Agreement remedial compliance measures. Also, Keysight must hire an outside Special Compliance Officer for a term of two years and conduct an external audit to assess and improve its compliance program during the Consent Agreement term.

3. Litigation: *Washington v. Department of State* and *Defense Distributed*

For more detailed background on the *Defense Distributed* case, see *Digest 2015* at 680–84, *Digest 2016* at 668–75, *Digest 2019* at 578–79 and *Digest 2020* at 629. The case involved challenges to the restrictions on publishing instructions on the Defense

Distributed website that would enable the 3D printing of certain weapons. After the State Department settled the *Defense Distributed* litigation in June 2018, and began to implement a long-planned transition of certain firearms from Categories I-III of the U.S. Munitions List ("USML") and the ITAR to the export control jurisdiction of the Department of Commerce's Export Administration Regulations ("EAR"), first via a temporary modification, and later followed by rulemaking, several U.S. states sued the State Department in July 2018 over the temporary modification. The district court enjoined the temporary modification before later granting summary judgment in favor of the several states, and vacating the modification, finding that the State Department had violated the Administrative Procedure Act ("APA"). *See Washington v. Dep't of State*, 420 F. Supp. 3d 1130 (W.D. Wash. 2019). But nothing in the court order precluded continuing with the long-planned rulemaking to transition certain firearms from the ITAR to the EAR. Accordingly, the Department published a final rule effecting that transition, which was set to go into effect on March 6, 2020. 85 Fed. Reg. 3819 (Jan. 23, 2020). Shortly before the rule was set to go into effect, several U.S. states again sued. The district court granted the states' motion for a preliminary injunction. *See Washington v. United States Dep't of State*, 443 F. Supp. 3d 1245 (W.D. Wash. 2020). The State Department appealed, and the Ninth Circuit vacated that district court decision and ordered the district court to dismiss the case in late April 2021. *Washington v. Dep't of State,* 996 F.3d 552 (9th Cir. 2021). Excerpts follow from that Ninth Circuit opinion (including footnote 3, which discusses the applicability of the APA's foreign affairs exception).

* * * *

The U.S. Department of State ("DOS") and Department of Commerce appeal the district court's order granting the motion of 22 states and the District of Columbia to enjoin DOS's final rule removing 3D-printed guns and their associated files from the U.S. Munitions List. Because Congress expressly precluded review of the relevant agency actions here, we vacate the injunction and remand with instructions to dismiss.

I

A

In 1976, Congress authorized the President to "designate those items which shall be considered defense articles" and "to promulgate regulations for the import and export of such articles." International Security Assistance and Arms Export Control Act of 1976 ("Control Act"), Pub. L. No. 94-329, §212(a)(1), 90 Stat. 729, 744 (codified at 22 U.S.C. § 2778(a)(1)). The President subsequently delegated his authority to the Secretary of State. Administration of Arms Export Controls, Exec. Order No. 11,958, 42 Fed. Reg. 4,311 (Jan. 18, 1977); *see also* 22 C.F.R. § 120.1(a). In turn, DOS promulgated and updated the International Traffic in Arms Regulations ("ITAR") to control the licensing, export, and import of defense articles. *See generally* 22 C.F.R. §§ 120–130. When DOS designates an item as a defense article, it is placed on the U.S. Munitions List ("Munitions List") and regulated by the ITAR. 22 U.S.C.

§ 2778(a)(1). The ITAR also regulates a defense article's associated technical data. 22 C.F.R. §§ 120.6, 120.10(a)(1), (4).

Congress did not define when an item qualifies as a "defense article." Instead, it delegated this decision to the President. *See* 22 U.S.C. § 2778(f)(5)(C) (explaining a "defense article" is "an item designated by the President" as such); 22 C.F.R. § 120.6 (defining "[d]efense article" as "any item . . . designated in" the Munitions List by the President). True, the President must exercise this designation authority "[i]n furtherance of world peace and the security and foreign policy of the United States." 22 U.S.C. § 2778(a)(1). But the point at which an item becomes a "defense article" is within the President's sole discretion. Not surprisingly, some courts have historically rejected suits challenging designation decisions as nonjusticiable political questions. *See, e.g.*, *United States v. Martinez*, 904 F.2d 601 (11th Cir. 1990).

In 1981, Congress added a provision to the Control Act requiring the President to give notice to several congressional committees 30 days "before any item is removed from the Munitions List." International Security and Development Cooperation Act of 1981, Pub. L. No. 97- 113, § 107, 95 Stat. 1519, 1522 (codified as amended at 22 U.S.C. § 2778(f)(1)). So long as the President provides this notice, whether to remove an item from the Munitions List is still within his discretion. *See id.*

In 1989, Congress added an additional wrinkle at the heart of this appeal: "The designation . . . of items as defense articles . . . shall not be subject to judicial review." Anti-Terrorism and Arms Export Amendments Act of 1989, Pub. L. No. 101-222, § 6, 103 Stat. 1892, 1899 (codified at 22 U.S.C. § 2778(h)).

B

The Department of Commerce ("Commerce") is empowered to regulate non-Munitions List items under the Export Control Reform Act ("Reform Act"). *See* 50 U.S.C. § 4801 *et seq.* These items are placed on the Commerce Control List ("CCL"), *id.* § 4813(a), subject to regulation under the Export Administration Regulations ("EAR"), *see generally* 15 C.F.R. § 730 *et seq.* Congress similarly gave Commerce broad discretion in deciding which items to place on the CCL. Commerce must only use its authority to "further significantly the foreign policy of the United States," "fulfill its declared international obligations," and limit exports making a "significant contribution to the military potential of any other country" or "prov[ing] detrimental to . . . national security." 50 U.S.C. § 4811(1). Congress also exempted Commerce's "functions exercised under [the Reform Act]" from review under the Administrative Procedure Act ("APA"). *Id.* § 4821(a).

C

On May 24, 2018, DOS proposed a rule removing all "non-automatic and semi-automatic firearms to caliber .50 ... and all of the parts, components, accessories, and attachments specifically designed for those articles" from the Munitions List. International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III, 83 Fed. Reg. 24,198, 24,198 (proposed May 24, 2018) ("DOS Proposed Rule"). The DOS Proposed Rule clarified that technical data would remain on the Munitions List only if "directly related to the defense articles" remaining on the Munitions List. *Id.* at 24,201. Because 3D-printed guns and their associated electronic files fell within Category I small-caliber firearms, DOS, in effect, proposed to remove 3D-printed-gun files from the Munitions List and regulation under the ITAR. These and other removed items

were to be placed on the CCL and regulated by Commerce under the EAR instead. *Id.* at 24,198. DOS also provided a 45-day comment period.[3]

The same day, Commerce proposed its own rule expressly assuming regulatory jurisdiction over those items removed from the Munitions List. Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List, 83 Fed. Reg. 24,166 (proposed May 24, 2018) ("Commerce Proposed Rule"). Commerce also provided a period of public comment. *Id.* at 24,177.

During the Proposed Rules' concurrent comment periods, many commentors expressed concerns that shifting 3D-printed-gun files from the Munitions List to the CCL would impermissibly deregulate 3D-printed guns. …

DOS responded to these comments in its final rule, promulgated on January 23, 2020, explaining that the Commerce Final Rule would "sufficiently address the U.S. national security and foreign policy interests relevant to export controls." International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III, 85 Fed. Reg. 3,819, 3,823 (Jan. 23, 2020) ("DOS Final Rule")…

That same day, Commerce promulgated its final rule. Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List, 85 Fed. Reg. 4,136, 4,140 (Jan. 23, 2020) ("Commerce Final Rule"). Whereas the DOS Proposed and Final Rules were identical in all relevant respects, the Commerce Proposed and Final Rules were not. Originally, Commerce proposed no changes to the EAR as it believed then-existing EAR regulations "struck the appropriate approach in providing for national security and foreign policy control of firearms that would transfer to the CCL." *Id.* at 4,141; *see also* Commerce Proposed Rule, 83 Fed. Reg. at 24,167 (explaining that "existing EAR concepts" would remain in place). But after considering commentors' concerns, Commerce decided to add 15 C.F.R. § 734.7(c) to ensure that 3D-printed-gun files would remain regulated, even if posted online. Commerce Final Rule, 85 Fed. Reg. at 4,141–42; *see also id.* at 4,172– 73 (codified at 15 C.F.R. § 734.7(c)). Commerce's new substantive change, ultimately, is what undergirds the States' claims against both agencies.

The day the Final Rules were promulgated, 22 states and the District of Columbia ("States") sued DOS and Commerce, claiming both Final Rules violated the APA and seeking to preliminarily and permanently enjoin their enforcement. *Washington v. U.S. Dep't of State* (*Washington III*), 443 F. Supp. 3d 1245, 1253 (W.D. Wash. 2020). The district court held the Final Rules were reviewable and the States had shown a likelihood of success on their APA claims. *Id.* at 1255–60. The district court primarily faulted the Commerce Final Rule for its procedural errors in adding §734.7(c), *e.g.*, *id.* at 1257, but preliminarily enjoined only the DOS Final Rule as it related to the transfer of 3D-printed-gun files, *id.* at 1262–63. DOS and Commerce appealed.

[3] DOS stated it was not required to provide this comment period under the APA because of the foreign affairs exception. DOS Proposed Rule, 83 Fed. Reg. at 24,200. DOS has repeatedly maintained this position since 1954. *See* United States Munitions List; Enumeration of Arms, Ammunition and Implements of War Subject to Import and Export Controls, 19 Fed. Reg. 7,403, 7,405 (Nov. 17, 1954). In adopting the Control Act, Congress ratified DOS's position. *See* Control Act, § 212(b)(2), 90 Stat. at 745 (affirming "[a]ll ... regulations ... entered into under section 414 of the Mutual Security Act of 1954 shall continue in full force and effect until modified, revoked, or superseded by appropriate authority"); *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 275, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974) ("[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."). We do not reach whether the foreign affairs exception applies, however, because the DOS Final Rule is not subject to judicial review. *See infra* Part II.A.

II

We review the grant of a preliminary injunction for an abuse of discretion, the underlying legal conclusions de novo, and factual findings for clear error. …

III

An individual "suffering legal wrong because of agency action" is entitled to judicial review under the APA. 5 U.S.C. § 702. An agency's action is unreviewable, however, if a "statute[] preclude[s] judicial review." *Id.* § 701(a)(1). That said, the APA's "basic presumption of judicial review" can only be overcome if there is "clear and convincing" evidence that Congress intended to preclude judicial review. *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140–41 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The texts of both the Control Act and Reform Act demonstrate Congress's intent to preclude judicial review of both the DOS and Commerce Final Rules.

A

We first turn to the reviewability of the DOS Final Rule. The Control Act states: "The designation . . . of items as defense articles or defense services for purposes of this section shall not be subject to judicial review." 22 U.S.C. § 2778(h). A plaintiff cannot challenge the government's decision to *designate* items as defense articles. *E.g.*, *Martinez*, 904 F.2d at 601–03; *United States v. Pulungan*, 569 F.3d 326, 326–28 (7th Cir. 2009); *United States v. Roth*, 628 F.3d 827, 832 (6th Cir. 2011). That said, we are presented with a slightly different question: whether § 2778(h) bars judicial review of the decision to *undesignate* items as defense articles (i.e., remove them from the Munitions List). The district court relied on *Washington v. U.S. Department of State* (*Washington I*), 318 F. Supp. 3d 1247, 1260 (W.D. Wash. 2018), which erroneously stated in passing that "Congress chose not to make unreviewable" "the removal of an item from the Munitions List." *Washington III*, 443 F. Supp. 3d at 1255 (alteration adopted). But the original public meaning of § 2778(h) makes clear that the undesignation of an item as a defense article is also judicially unreviewable. *See Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) ("[O]ur job is to interpret the words consistent with their ordinary meaning . . . at the time Congress enacted the statute." (citation omitted)).

The phrase "designation ... as defense articles" in §2778(h) is substantively identical to the phrase in § 2778(a)(1) under which the President is authorized to "designate [items] . . . as defense articles." Accordingly, we assume these same phrases "used in different parts of the same act are intended to have the same meaning," unless context demonstrates otherwise. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012) (citations and internal quotation marks omitted); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831) ("[T]he same words have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is controlled by context.").

The term "designate" in § 2778(a)(1) was originally understood to authorize both designations *and* undesignations. In 1976, Congress authorized the President to "designate" items as defense articles in § 2778(a)(1), but did not expressly authorize the President to undesignate, or remove, items from the Munitions List. *See* 22 U.S.C. § 2778(a)(1). Nonetheless, the President immediately thereafter delegated authority to the Secretary of State to make "[d]esignations, including *changes* in designations . . . of items or categories which shall be considered as defense articles." *See* Administration of Arms Export Controls, Exec. Order No. 11,958, 42 Fed. Reg. 4,311 (Jan. 18, 1977) (emphasis added). From 1976 on, items were routinely designated *and* undesignated as defense articles.

Congress's later addition to the Control Act supports this reading as well. In 1980, Congress required the President to review the Munitions List and determine which items, "if any, should be removed from such List." International Security and Development Cooperation Act of 1980, Pub. L. No. 96-533, § 108(a), 94 Stat. 3131, 3137. A year later, Congress modified this language slightly, requiring the President to "periodically review the items on the United States Munitions List" and provide 30-days' notice to congressional committees "before any item is *removed* from the Munitions List." Pub. L. No. 97-113, § 107, 95 Stat. at 1522 (codified as amended at §2778(f)(1)) (emphasis added).

Despite recognizing the President's power to remove items from the Munitions List, these amendments contain no language expressly granting the President that authority. Rather, Congress recognized what had always been implicit from § 2778(a)(1): the lesser power to undesignate is part and parcel of the greater power to designate. *See id.*; *see also United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812) (finding Congress's power to create federal courts includes the lesser power to restrict jurisdiction); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020) (finding the President's executive power "generally includes the ability to supervise and remove the agents who wield executive power in his stead.").

* * * *

B

We next turn to the reviewability of the Commerce Final Rule. The Reform Act states: "[T]he functions exercised under [the Reform Act] shall not be subject to sections 551, 553 through 559, and 701 through 706 of Title 5." 50 U.S.C. § 4821(a). As applied here, this provision is clear and unambiguous: the Commerce Final Rule amended the EAR pursuant to the Reform Act; therefore the Rule is not reviewable under the APA. *See* Commerce Final Rule, 85 Fed. Reg. at 4,169 ("[The Reform Act] provides the legal basis for [Commerce]'s principal authorities and serves as the authority under which [Commerce] issues this rule.").

The district court recognized as much, noting the "Commerce Rule, when viewed in isolation, appears to fall within [§ 4821(a)'s] exemption." *Washington III*, 443 F. Supp. 3d at 1255. Nonetheless, the district court believed, without citation to authority, it could review the Commerce Final Rule because it was promulgated in conjunction with the DOS Final Rule. *Id.* at 1255–56. Even assuming the DOS Final Rule was reviewable (it is not), this theory of review goes beyond established principles of delegated authority and agency action. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Accordingly, Commerce could have only acted pursuant to its delegated authority under the Reform Act in promulgating its Final Rule. And because Commerce engaged in "functions exercised under" the Reform Act, the Reform Act expressly bars APA challenges, regardless of joint agency efforts.

Congress not only barred APA challenges to Commerce's Reform Act functions; it rendered them, in effect, judicially unreviewable. The federal government cannot be sued unless it first waives sovereign immunity. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States . . . ."); *see also* Federalist No. 81 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amendable to the suit of an individual without its consent." (emphasis omitted)). And the APA is, foremost, a waiver of sovereign immunity to allow private litigants to challenge agency action. 5 U.S.C. § 702; *Ramos v. Wolf*, 975 F.3d 872, 900 (9th Cir.

2020) (R. Nelson, J., concurring). But because § 702 does not apply to "functions exercised under" the Reform Act, 50 U.S.C. §4821(a), federal sovereign immunity has not been waived, precluding judicial review of the States' challenge.

* * * *

After the mandate of the Ninth Circuit was issued, the State Department published a notice in the Federal Register on June 1, 2021, providing public notice of the vacatur of the preliminary injunction, which then made the final rule of January 23, 2020, transferring certain firearms and restrictions on publishing instructions on how to 3-D print those firearms and certain components to the Department of Commerce's EAR, take full effect. 86 Fed. Reg. 29,196 (June 1, 2021).

There were further developments in 2021 in the follow-on litigation in district court in the Western District of Texas, *Def. Distributed v. Grewal*, No. 18-cv-00637 (W.D.Tex.). The Department was brought in as a defending party in district court in a suit claiming breach of the settlement agreement. The district court in Texas, in April 2021, granted the motion of the New Jersey Attorney General to sever and transfer to district court in New Jersey, where a related suit, *Def. Distributed v. Grewal*, No. 21-cv-09867 (D.N.J. filed Apr. 20, 2021) (consolidated with *Def. Distributed v. Grewal*, No. 19-cv-4753 (D.N.J. filed Feb. 5, 2019)), had also been filed. On April 20, 2021, the transfer order was appealed in the Fifth Circuit U.S. Court of Appeals. *Def. Distributed v. Bruck*, No. 21-50327 (5th Cir.). The Court of Appeals construed the direct appeal as a petition for mandamus against the district court because no statute allowed an interlocutory appeal of a discretionary venue transfer order. The appellate panel heard oral arguments on the motion in August 2021. The Fifth Circuit decision may only issue an order directing the district court within the Fifth Circuit, and not the New Jersey district court, where the case was received and docketed. The proceedings against the State Department in district court are on hold, pending the decision of the Fifth Circuit.

Cross References

U.S. Passports Invalid for Travel to North Korea, **Ch. 1.A.5**
Bautista-Rosario v. Mnuchin *(challenge to Section 7031(c) designation),* **Ch. 1.B.1.a**
Designations of Foreign Terrorist Organizations ("FTOs"), **Ch. 3.B.1.f**
Corruption, **Ch. 3.B.4**
Organized Crime, **Ch. 3.B.5**
Termination of sanctions relating to the ICC, **Ch. 3.C.2.b**
Crystallex v. Venezuela, **Ch. 5.A.1**
UN 3C statements on sanctions, **Ch. 6.A.4**
HRC on Xinjiang, **Ch. 6.A.6.e**
Forced labor in China, **Ch. 6.F**
Repression of rights in Cuba, **Ch. 6.J.1**
Repression of rights in Russia, **Ch. 6.J.3**
Media freedom in Hong Kong, **Ch. 6.K.1**
Media freedom in Russia, **Ch. 6.K.1**
OAS on repression in Nicaragua, **Ch. 7.D.1**
Resolution of Sudan claims, **Ch. 8.B**
Libya, **Ch. 9.A.4**
Burma, **Ch. 9.A.7**
Bosnia and Herzegovina, **Ch. 9.B.4**
Hong Kong, **Ch. 9.B.5**
Forced Diversion of Ryanair Flight to Minsk, **Ch. 11.A.2**
Syria, **Ch. 17.B.2**
Yemen, **Ch. 17.B.5**
Ethiopia, **Ch. 17.B.6**
Atrocities in Burma, **Ch. 17.C.3**
Atrocities in Xinjiang, **Ch. 17.C.4**
Atrocities in Ethiopia, **Ch. 17.C.5**
Actions in Response to Iran and Iran-Backed Militia Groups, **Ch. 18.A.3**
Applicability of international law to conflicts in cyberspace, **Ch. 18.A.5.d**
Iran, **Ch. 19.B.2.a**
Chemical weapons in Syria, **Ch. 19.D.1**
Russia chemical weapons use, ***Ch. 19.D.2.b***

CHAPTER 17

International Conflict Resolution and Avoidance

A. MIDDLE EAST PEACE PROCESS

Ambassador Linda Thomas-Greenfield, U.S. Representative to the United Nations, delivered remarks on May 20, 2021 at the UN General Assembly stakeout following the announcement of a ceasefire in the Middle East. Ambassador Thomas-Greenfield's remarks are excerpted below and available at https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-the-un-general-assembly-stakeout-following-the-announcement-of-a-ceasefire/.

* * * *

Good evening. President Biden just addressed the nation, where he announced that Israel has agreed to a mutual, unconditional ceasefire, and that the Egyptians have informed us that Hamas, and other groups in Gaza, have also agreed. As I said earlier today, the United States has approached the crisis in Israel and Gaza with a singular focus: bringing an end to the conflict as quickly as possible.

The announcement of today's ceasefire – if it holds – brings us one step closer to that goal. Now, we must turn our focus toward making more tangible progress toward a durable peace. And we must work together to address the urgent humanitarian needs on the ground, which are especially – in fact significantly – immense in Gaza.

In all of our efforts – past and present – we've been guided by a resolve to work multilaterally, diplomatically, and also strategically. We are committed to working with other members of the international community over the long term to create the conditions for a lasting and sustainable peace.

As President Biden said tonight, we will be working with the UN and UN bodies to provide urgent humanitarian assistance to the people of the region, and we will be asking for other nations to step up their contributions, as well. And as we have repeatedly said, Israelis and Palestinians deserve safety and security, and should enjoy equal measures of freedom, security, prosperity, and democracy. And we will continue to work relentlessly in pursuit of that goal.

* * * *

On May 23, 2021, Secretary Antony J. Blinken provided an interview regarding the ceasefire between the Israelis and Palestinians. The interview transcript is available at https://www.state.gov/secretary-antony-j-blinken-on-cnns-fareed-zakaria-gps-with-fareed-zakaria/ and excerpts follow.

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* * * *

QUESTION: President Biden says that he thinks now that there is a ceasefire in – between the Israelis and Palestinians – there is a significant opportunity for even more positive developments, or a "genuine opportunity," I think, if I'm quoting him correctly. And I'm wondering: Is there really? … Is there really a prospect of some kind of movement towards a genuine political solution?

SECRETARY BLINKEN: …I think there has to be. I think both sides are reminded that we have to find a way to break the cycle, because if we don't, it will repeat itself at great cost and at great human suffering on all sides. Look, we worked very hard with this intense but behind-the-scenes diplomacy to get to the ceasefire, and I think President Biden leading this effort made the judgment that we could be most effective in doing that. And ultimately, after this intensive effort across the government, we got to where everyone wanted to be, which was to end the violence.

But now, as the President said, I think it's incumbent upon all of us to try to make the turn to start to build something more positive. And what that means at heart is that Palestinians and Israelis alike have to know in their day-in and day-out lives equal measures of opportunity, of security, of dignity…

QUESTION: Will you use, as a template, the last peace plan put forward by the United States Government that is the peace plan shepherded by Jared Kushner?

SECRETARY BLINKEN: Look, I don't think we're at the – in a place where the – getting to some kind of a negotiation for what ultimately, I think, has to be the result, which is a two-state solution, is the first order of business. We have to start building back in concrete ways and offering some genuine hope, prospects, opportunity in the lives of people.

And of course, in the first instance, we've got to deal with the humanitarian situation, which is grave in Gaza. We've got to start to bring countries together to support reconstruction and development. And as we're doing that, we'll be re-engaging with the Palestinians, of course, continuing our deep engagement with the Israelis, and trying to put in place conditions that allow us over time hopefully to advance a genuine peace process. But that is not the immediate order of business. We have a lot of work to do to get to that point.

QUESTION: But does the United States Government still endorse the outlines of that plan?

SECRETARY BLINKEN: We're going to look at everything that's been done before, learn from that just as we have in other areas, and see what makes sense and what doesn't. But our focus right now relentlessly is on dealing with the humanitarian situation, starting to be – to do reconstruction and rebuild, and engage intensely with everyone, with Palestinians, with Israelis, with partners in the region.

* * * *

SECRETARY BLINKEN: Look, one thing that's been, I think, deeply disturbing about recent events has been the inter-communal violence. And that's something that we have not seen, at least in recent years. And I believe and I hope that Israelis of all persuasions will find ways to come together to try to make sure that that doesn't happen again. And hopefully that finds expression as well in their politics and in their governments. But again, these are decisions for Israelis to make, not for us.

* * * *

B. PEACEKEEPING AND CONFLICT RESOLUTION

1. Afghanistan

As discussed in *Digest 2020* at 636-48, the United States and its allies worked to encourage a political solution to the decades-long war in Afghanistan. See Chapter 18 for discussion of the U.S. military withdrawal from Afghanistan.

On January 28, 2021, Secretary of State Antony J. Blinken spoke with Afghan President Ashraf Ghani regarding the U.S.-Afghan partnership. The State Department spokesperson's readout of the call is available at https://www.state.gov/secretary-blinkens-call-with-afghan-president-ghani/ and includes the following:

> The Secretary highlighted robust diplomatic support for the peace process focused on helping the parties to the conflict achieve a durable and just political settlement and permanent and comprehensive ceasefire that benefits all Afghans. He shared that the United States is reviewing the February 2020 U.S.-Taliban agreement and whether the Taliban are living up to their commitments to cut ties with terrorist groups, to reduce violence in Afghanistan, and to engage in meaningful negotiations with the Afghan government and other stakeholders. The Secretary reiterated his desire for all Afghan leaders to support this historic opportunity for peace while preserving the progress made over the last 20 years with regard to human rights, civil liberties, and the role of women in Afghan society. The Secretary committed to consultations with the Government of Afghanistan, NATO allies, and international partners regarding a collective strategy to support a stable, sovereign, democratic, and secure future for Afghanistan.

On May 7, 2021, the State Department issued as a media note the U.S.-Europe Communiqué on the Afghan Peace Process, available at https://www.state.gov/u-s-europe-communique-on-the-afghan-peace-process/. Special envoys and special representatives of the United States of America, European Union, France, Germany, Italy, NATO, Norway, and the United Kingdom met in Berlin on May 6th, 2021. They issued the following communiqué.

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Respectful of the sovereignty, independence and territorial integrity of Afghanistan, participants exchanged views on the current status of the Afghanistan peace process and discussed ways to support the Afghan people's desire for a just and lasting peace. To that end, participants:

1. Acknowledged the widespread and sincere demand of the Afghan people for an end to the war and a fair and lasting peace, and confirmed that such a peace can only be achieved through an inclusive, negotiated political settlement among Afghans. Participants affirmed their commitment to UNSC resolution 2513 (2020) and emphasized that they oppose the establishment in Afghanistan of any government by force which would constitute a threat to regional stability.

2. Highlighted the need to accelerate the pace of the Afghan-led and Afghan-owned peace negotiations and 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 and political compromise that ends the war for the benefit of all Afghans and that contributes to regional stability and global security.

3. Expressed appreciation to the Government of Qatar for its long-standing contribution to facilitate the peace process, including hosting and supporting Afghanistan Peace Negotiations since September 12th, 2020, and underlined their support for the continuation of discussions between the parties' negotiating teams in Doha. Appreciated the offer from the Republic of Turkey, the United Nations, and the State of Qatar to co-convene a senior-level peace conference in Istanbul and welcomed plans for related events to channel civil society voices into the process. Urged the immediate resumption, without pre-conditions, of substantive negotiations on the future of Afghanistan with the aim to develop and negotiate realistic compromise positions on power sharing that can lead to an inclusive and legitimate government and a just and durable settlement.

4. Welcomed an expanded role for the United Nations in contributing to the Afghanistan peace and reconciliation process, including by leveraging its considerable experience and expertise in supporting other peace processes.

5. Strongly condemned the continued violence in Afghanistan for which the Taliban are largely responsible and demanded all parties to take immediate and necessary steps to reduce violence and in particular, to avoid civilian casualties in order to create an environment conducive to reaching a political settlement. Participants further called on all parties to respect their obligations under international humanitarian law in all circumstances, including those related to protection of civilians, and urged all sides to immediately agree on steps that enable the successful implementation of a permanent and comprehensive ceasefire.

6. In this regard, participants called upon the Taliban to stop their undeclared spring offensive, to refrain from attacks against civilians, and to stop immediately all attacks in the vicinity of hospitals, schools, universities, mosques and other civilian areas. In particular, participants demanded an immediate end to the campaign of targeted assassinations against civil society leaders, the clergy, journalists and other media workers, human rights defenders, healthcare personnel, judicial employees and other civilians.

7. Following the April 14 announcement by the United States and NATO that U.S. and Resolute Support Mission forces will conduct an orderly, coordinated, and deliberate withdrawal from Afghanistan, to be concluded by September 11, 2021 participants reiterated that

during the withdrawal, the safety of international troops must be ensured and that any Taliban attacks on our troops during this period will be met with a forceful response. Participants stressed that the process of the troop withdrawal must not serve as an excuse for the Taliban to suspend the peace process and that good-faith political negotiations must proceed in earnest.

8. In light of this withdrawal of forces, the participants recommitted to a strong and enduring partnership with Afghanistan, its governing and security institutions and its people. Participants also agreed that substantial international development assistance will be needed for Afghanistan's stability during peace negotiations and reaffirmed their commitment to mobilize international support for reconstruction following a peace agreement, based on the conditions as laid out in the outcome documents of the 2020 Geneva Conference, including the preservation and respect for the rights of all Afghans, including women and minorities. Participants underscored their commitment to conditional civilian assistance to Afghanistan beyond a military withdrawal with the aim of ensuring a better future for the Afghan people.

9. 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 greater adherence to the rule of law, respect for Afghanistan's international obligations, and improvements in inclusive and accountable governance. Highlighted that the Afghan parties' ownership and leadership of intra-Afghan negotiations is important for a successful outcome. Reiterated that a stable, safe and prosperous Afghanistan is dependent on women playing full and meaningful roles in the peace negotiations and all parts of society, including in government.

10. Underscored that the Taliban and the Government of the Islamic Republic must fulfill their counterterrorism commitments including to prevent al-Qaida, Daesh, or other terrorist groups and individuals from using Afghan soil to threaten or violate the security of any other country; not to host members of these groups; and to prevent them from recruiting, training, or fundraising.

11. Reiterated that diplomatic personnel and property are inviolable, and that the perpetrators of any attack or threat on foreign diplomatic personnel and properties in Afghanistan must be held accountable.

12. Underscored that – while fully respecting the right of the Afghan people to self-determination – the countries and organizations represented at this meeting strongly advocate a durable and just political resolution that will result in the formation of a sovereign, unified, peaceful and democratic Afghanistan, free of terrorism and an illicit drug industry, which contributes to regional stability and global security.

13. Reaffirmed that current and future support to any Afghan government relies on the adherence to the principles set out in the Afghanistan Partnership Framework and progress towards the outcomes in the Afghanistan National Peace and Development Framework II as decided upon at the November 2020 Geneva donor's conference.

14. Participants called upon the Government of the Islamic Republic to effectively fight corruption and promote good governance, and to implement anti-corruption legislation. Participants stressed their conviction that widespread corruption undermines the foundations of the Republic as well as the ability of the international community to continue to support Afghan institutions.

15. Urged the Taliban to facilitate access for delivery of humanitarian aid, without preconditions and in accordance with international humanitarian law, to the parts of the country under their effective control.

16. Stressed the importance of fighting illegal drug production and trafficking and urged both sides to eliminate the drug threat in and from Afghanistan.

17. Agreed that continued international support to the Afghan National Defense and Security Forces will be necessary to ensure Afghanistan can defend itself against internal and external threats.

18. Encouraged all concerned countries, in particular Afghanistan's neighbors and countries of the region, to continue to support the Afghan people and constructively contribute to a lasting peace settlement and sustainable economic development in the interest of all.

19. Thanked the negotiating team of the Islamic Republic of Afghanistan and the negotiating team of the Taliban for their important contributions to today's meeting via video and for the frank and open discussion on challenging issues.

20. Expressed their appreciation to the German government for organizing these consultations and agreed to set the date and venue of the next meeting through diplomatic channels.

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On July 19, 2021, the State Department issued a press statement welcoming Afghanistan peace talks held July 17-18 in Doha. The press statement follows and is available at https://www.state.gov/senior-leaders-from-afghanistan-hold-peace-talks/.

> The United States welcomes the talks held July 17-18 between senior leaders of the Islamic Republic of Afghanistan and the Taliban in Doha and the commitment the two sides have declared to accelerate negotiations towards an inclusive political settlement. Only a negotiated settlement can bring a lasting end to over 40 years of conflict in Afghanistan.
>
> The United States urges the Taliban to uphold the commitment in the Joint Declaration to protect Afghanistan's infrastructure, protect civilians, and cooperate on humanitarian assistance.
>
> The United States commends the leadership of the State of Qatar in bringing the parties together as well as the United Nations for the essential role it is playing. We remain committed to working alongside the international community and Afghanistan's neighbors in advancing the Afghanistan peace process and supporting the people of Afghanistan in achieving the just and lasting peace they deserve.

The special representatives and special envoys of the United States of America, the European Union, France, Germany, Italy, NATO, Norway, and the United Kingdom met again in Rome on July 22, 2021 to discuss the situation in Afghanistan and the developments in Afghanistan peace negotiations after the latest round of high-level talks in Doha on July 17-18, 2021. The text of the communiqué issued by the United States of America, the European Union, France, Germany, Italy, NATO, Norway, and the

United Kingdom follows and appears as a State Department media note at https://www.state.gov/u-s-europe-communique-on-afghanistan-and-peace-efforts/.

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We affirm that:

1. Our countries and organizations are committed to a strong partnership with Afghanistan and will be closely monitoring ongoing developments in this new phase of transition with the withdrawal of international forces.

2. The people of Afghanistan have suffered for too long from conflict. We are deeply concerned about the high levels of violence, the Taliban's military offensive, and the number of reported serious human rights abuses and violations alleged in communities most affected by the ongoing armed conflict across the country.

3. We call on all parties to reduce violence and protect civilians, respecting their obligations under international humanitarian law. We call on the Taliban to end their military offensive, and on both the Islamic Republic and the Taliban to engage meaningfully in the peace process. We reiterate the urgency of reaching a ceasefire to ensure the success of negotiations, and we acknowledge the sacrifices of the Afghan security forces.

4. We reaffirm that there is no military solution to the conflict in Afghanistan, we stand by UNSC resolution 2513 (2020), and we do not support any government in Afghanistan imposed through military force.

5. We express our full support to an inclusive Afghan-owned and Afghan-led peace process with full and meaningful participation of women that leads to a just and durable political settlement. We also highlight five elements of a final settlement that are most critical: (1) inclusive governance; (2) the right to elect political leaders; (3) protections for human rights, including rights of women, youth and minorities; (4) commitments on counter-terrorism, including to ensure that Afghanistan does not again serve as a safe haven for terrorists; and (5) adherence to international law, including international humanitarian law. We emphasize that international support to any future government will depend, at least in part, on adherence to these five elements.

6. We intend to maintain our support for Afghan institutions, including defense and security forces, to address the country's urgent needs. We also reiterate that future assistance to Afghanistan is dependent on good governance and a commitment to the rule of law and human rights, including preservation of the gains made by women and girls over the past two decades, as well as the government taking meaningful steps to tackle corruption and to meeting commitments made at the November 2020 Geneva Conference.

7. We took due note of yesterday's briefings by the representatives of the Islamic Republic of Afghanistan and the Taliban and welcome the talks held in Doha on July 17 and 18 between senior leaders of the two sides. We further welcome the declared commitment of the two sides to accelerate negotiations toward an inclusive political settlement and to meet again in the near future. We believe future meetings should focus on core issues that will be fundamental to reaching an inclusive political settlement.

8. We acknowledge that reaching a final political settlement, including on the Constitution, will likely take time. We urge the two sides to agree on a permanent and

comprehensive ceasefire and on foundational principles for the future Afghan State and details of transitional governing arrangements until a final political settlement is reached. We emphasize that any transitional governing arrangements must be inclusive, respect the rights of all Afghans in line with Afghanistan's international commitments and also uphold counter-terrorism commitments.

9. We welcome in particular the commitments made by the Taliban yesterday to inclusive governance, respecting human rights including the rights of women and minorities, to abide by international law, including international humanitarian law, and to upholding counter terrorism commitments. We also welcome their openness to negotiate a mechanism for representative government with the Islamic Republic negotiation team.

10. We call on the two parties to negotiate in good faith in order to reach a just and durable political settlement. To promote progress in the negotiations, we support any third-party facilitation or mediation welcomed by the two sides.

11. We seize this opportunity to reiterate appreciation to Qatar as host of the negotiations, and we commend it for bringing the parties together and for its overall contribution to the process. We also commend the United Nations for the essential and expanded role it is playing in support of the process.

12. We reiterate that the Taliban and the Islamic Republic must deliver on their commitments (1) to prevent the use of Afghan soil by al Qaeda, Da'esh or other terrorist groups from launching attacks against, or threatening the security of, any other country; and (2) not to host members of these groups nor to allow them to recruit, train, fundraise or transit through Afghanistan.

13. We urge the Taliban to reduce violence, uphold their commitments to protect Afghanistan's infrastructure, protect civilians and cooperate on humanitarian assistance, particularly as the Afghan people suffer acutely from the effects of COVID-19 and drought, in addition to violence. We call on the Taliban to allow and facilitate, without preconditions and consistent with international humanitarian law, access for delivery of humanitarian aid, to areas under their control.

14. We believe that Afghanistan can contribute to regional and international stability and connectivity. We encourage Afghanistan's neighbors to intensify their support to the Afghan people and to contribute to a lasting peace settlement and economic development in the interests of all.

15. We also call upon all parties to ensure the safety of foreign embassies and other diplomatic missions, multilateral agencies, media representatives, airports and non-governmental organizations and their Afghan and international staff. We particularly appreciate Turkey's readiness and commitment to assist with airport security as needed.

16. We express our appreciation to Italy for organizing these consultations and agreed to set the date and venue of the next meeting through diplomatic channels.

* * * *

On August 15, 2021, a joint statement on Afghanistan was released by the following countries: Albania, Australia, Austria, Bahamas, Belgium, Burkina Faso, Canada, Chile, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Denmark, Dominican Republic, El Salvador, Estonia, The High Representative of the European Union for Foreign Affairs and Security Policy, Federated States of Micronesia, Fiji,

Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Guyana, Haiti, Honduras, Iceland, Ireland, Italy, Japan, Kosovo, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Malta , Marshall Islands, Mauritania, Montenegro, Nauru, Netherlands, New Zealand, Niger, North Macedonia, Norway, Palau, Panama, Paraguay, Poland, Portugal, Qatar, Republic of Korea, Republic of Cyprus, Romania, Sierra Leone, Slovakia, Slovenia, Spain, Suriname, Sweden, Togo, Tonga, Uganda, United Kingdom, United States of America, Ukraine, and Yemen. The joint statement follows and is available as a State Department media note at https://www.state.gov/joint-statement-on-afghanistan/.

> Given the deteriorating security situation, we support, are working to secure, and call on all parties to respect and facilitate, the safe and orderly departure of foreign nationals and Afghans who wish to leave the country. Those in positions of power and authority across Afghanistan bear responsibility—and accountability—for the protection of human life and property, and for the immediate restoration of security and civil order.
>
> Afghans and international citizens who wish to depart must be allowed to do so; roads, airports and border crossing must remain open, and calm must be maintained.
>
> The Afghan people deserve to live in safety, security and dignity. We in the international community stand ready to assist them.

The following is the text of an August 20, 2021 joint statement by the NATO foreign ministers on Afghanistan. The joint statement is available as a State Department media note at https://www.state.gov/joint-statement-by-the-nato-foreign-ministers-on-afghanistan/.

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* * * *

1. We, the Foreign Ministers of NATO, met today to discuss the difficult situation in Afghanistan.

2. We are united in our deep concern about the grave events in Afghanistan and call for an immediate end to the violence. We also express deep concerns about reports of serious human rights violations and abuses across Afghanistan. We affirm our commitment to the statement by the UN Security Council on 16 August, and we call for adherence to international norms and standards on human rights and international humanitarian law in all circumstances.

3. Our immediate task is now to meet our commitments to continue the safe evacuation of our citizens, partner country nationals, and at-risk Afghans, in particular those who have assisted our efforts. We call on those in positions of authority in Afghanistan to respect and facilitate their safe and orderly departure, including through Hamid Karzai International Airport in Kabul. As long as evacuation operations continue, we will maintain our close operational coordination through Allied military means at Hamid Karzai International Airport.

4. The Afghan people deserve to live in safety, security and dignity, and to build on the important political, economic and social achievements they have made over the last twenty

years. We stand by civil society actors who must be able to continue to safely play their meaningful role in Afghan society. We call on all parties in Afghanistan to work in good faith to establish an inclusive and representative government, including with the meaningful participation of women and minority groups. Under the current circumstances, NATO has suspended all support to the Afghan authorities. Any future Afghan government must adhere to Afghanistan's international obligations; safeguard the human rights of all Afghans, particularly women, children, and minorities; uphold the rule of law; allow unhindered humanitarian access; and ensure that Afghanistan never again serves as a safe haven for terrorists.

5. For the last twenty years, we have successfully denied terrorists a safe haven in Afghanistan from which to instigate attacks. We will not allow any terrorists to threaten us. We will remain committed to fighting terrorism with determination, resolve, and in solidarity.

6. We honour the service and sacrifice of all who have worked tirelessly over the last twenty years to realise a better future for Afghanistan. Together, we will fully reflect our engagement in Afghanistan and draw the necessary lessons. We will continue to promote the stable, prosperous Afghanistan that the Afghan people deserve and address the critical questions facing Afghanistan and the region, in the immediate future and beyond, including through our cooperation with regional and international partners, such as the European Union and United Nations.

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On August 31, 2021, President Biden delivered remarks on the end of the war in Afghanistan. His remarks are excerpted below and available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/.

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Last night in Kabul, the United States ended 20 years of war in Afghanistan — the longest war in American history.

We completed one of the biggest airlifts in history, with more than 120,000 people evacuated to safety. That number is more than double what most experts thought were possible. No nation — no nation has ever done anything like it in all of history. Only the United States had the capacity and the will and the ability to do it, and we did it today.

The extraordinary success of this mission was due to the incredible skill, bravery, and selfless courage of the United States military and our diplomats and intelligence professionals. For weeks, they risked their lives to get American citizens, Afghans who helped us, citizens of our Allies and partners, and others onboard planes and out of the country. And they did it facing a crush of enormous crowds seeking to leave the country. And they did it knowing ISIS-K terrorists — sworn enemies of the Taliban — were lurking in the midst of those crowds.

And still, the men and women of the United States military, our diplomatic corps, and intelligence professionals did their job and did it well, risking their lives not for professional gains but to serve others; not in a mission of war but in a mission of mercy. Twenty servicemembers were wounded in the service of this mission. Thirteen heroes gave their lives.

I was just at Dover Air Force Base for the dignified transfer. We owe them and their families a debt of gratitude we can never repay but we should never, ever, ever forget.

In April, I made the decision to end this war. As part of that decision, we set the date of August 31st for American troops to withdraw. The assumption was that more than 300,000 Afghan National Security Forces that we had trained over the past two decades and equipped would be a strong adversary in their civil wars with the Taliban.

That assumption — that the Afghan government would be able to hold on for a period of time beyond military drawdown — turned out not to be accurate.

But I still instructed our national security team to prepare for every eventuality — even that one. And that's what we did.

So, we were ready when the Afghan Security Forces — after two decades of fighting for their country and losing thousands of their own — did not hold on as long as anyone expected.

We were ready when they and the people of Afghanistan watched their own government collapse and their president flee amid the corruption and malfeasance, handing over the country to their enemy, the Taliban, and significantly increasing the risk to U.S. personnel and our Allies.

As a result, to safely extract American citizens before August 31st — as well as embassy personnel, Allies and partners, and those Afghans who had worked with us and fought alongside of us for 20 years — I had authorized 6,000 troops — American troops — to Kabul to help secure the airport.

* * * *

My predecessor, the former President, signed an agreement with the Taliban to remove U.S. troops by May the 1st, just months after I was inaugurated. It included no requirement that the Taliban work out a cooperative governing arrangement with the Afghan government, but it did authorize the release of 5,000 prisoners last year, including some of the Taliban's top war commanders, among those who just took control of Afghanistan.

And by the time I came to office, the Taliban was in its strongest military position since 2001, controlling or contesting nearly half of the country.

The previous administration's agreement said that if we stuck to the May 1st deadline that they had signed on to leave by, the Taliban wouldn't attack any American forces, but if we stayed, all bets were off.

So we were left with a simple decision: Either follow through on the commitment made by the last administration and leave Afghanistan, or say we weren't leaving and commit another tens of thousands more troops going back to war.

That was the choice — the real choice — between leaving or escalating.

I was not going to extend this forever war, and I was not extending a forever exit. The decision to end the military airlift operations at Kabul airport was based on the unanimous recommendation of my civilian and military advisors — the Secretary of State, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff and all the service chiefs, and the commanders in the field.

Their recommendation was that the safest way to secure the passage of the remaining Americans and others out of the country was not to continue with 6,000 troops on the ground in harm's way in Kabul, but rather to get them out through non-military means.

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2. Syria

a. Joint statements

On March 15, 2021, Secretary Blinken, French Foreign Minister Jean-Yves Le Drian, German Foreign Minister Heiko Maas, Italian Foreign Minister Luigi Di Maio, and UK Foreign Secretary Dominic Raab issued a joint statement on the occasion of the 10-year anniversary of the Syrian uprising. The joint statement is available as a State Department media note at https://www.state.gov/joint-statement-by-the-secretary-of-state-of-the-united-states-of-america-the-foreign-secretary-of-the-united-kingdom-and-the-foreign-ministers-of-france-germany-and-italy/, and excerpted below.

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Today marks ten years since the Syrian people peacefully took to the streets calling for reform. The Assad regime's response has been one of appalling violence. President Assad and his backers bear responsibility for the years of war and human suffering that followed. We praise the brave individuals and organisations who over the last ten years have exposed the truth from Syria, documented and pursued abuses, mass atrocities, and grave violations of international law to hold the perpetrators accountable and delivered vital assistance to communities. That work remains essential.

After years of conflict, widespread corruption, and economic mismanagement, the Syrian economy is broken. More than half of the population, nearly 13 million Syrians, depend upon humanitarian assistance. The millions of Syrian refugees, hosted generously by Syria's neighbours, Turkey, Jordan, Lebanon, Iraq, and Egypt as well as those internally displaced cannot yet return home without fear of violence, arbitrary arrest, and torture. Continued conflict has also led to space for terrorists, particularly Daesh, to exploit. Preventing Daesh's resurgence remains a priority.

It is imperative the regime and its supporters engage seriously in the political process and allow humanitarian assistance to reach communities in need. The proposed Syrian Presidential election this year will neither be free nor fair, nor should it lead to any measure of international normalization with the Syrian regime. Any political process needs the participation of all Syrians, including the diaspora and the displaced, to enable all voices to be heard.

… Our nations commit to reinvigorating the pursuit of a peaceful solution which protects the rights and future prosperity of all Syrians, based on UN Security Council Resolution 2254. Impunity is unacceptable and we will firmly continue to press for accountability for the most serious crimes. We will continue to support the important role of the Commission of Inquiry and the International, Impartial and Independent Mechanism. We welcome the ongoing efforts by national courts to investigate and prosecute crimes within their jurisdiction committed in Syria. We will not tolerate Syria's non-compliance with the Chemical Weapons Convention and fully support the work of the OPCW in this regard. We will continue to strongly call for a nationwide ceasefire, unhindered aid access through all possible routes to those in need, including through the renewal of UN Security Council Resolution 2533 and the cross-border mechanism by the UN

Security Council, as well as the release of those arbitrarily detained, and free and fair elections under UN auspices with all Syrians participating, including members of the diaspora. To that end we reiterate our firm support for UN Special Envoy for Syria, Geir Pedersen's efforts to deliver all aspects of UN Security Council Resolution 2254 as the only way to resolve this conflict. Clear progress towards an inclusive political process and an end to the repression of the Syrian people is essential. We cannot allow this tragedy to last another decade.

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On May 25, 2021, the following statement regarding Syria's presidential election was released by Secretary Blinken, French Foreign Minister Jean-Yves Le Drian, German Foreign Minister Heiko Maas, Italian Foreign Minister Luigi Di Maio, and UK Foreign Secretary Dominic Raab. The joint statement is available as a State Department media note at https://www.state.gov/joint-statement-by-the-secretary-of-state-of-the-united-states-of-america-the-foreign-secretary-of-the-united-kingdom-and-the-foreign-ministers-of-france-germany-and-italy-2/.

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We, the Foreign Ministers of France, Germany, Italy, the United Kingdom and the United States of America wish to make clear that Syria's May 26 presidential election will neither be free nor fair. We denounce the Assad regime's decision to hold an election outside of the framework described in UN Security Council Resolution 2254 and we support the voices of all Syrians, including civil society organisations and the Syrian opposition, who have condemned the electoral process as illegitimate.

As outlined in the Resolution, free and fair elections should be convened under UN supervision to the highest international standards of transparency and accountability. For an election to be credible, all Syrians should be allowed to participate, including internally displaced Syrians, refugees, and members of the diaspora, in a safe and neutral environment.

Without these elements, this fraudulent election does not represent any progress towards a political settlement. We urge the international community to unequivocally reject this attempt by the Assad regime to regain legitimacy without ending its grave human rights violations and meaningfully participating in the UN-facilitated political process to end the conflict.

We reiterate our firm support for the UN Special Envoy for Syria's efforts to promote a political settlement, based on all aspects of UNSCR 2254, which protects the future prosperity and the rights of all Syrians, including the right to vote in free and fair elections.

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The Governments of the United States, Italy, Canada, Egypt, France, Germany, Greece, Iraq, Ireland, Japan, Jordan, Lebanon, the Netherlands, Norway, Qatar, Saudi Arabia, Turkey, the United Arab Emirates, the United Kingdom, and representatives of the League of Arab States and European Union, issued the following joint statement on June 28, 2021, on the margins of the Defeat ISIS Coalition Ministerial. The joint

statement is available as a State Department media note at https://www.state.gov/joint-statement-on-the-ministerial-meeting-on-syria/.

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We, the Ministers and representatives of the United States, Italy, Canada, Egypt, France, Germany, Greece, Iraq, Ireland, Japan, Jordan, Lebanon, the Netherlands, Norway, Qatar, Saudi Arabia, Turkey, the United Arab Emirates, the United Kingdom, and representatives of the League of Arab States and European Union, met today on the margins of the Defeat ISIS Coalition Ministerial to discuss the crisis in Syria. We stressed the critical importance of meeting humanitarian needs, including life-saving assistance and COVID-19 response for all Syrians in need through all modalities, including through the provision and expansion of the UN cross-border mechanism to which there is no adequate alternative. We also underlined the importance of continued support to Syrian refugees and host countries until Syrians can voluntarily return home with safety and dignity in line with UNHCR standards.

We welcomed UN Special Envoy Geir Pedersen's briefing and reaffirmed strong support for UN-led efforts to implement all aspects of UN Security Council Resolution 2254, including continued support for an immediate nation-wide ceasefire, the unimpeded and safe delivery of aid, and the Constitutional Committee, as well as fighting against terrorism in all its forms and manifestations.

Reaffirming the unity and territorial integrity of Syria, we remain committed to continue working actively to reach a credible, sustainable, and inclusive political solution based on Resolution 2254. This is the only solution that will bring an end to Syria's decade long conflict and guarantee the security of the Syrian people and fulfil their aspirations.

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On December 2, 2021, representatives of the Arab League, Egypt, the European Union, France, Germany, Iraq, Jordan, Norway, Qatar, Saudi Arabia, Turkey, the United Kingdom, and the United States issued a joint statement after a meeting with the Syria special envoy in Brussels to discuss the crisis in Syria. The joint statement is available as a State Department media note at https://www.state.gov/joint-statement-on-the-syria-special-envoy-meeting/, and excerpted below.

We reaffirmed our support for the unity and territorial integrity of Syria and to the fight against terrorism in all its forms and manifestations as well as for the implementation of all aspects of UN Security Council Resolution 2254, including an immediate nationwide ceasefire, the release of the arbitrarily detained, and the unimpeded and safe delivery of aid.

We welcomed UN Special Envoy for Syria Geir Pedersen's briefing and pledged to redouble our support to his continued efforts, including in the Constitutional Committee, to engage all parties and advance progress towards a

> political resolution to the crisis in accordance with UNSCR 2254. We will also firmly press for accountability for the most serious crimes.

b. U.S. statements at the UN

For statements on the Impartial and Independent Mechanism for Syria ("IIIM"), see Chapter 3.C.4.b.

U.S. Representative to the UN Kelly Craft delivered a statement on Syria at the UN on January 20, 2021, available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-situation-in-syria-via-vtc-6/, which includes the following:

> The United States welcomes plans for the convening of the fifth round of the Constitutional Committee next week in Geneva. The important work of drafting a new constitution has been delayed for far too long. The Assad regime must meaningfully participate in the Committee's work to deliver a constitution that represents the entirety of the Syrian people.
>
> We also underscore Special Envoy Pedersen's authority to take measures he deems appropriate to facilitate the parties' efforts to begin work on a new constitution itself.
>
> We are under no illusions here. It is clear that the Assad regime is deliberately stalling the Committee's progress to distract the international community as the regime prepares to carry out a sham presidential election this year.
>
> Any such election would be illegitimate. The vast majority of the international community and reputable NGOs agree that the current elections framework in the 2012 Syrian Constitution does not meet the most basic international standards.

On March 18, 2021, Acting Alternate Representative for Special Political Affairs Jeffrey DeLaurentis delivered remarks at a side event on the 10th anniversary of the Syrian uprising, hosted by the Syria National Coalition, and cosponsored by the United States. For the joint statement marking the 10th anniversary, see Section B.2.a, *supra*. Ambassador Delaurentis's statement is available at https://usun.usmission.gov/remarks-at-a-side-event-on-the-10th-anniversary-of-the-syrian-uprising-hosted-by-the-syria-national-coalition/ and excerpted below.

> We remain firm in stating that the only way forward is to push for a political process that meets the conditions outlined in Security Council Resolution 2254. We recognize the Syrian Negotiation Commission's efforts to meaningfully participate in the constitutional drafting process. However, our ability to make progress on this front is limited by the Assad regime's continuous refusal to engage in good faith.

> It's clear that the regime will leverage the upcoming presidential elections in May to unfairly claim Assad's legitimacy. The United States will not recognize these elections unless they are free, fair, representative of Syrian society, and supervised by the United Nations.
>
> In the absence of serious and meaningful cooperation by the regime and its allies, the United States continues to support the efforts of the Special Envoy on other pressing files, including the release of detainees and the status of missing persons. In the Security Council a few days ago, we called on the Special Envoy to apply greater focus on detainees, and to engage directly and more regularly with families of the detained, former detainees themselves, and civil society.

On August 24, 2021, U.S. Representative the UN Linda Thomas-Greenfield addressed a UN Security Council briefing on Syria. Her remarks are available at https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield%E2%80%AFat-a-un-security-council-briefing-on-syria/, and include the following:

> So, the United States reiterates its full support for the Special Envoy's tireless efforts to broker a peaceful solution to the conflict in Syria and achieve a lasting, nationwide ceasefire. We strongly support the Special Envoy's efforts to foster dialogue and bridge gaps between all parties. To that end, there are clear steps the Assad regime can and must take. When it finally meets again, the Constitutional Committee must be allowed to produce results. It is time for the Assad regime to quit stalling and credibly participate. These negotiations are a crucial step in the process toward ending the fighting and achieving lasting peace.
>
> The Syrian regime can take a step forward by addressing the plight of detained and missing persons. Members of this Council have repeatedly expressed this would bolster the political process. The Syrian regime understands this. It occasionally announces purported amnesties. But it has yet to make any meaningful efforts to address this critical issue. The Assad regime should immediately release the tens of thousands of arbitrarily detained men, women, and children in its custody, and share information on the fate of the more than 130,000 Syrians who are reportedly missing or detained after being arbitrarily arrested by the regime.
>
> Finally, today marks the first time that the Security Council has met on the humanitarian situation in Syria since the reauthorization of UN cross-border humanitarian assistance. And thanks to unanimous action by this Council, the vital cross-border lifeline at Bab al-Hawa was restored. Approximately 1,000 trucks a month, filled with food and medicine, including vaccines and equipment to prevent the spread of COVID-19, will continue to reach Syrians – the more than three million Syrians – in desperate need in the northwest for another year. We commend the Security Council and its Member States, which worked

> tirelessly and constructively to reach agreement, adopted this resolution unanimously, and in the process, saved countless lives. This was an important moment for this Council – it showed we can do more than just talk. We can work together to find solutions and deliver actions on the world's most pressing challenges. And now is the time to do that again, because Secretary-General Guterres, UN agencies, and dozens of NGOs operating in Syria are all in agreement: we need to do more.

On September 28, 2021, Deputy U.S. Representative to the UN Richard Mills delivered remarks at a Security Council briefing on Syria. His remarks are available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-syria-8/, and include the following:

> Finally, we have lamented in this Council that it's been two years since the inauguration of the Constitutional Committee, and we have yet to see the members actually discuss a single clause or a single sentence of the constitution. So, we very much welcome the news today on progress and holding a new round of the Constitutional Committee. We now urge all sides to participate in good faith at this sixth round of the drafting group in October. And we call on the Assad regime to stop stalling the process and meaningfully participate.
>
> Madam President, in conclusion, there is only one way forward for peace and stability in Syria, and that's a peaceful resolution to the conflict and an end to this war. It is time for the Assad regime and all parties involved to come to the table, follow the path that has been laid out in Resolution 2254, and put an end to the Syrian conflict once and for all.

On December 20, 2021, Ambassador Mills delivered remarks at a UN Security Council briefing on the political and humanitarian situation in Syria, available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-political-and-humanitarian-situation-in-syria/, focusing mainly on humanitarian assistance, but also conveying the following:

> Ultimately, however, humanitarian aid merely treats the symptoms of Syrians' suffering – not the cause. We support the Syrian people and their efforts to live in dignity. We continue to call for a nationwide ceasefire. The only path towards a sustainable, peaceful future for the Syrian people is an end of the conflict as laid out in our Resolution 2254. We urge the Assad regime to seriously pursue the avenues towards peace that Special Envoy Pedersen, has laid out, including through the Constitutional Committee.
>
> Mr. President, confirming the whereabouts of the tens of thousands of missing Syrians and securing the release of those arbitrarily detained will remain a priority for the United States. Seeking accountability and justice is critical to build confidence in the broader political process, as called for in Resolution 2254.

Without this accountability, the Syrian people will never experience a stable, just, and enduring peace.

3. Armenia and Azerbaijan and Nagorno-Karabakh

On May 27, 2021, the State Department issued a press statement on the detention of Armenian soldiers by Azerbaijan. The press statement follows and is available at https://www.state.gov/detention-of-armenian-soldiers/.

> The United States is concerned by recent developments along the international border between Armenia and Azerbaijan, including the detention of several Armenian soldiers by Azerbaijani forces. We call on both sides to urgently and peacefully resolve this incident. We also continue to call on Azerbaijan to release immediately all prisoners of war and other detainees, and we remind Azerbaijan of its obligations under international humanitarian law to treat all detainees humanely.
>
> The United States considers any movements along the non-demarcated areas of the international border between Armenia and Azerbaijan to be provocative and unnecessary. We reject the use of force to demarcate the border and call on both sides to return to their previous positions and to cease military fortification of the non-demarcated border and the emplacement of landmines. Specifically, we call on Azerbaijan to relocate its forces to the positions they held on May 11. We also call on Armenia to relocate its forces to the positions they held on May 11, and welcome statements of intent to this effect. These actions will de-escalate tensions and create space for a peaceful negotiation process to demarcate the border on an urgent basis. The United States is prepared to assist these efforts.
>
> The United States urges the sides to return as soon as possible to substantive negotiations under the auspices of the OSCE Minsk Group Co-Chairs to achieve a long-term political settlement to the Nagorno-Karabakh conflict.

On November 16, 2021, Secretary Blinken issued a press statement, available at https://www.state.gov/fighting-between-armenia-and-azerbaijan/, on the fighting between Armenia and Azerbaijan. He stated:

> The United States is deeply concerned about reports of intensive fighting today between Armenia and Azerbaijan. We urge both sides to take immediate concrete steps to reduce tensions and avoid further escalation. We also call on the sides to engage directly and constructively to resolve all outstanding issues, including border demarcation.
>
> As noted in the Minsk Group Co-Chairs' statement on November 15, the recent increase in tension between Armenia and Azerbaijan underscores the

need for a negotiated, comprehensive, and sustainable settlement of all remaining issues related to or resulting from the Nagorno-Karabakh conflict.

4. Sudan

On October 3, 2021, the State Department issued as a media note, available at https://www.state.gov/troika-statement-on-the-anniversary-of-the-juba-peace-agreement/, the joint statement of the United States, United Kingdom, and Norway (the Troika) on the anniversary of the Juba Peace Agreement. The joint statement follows.

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The United States, the United Kingdom, and Norway (the Troika) commend the Sudanese people as they celebrate the first anniversary of the signing of Juba Peace Agreement (JPA) on October 3, 2020. This historic agreement responds to the Sudanese people's calls for freedom, peace, and justice, especially from those affected by conflict across Sudan. We commend the JPA signatories for upholding their partnership and urge the parties to recommit to fully implement the agreement.

The Troika applauds the strides made toward transitional justice including the government's cooperation with the International Criminal Court (ICC). We welcome the Cabinet's stated commitment to hand over former President Omar al-Bashir and the other former officials subject to international arrest warrants, and we urge the government to move quickly on this commitment and to make progress on establishing the Special Court for Darfur. Due legal process will help give justice to victims and support the process for reconciliation.

We are, however, deeply concerned by delays implementing commitments made one year ago. This includes in establishing the Peace Commission, Monitoring and Evaluation Mechanism, the Transitional Legislative Assembly, and establishing the Darfur Security Keeping Forces and JPA security arrangements. Progress is needed now. We urge all JPA signatories to demonstrate leadership and work together to refocus on implementation to deliver much needed peace and security for the people. Special efforts should be made to meet the ambitious goals set in the Constitutional Declaration and JPA for the involvement of women.

The Troika is disappointed with the lack of momentum in peace negotiations with the SPLM-N-Abdelaziz Alhilu. We urge Chairman Alhilu and the Government of Sudan to return to Juba and negotiate on the basis of the March 2021 Declaration of Principles. Lastly, the Troika notes with concern the growing unrest in Eastern Sudan and condemns all actions that threaten Sudan's stability and economy. We encourage the government and all Eastern parties to engage in dialogue to address legitimate grievances on the basis of the Constitutional Declaration and the JPA.

The Troika remains committed to supporting the Government of Sudan and the JPA parties to deliver their vision for lasting peace as part of the democratic transition agreed in 2019.

Sustainable peace will require dedicated Sudanese-led efforts to implement the JPA in a timely manner so all can benefit from equitable development, a new constitution, equal citizenship, and the opportunity to choose a democratically elected government. The Troika

looks forward to continuing our support to the parties and all Sudanese in the realization of a lasting peace.

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5. Yemen

On February 7, 2021, the State Department issued a press release on Houthi attacks impacting civilians in Yemen. The press release, available at https://www.state.gov/houthi-attacks-impacting-civilians/, states:

> As the President is taking steps to end the war in Yemen and Saudi Arabia has endorsed a negotiated settlement, the United States is deeply troubled by continued Houthi attacks. We call on the Houthis to immediately cease attacks impacting civilian areas inside Saudi Arabia and to halt any new military offensives inside Yemen, which only bring more suffering to the Yemeni people. We urge the Houthis to refrain from destabilizing actions and demonstrate their commitment to constructively engage in UN Special Envoy Griffiths' efforts to achieve peace. The time is now to find an end to this conflict.

On March 11, 2021, the governments of France, Germany, Italy, the United Kingdom, and the United States of America released a joint statement on Houthi attacks in Yemen. The joint statement follows and is available as a State Department media note at https://www.state.gov/joint-statement-of-the-governments-of-france-germany-italy-the-united-kingdom-and-the-united-states-of-america-on-houthi-attacks/.

> We, the governments of France, Germany, Italy, the United Kingdom, and the United States of America, condemn the sustained Houthi offensive on the Yemeni city of Ma'rib and the major escalation of attacks the Houthis have conducted and claimed against Saudi Arabia. Their determined attack on Ma'rib is worsening an already dire humanitarian crisis.
>
> Our renewed diplomatic efforts to end the Yemen conflict, in support of the UN Special Envoy, with the support of Saudi Arabia, Oman, and the international community, offer the best hope for ending this war. We urge the Houthis to seize this opportunity for peace and end the ongoing escalation.
>
> We reiterate our firm commitment to the security and integrity of Saudi territory, and to restoring stability and calm along the Saudi/Yemeni border. We reaffirm our strong support for a swift resolution of the Yemeni conflict, which will bring much-needed stability to the region and immediate benefit to the people of Yemen.

6. Ethiopia

For statements regarding atrocities in northern Ethiopia, see section C.5, *infra*.

On June 29, 2021, the State Department issued a press statement calling on all parties to commit to an "immediate, indefinite, negotiated ceasefire" in Ethiopia, after the Government of Ethiopia announced a unilateral ceasefire in the Tigray region on June 28. The press statement is available at https://www.state.gov/ceasefire-in-ethiopias-tigray-region/, and includes the following:

> We urge all parties to adhere strictly to international humanitarian law and commit to unhindered humanitarian access and independent mechanisms for accountability for human rights violations and abuses. We continue to call for the immediate, verifiable withdrawal of all Eritrean forces from Ethiopian territory, a necessary step for an effective, sustainable ceasefire and in accordance with the Ethiopian government's March commitment to do so.

On November 4, 2021, Secretary Blinken issued a statement on the urgent need to end the conflict in Ethiopia. His statement, available at https://www.state.gov/the-urgent-need-to-end-the-conflict-in-ethiopia/, includes the following:

> As the conflict in Ethiopia marks a full year, Ethiopian leaders – both inside and outside government and from across the country – face an urgent need to act immediately and alleviate the suffering of the Ethiopian people. The United States reiterates our deep concern about the risk of intercommunal violence aggravated by bellicose rhetoric on all sides of the conflict, especially on social media. Inflammatory language fuels the flames of this conflict, pushing a peaceful resolution ever further away. We are also concerned about reports of arbitrary detentions based on ethnicity in Addis Ababa.
>
> With the safety and security of millions in the balance, and more than 900,000 facing conflict-induced famine-like conditions, we prevail upon all forces to lay down their arms and open dialogue to maintain the unity and integrity of the Ethiopian state. We call on the Government of Ethiopia to halt its military campaign, including air strikes in population centers in Tigray and mobilization of ethnic militias. We call on the Government of Eritrea to remove its troop from Ethiopia. We call on the forces of the Tigray People's Liberation Front (TPLF) and the Oromo Liberation Army (OLA) to immediately stop the current advance towards Addis Ababa. All parties must also allow and facilitate humanitarian access so that life-saving assistance can reach people in need. We urge all parties to open ceasefire negotiations without preconditions to find a sustainable path towards peace. The international community stands ready to assist the Ethiopian people to end this conflict now.

C. CONFLICT AVOIDANCE AND ATROCITIES PREVENTION

1. Congressional Report under the Elie Wiesel Genocide and Atrocities Prevention Act

On July 12, 2021, Secretary Blinken announced that the 2021 annual report under the Elie Wiesel Genocide and Atrocities Prevention Act of 2018, Pub. L. No. 115-441, Section 5 ("the Elie Wiesel Act") had been submitted to Congress. The 2021 report is the third annual report to be submitted under the Elie Wiesel Act, which requires an update on the U.S. government's efforts to prevent and respond to atrocities based on a global assessment of ongoing atrocities and countries at risk of atrocities. See notice to the press, available at https://www.state.gov/secretary-blinken-to-release-the-2021-congressional-report-pursuant-to-the-elie-wiesel-genocide-and-atrocities-prevention-act/. Secretary Blinken's remarks to the press on the report's release are available at https://www.state.gov/secretary-antony-j-blinken-remarks-to-the-press-on-release-of-the-2021-congressional-report-pursuant-to-the-elie-wiesel-genocide-and-atrocities-prevention-act/ and excerpted below. As discussed in *Digest 2019* at 588, the Elie Wiesel Act took effect in January 2019.

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Elie Wiesel said that the opposite of love isn't hate. It's indifference.

The report that we release today represents a stand against indifference and a commitment to do more to prevent and respond to atrocities, including genocide, crimes against humanity, and war crimes.

It's fitting that we're meeting today. Yesterday was the 26th anniversary of the genocide at Srebenica, when more than 8,000 Bosniak Muslim boys and men were slaughtered. The American people join the people of Bosnia and Herzegovina in solemn remembrance of those victims and in solidarity with their families. We're reminded of how important it is to do all we can to prevent atrocities like this from ever occurring.

I want to thank Assistant Secretary Rob Faucher and the entire Conflict and Stabilization Operations team for leading the effort to produce this report, as well as the members of the interagency Atrocity Early Warning Task Force, led by the White House, and the hundreds of American diplomats around the world whose reporting, insights, and efforts are reflected here.

Let me just take a moment to put this report in context.

Over the past decade and a half, the United States has steadily and systematically increased our efforts to stop mass atrocities.

In 2008, a bipartisan Genocide Prevention Task Force, chaired by former Secretary of State Madeleine Albright and former Secretary of Defense Bill Cohen, produced a blueprint for U.S. policymakers, with 34 recommendations for how to identify and avert genocide.

In 2011, President Obama issued a presidential study directive on mass atrocities, writing, and I quote, "Preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States."

To deliver on that core interest, we created the Atrocities Prevention Board at the NSC – it's now called the Atrocity Early Warning Task Force – and soon after, the Bureau of Conflict and Stabilization Operations here at the State Department.

And in 2018, Congress passed the Elie Wiesel Genocide and Atrocities Prevention Act.

It codified atrocity prevention as an American priority.

It directed the United States Government to enhance its capacity to prevent, mitigate, and respond to atrocities.

It required the State Department to provide additional training to our teams in Washington and around the world on how to spot warning signs of potential atrocities and early prevention steps to take.

And it mandated the annual report that we're releasing today.

All this work – under both Democratic and Republican presidents, with bipartisan support from Congress – reflects our hope that, with the right tools, resources, and commitment, we can ward off atrocities before they lead to mass human suffering.

We want to change the story that we've seen play out too many times – that by the time senior policymakers are fully engaged, many people have died, the costs of taking action have risen, opportunities for early intervention have been missed.

I say all this with humility, as someone who has served in senior levels of government before, and has been in rooms when we grappled with what to do when political unrest somewhere in the world gave way to mass violence toward civilians.

This is an incredibly difficult challenge. My friend and colleague Samantha Power described it as a "problem from hell." You'll recall her groundbreaking book on the subject. And we haven't cracked it yet. But we continue to believe that it's possible, and that training, preparation, resources, cooperation – within governments and among governments – are key. And so, of course, is determination.

This year, for the first time, the report provides direct, detailed accounts of atrocities taking place in specific countries, including Burma, Ethiopia, China, and Syria. These places represent some of the toughest foreign policy challenges on our agenda, and we'll keep working toward resolutions that reflect our commitment to human rights and democratic values.

We'll use all of the tools at our disposal – including diplomacy, foreign assistance, investigations and fact-finding missions, financial tools and engagements, reports like this one which raise awareness and allow us to generate coordinated international pressure in response – in a whole-of-government approach to preventing and mitigating atrocities around the globe.

At our best, the United States helps bring peace and stability to places where people are suffering. Our work on preventing atrocities represents our highest ideals in action. And the Biden-Harris administration will build upon the work of past administrations to bring us closer to a future in which atrocities are never allowed to happen again.

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Another briefing on the 2021 Elie Wiesel report by Acting Assistant Secretary for Conflict and Stabilization Operations Robert Faucher is available at https://www.state.gov/briefing-with-acting-assistant-secretary-for-conflict-and-stabilization-operations-robert-faucher-on-release-of-the-2021-congressional-report-pursuant-to-the-elie-wiesel-genocide-and-atrocities-p/ and excerpted below.

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This year's report details a few specific country cases where the department has determined or acknowledged that atrocities have occurred in recent years, and thus are at risk of further atrocities.

For example, the report draws attention to Xinjiang, where the People's Republic of China has committed and continues to commit genocide and crimes against humanity, against Uyghurs and members of other ethnic and religious minority groups.

The report draws attention to the heinous acts of sexual violence and gross human rights violations that have been reported in Tigray, Ethiopia, including indiscriminate attacks on civilians, medical personnel, and humanitarian workers.

And the report also calls attention to the brutal crackdown on peaceful protestors and human rights defenders in Burma by a military regime whose leadership includes many individuals responsible for ethnic cleansing against the predominantly Muslim Rohingya, and appalling violence against ethnic and religious minorities.

With the submission of this report, the United States reaffirms that atrocity prevention must remain at the forefront of international peace and security efforts. Atrocity crimes pose some of the gravest threats to the rules-based international order that has helped bring peace and prosperity for more than seven decades. Importantly, this report is about continuous improvement in U.S. efforts to uphold that order by preventing atrocities from occurring.

To carry out this important work, the White House-led Atrocity Early Warning Task Force continues to coordinate a whole-of-government approach to prevent, mitigate, and respond to atrocities.

In the three years since the Elie Wiesel Act became law, we have trained thousands of diplomatic, development, and defense professionals to do the crucial work of prevention. We are innovating by piloting new systems that uses – that use satellite imagery to give early warning of potential violent events to groups on-the-ground. And we have deployed life-saving aid to human rights defenders and civil society leaders threatened by and in danger from repressive regimes.

This report makes clear that the United States will continue to redouble its efforts to prevent, mitigate, and respond to atrocities with more timely and effective actions in coordination with likeminded partners in multilateral fora, such as the International Atrocity Prevention Working Group. We will continue to actively solicit vital input from civil society on atrocity risk analysis, prevention strategies, and methods to address grievances and community recovery.

These steps taken together move us one step closer to "never again."

The United States Government is committed to reducing the risk of future atrocities, and, with persistent determination, create conditions for a more peaceful and prosperous world.

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2. Responsibility to Protect

a. U.S. statement marking anniversary of R2P

On May 11, 2021, Charles Bentley delivered the U.S. statement marking the fifteenth anniversary of the Responsibility to Protect ("R2P"), at a Human Rights Council ("HRC") intersessional panel discussion. His statement is available at https://geneva.usmission.gov/2021/05/11/u-s-statement-marking-the-15th-anniversary-of-the-responsibility-to-protect/ and excerpted below.

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The United States remains deeply committed to preventing, mitigating, and responding to atrocities. Today we reaffirm the international community's commitment made over fifteen years ago at the 2005 World Summit regarding the Responsibility to Protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. We believe that more should be done to improve our responses to early warning signals and coordinated international action *before* atrocities occur.

States that disregard their responsibility to protect their populations represent one of the greatest threats to human rights we face today. Those who attempt to shield their crimes behind a veil of national sovereignty should find no comfort in the Human Rights Council. As the preamble of the Universal Declaration – written in the aftermath of war and unspeakable horror – reads, "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" – a statement that is sadly no less true today than it was 70 years ago when that foundational document was drafted.

The United States has strengthened its preventative capacities through the Elie Wiesel Genocide and Atrocities Prevention Act of 2018. Furthermore, the White House-led Atrocity Early Warning Task Force continues to coordinate a "whole-of-government" approach to bolster the U.S. ability to forecast, prevent, and respond to atrocities.

We recognize that gender-based violence, including conflict-related sexual violence, often accompanies the perpetration of atrocities and can itself be an atrocity crime– and that women and girls are often deliberately targeted. The United States promotes the meaningful participation of women in efforts to prevent atrocities and supports gender-sensitive programming to prevent and respond to all forms of gender-based violence.

When prevention fails, promoting accountability for atrocities is a priority for the United States. Bringing perpetrators to justice can deter those who otherwise might be emboldened to follow in their footsteps and can help advance post-conflict reconciliation.

The United States will continue to work with other governments, international organizations, and civil society organizations in the Human Rights Council to prevent and respond to atrocities.

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b. Joint Statements on R2P

The Group of Friends of the Responsibility to Protect delivered several joint statements at the UN Human Rights Council ("HRC") in 2021. The 46th regular session of the HRC took place in February and March of 2021 ("HRC 46"). See discussion of HRC 46 in Chapter 6 of this Digest. The Group of Friends' February 26, 2021 joint statement, which the United States joined, is excerpted below.

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In many atrocity situations we are currently witnessing around the world, these were preceded by systematic human rights violations and abuses, which are often further facilitated in a world now subject to increasing levels of disinformation, hate speech, and incitement to violence made more prevalent by the impacts of the pandemic. It is therefore essential to address serious violations and abuses at an early stage and prevent situations from escalating. The work of the High Commissioner and her office is essential in this regard, and UN member states can utilize the updates and information produced by OHCHR to identify warning signs of situations at risk, and engage with the concerned country, as well as the wider international community, on effective strategies to protect populations from atrocities. We also recognize the important work being undertaken by the Joint Office on the Prevention of Genocide and Responsibility to Protect.

The adoption of resolution 'The contribution of the Human Rights Council to the prevention of human rights violations' during the 45th session of the HRC is an important milestone and reinforces the prevention role of the High Commissioner for Human Rights and her Office.

The Geneva-based human rights mechanisms – including Special Procedures, the Universal Periodic Review (UPR) and Treaty Bodies – can all also contribute to strengthening atrocity prevention and response. Furthermore, HRC-mandated investigative mechanisms may not only be vital for accountability for past atrocities, but may also have a deterrent effect on the future commission of atrocity crimes. Through the work of these mechanisms, governments can furthermore identify gaps and challenges in their domestic atrocity prevention efforts and develop strategies to strengthen national resilience.

In this regard, we welcome the adoption of the resolution on the "Fifteenth anniversary of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, as enshrined in the World Summit Outcome of 2005" at the 44th session of the HRC and encourage all States to participate in the inter-sessional panel discussion to exchange best practices on strengthening national policies and strategies to implement R2P.

Over the past year, little has changed for populations around the world affected by, or at risk of, atrocities. They look to the HRC to recognize their suffering, prevent further escalation, and act upon the information produced by its mechanisms and procedures. We must become better at utilizing the vast information that is at our hand to respond to early warning signs and prevent atrocities before they occur.

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On June 28, 2021, the Group of Friends delivered a joint statement during the interactive dialogue with the special adviser on the prevention of genocide at the 47th regular session of the HRC ("HRC 47"). See discussion of HRC 47 in Chapter 6 of this Digest. The June 28, 2021 joint statement, which the United States joined, is excerpted below.

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The global COVID-19 pandemic has led to a further increase in stigmatisation, hate speech, xenophobia and intolerance, exacerbating existing vulnerabilities and increasing protection challenges for vulnerable populations around the world. Women and girls are often disproportionately impacted by atrocities, and the international community must integrate a gender lens to preventing and responding to atrocities. More than ever, prioritizing the protection and promotion of human rights remains critical to uphold our shared responsibility to help protect populations from genocide, war crimes, crimes against humanity and ethnic cleansing.

History has taught us that genocide and other atrocities do not occur without warning – rather, they are often preceded by long-standing patterns of human rights violations and abuses, discriminatory policies and practices and the exclusion and targeting of vulnerable groups. It is therefore our belief that genocide and other atrocities are preventable if early warning signs and risk factors are taken seriously and action is taken to address them. The UN human rights system – including the Office of the High Commissioner for Human Rights, Special Procedures, the Universal Periodic Review (UPR), Treaty Bodies and other relevant Geneva-based human rights mechanisms and procedures – can play a particular role in helping governments better understand and identify existing gaps and opportunities to mitigate unique risk factors particular to their country, and to provide necessary recommendations to prevent crises from escalating. At the same time, by investigating past atrocities, identifying root causes and contributing to processes of accountability, HRC investigative mechanisms can play a vital role in contributing to non-recurrence of atrocity crimes.

Although Special Rapporteurs and other Independent Experts are often the first ones to warn of risk factors leading to genocide and other atrocities, the international community is not yet systematically utilizing Special Procedures as a mechanism to identify and address risk factors for atrocities. Furthermore, progress can be made in utilizing the UPR to institutionalize genocide and atrocity prevention by encouraging States to conduct national risk assessments. We encourage States to provide targeted, atrocity prevention-related recommendations to other governments under review; and to ensure that relevant Special Procedures are directed to conduct atrocity risk assessments in accordance with their mandates.

At the national level, the UN human rights system has a unique potential in identifying areas for domestic reform, including protections for women and persons belonging to minorities, legislation against incitement to violence or strengthening atrocity prevention through education curricula that promote diversity, foster social solidarity and acknowledge past atrocities. Governments should utilize the information provided through Geneva-based human rights mechanisms to design holistic, government-wide atrocity prevention strategies and policies to assess and identify national vulnerabilities, strengthen societal resilience and build strong

national mechanisms and institutions to mitigate risk factors and prevent or respond to atrocity risks.

As emphasized in Resolution 43/29, civil society organizations (CSOs) are also instrumental in raising alarm when risk factors emerge. We call on States to systematically work with CSOs, national human rights defenders and national human rights institutions to strengthen domestic prevention policies. Many upstream risk factors for vulnerable populations require addressing cross-cutting issues and integrating policies and programs through systemic change. When states work with communities and non-government actors to generate change, success is more likely.

We strongly encourage the application of the UN Framework of Analysis for Atrocity Crimes by all relevant mechanisms and procedures. We also encourage the Joint Office to update the framework based on best practices and lessons learned since 2014 and to develop additional guidance and tools for member states on atrocity prevention. Active and intensified collaboration with the office of the Special Adviser can help the HRC to better address escalating crises more effectively and discuss options for how to appropriately respond. In this regard we urge the office of the Special Adviser, in line with her mandate, to share its analyses of specific situations and dynamics of atrocity crimes with the wider UN membership and regularly provide the necessary early warning assessments and recommendations on how to prevent atrocities, including to the Human Rights Council.

We would also like to note with appreciation the recently adopted UN General Assembly resolution that put responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity permanently on the General Assembly agenda and requests the Secretary General to report.

In this context, we also welcome the recent discussion on national implementation of R2P and the prevention of genocide and other atrocities in the context of the Intersessional Panel Discussion to mark the 15th anniversary of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, which took place on 11 May. We wish to thank Member States for sharing domestic initiatives to strengthen societal and institutional resilience to atrocities, and for the role of technical assistance and capacity building through the Office of the High Commissioner for Human Rights (OHCHR) and other mechanisms and procedures in strengthening domestic implementation of R2P. We believe that this discussion helped to advance the genocide and atrocity prevention agenda across the UN human rights system.

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On September 16, 2021, the Group of Friends delivered a joint statement in Geneva during the interactive dialogue with the special rapporteur on promotion of truth, justice, reparation, and guarantees of non-recurrence, at the 48th regular session of the HRC ("HRC 48"). See discussion of HRC 48 in Chapter 6 of this Digest. The statement, which the United States joined, is excerpted below.

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As specifically highlighted in the report, the investigation, pursuit, capture, prosecution and punishment of persons responsible for human rights violations and the promotion of truth, justice, reparation and guarantees of non-recurrence are not only central in combatting impunity, but are also essential to preventing the recurrence of atrocity crimes. During an Intersessional Panel Discussion marking the 15th anniversary of the Responsibility to Protect held earlier this year, the UN High Commissioner for Human Rights equally emphasized that "accountability and reparation are both components of non-recurrence" of mass atrocities. As such, these concepts should be considered as part of atrocity prevention efforts. The HRC, through its prevention mandate, can play a vital role in such efforts.

In recent decades, we have witnessed significant achievements in developing and strengthening various types of accountability mechanisms and procedures – including through international tribunals, Special Courts, and hybrid mechanisms. As outlined by the Special Rapporteur, this contributed to important justice processes for atrocity crimes committed in various countries. At the same time, a multitude of domestic accountability processes and national proceedings in countries from all regions underline important progress achieved in combatting impunity.

Unfortunately, as emphasized in the report, much remains to be done to ensure justice for all victims and accountability for all perpetrators, wherever atrocity crimes are occurring. Today, impunity for those currently committing crimes remains rampant. Failure to close the impunity gap contributes to the recurrence of new violations and abuses and emboldens those responsible for atrocities to continue to commit or recommit genocide, war crimes, crimes against humanity, or ethnic cleansing.

At the same time, a victim-centred approach to accountability goes beyond judicial proceedings and criminal prosecutions, and focuses on fostering reconciliation, societal healing and access to the truth. Justice, truth, reparations, and guarantees of non-repetition are critical to such an approach. The implementation of such an approach should be localized. Local actors need to be empowered to find their own solutions. We also wish to emphasize the importance of the systematic inclusion of a gender lens to international and domestic accountability efforts for atrocity crimes, both in terms of how crimes are assessed and with regards to who participates in such efforts.

All human rights monitoring mechanisms, including the OHCHR, Special Procedures, Treaty Bodies and international investigative bodies, can play a key role in contributing to dealing holistically with atrocities. By collecting and preserving existing evidence, mapping patterns of violations and sometimes identifying individual perpetrators, Commissions of Inquiry, Fact-Finding Missions and other investigative bodies are instrumental to advancing legal accountability. At the same time, these mechanisms often specifically identify the root causes of atrocity crimes. This helps establish a fact-based historical record and facilitates an understanding of risk factors, which, if unaddressed, may lead to recurrence.

We therefore call on all UN member states actively to utilize the information produced by these bodies to adopt a forward-looking strategy in situations with atrocity risks and take measures to prevent renewed escalation.

The mandate and work of the Special Rapporteur underlines the unique added value of HRC mechanisms and procedures in implementing R2P. We therefore also warmly welcome this year's Intersessional Panel Discussion on R2P at the HRC, which we believe helped to advance the genocide and atrocity prevention agenda across the UN human rights system, including through assisting countries in upholding their R2P.

We wish to commend governments that have undertaken steps to enact domestic legislation criminalizing atrocity crimes in accordance with their obligations under international law and encourage all States to explore avenues to do so.

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On September 30, 2021, the Group of Friends delivered a joint statement during the "General Debate" at HRC 48. The statement, which the United States joined, is excerpted below.

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As patterns of human rights violations and abuses and violations of international humanitarian law often serve as early warning signs of atrocity crimes, human rights bodies and mechanisms play a fundamental role in helping states to uphold their Responsibility to Protect. According to the UN Framework of Analysis for Atrocity Crimes, developed by the Office on Genocide Prevention and the Responsibility to Protect,

"Atrocity crimes in general and genocide in particular are preceded by less widespread or systematic serious violations of international human rights and humanitarian law. These are typically violations of civil and political rights, but they may include also severe restrictions to economic, social and cultural rights, often linked to patterns of discrimination or exclusion of protected groups, populations or individuals."

During today's General Debate, we wish particularly to stress the vital role of Special Procedures in assisting States and other stakeholders in the prevention of human rights violations and abuses, and therefore to the prevention of genocide, war crimes, crimes against humanity and ethnic cleansing, as was recently highlighted in the Report of the High Commissioner for Human Rights on the role of Special Procedures (A/HRC/48/21).

Special Procedures are indispensable in informing the Human Rights Council (HRC) and its members and observers on both country-specific and thematic situations which require attention and engagement. As outlined in report 48/21, Special Rapporteurs not only perform important public monitoring and reporting functions, but may also facilitate early action through country visits, consultations with various national stakeholders and issuing statements of concern. As such, they are essential in mobilizing concerned states, as well as the wider international community, about necessary action to prevent situations from escalating.

In recent years, we have seen various Special Procedure mandate holders make direct and concrete linkages between their unique mandates and the prevention of atrocity crimes. In his 2019 report (A/74/243), the Special Rapporteur on the right to education specifically focused on the connection between education and the prevention of atrocity crimes or grave human rights violations. Recommendations included guidance on how the education system can contribute to addressing hate speech and intolerance, both of which may constitute enabling factors to creating an environment conducive to atrocities. The Special Rapporteur also highlighted the role education can play in fostering knowledge and understanding of past atrocity crimes as a preventive tool. Mandate holders such as the Special Rapporteur in the field of cultural rights or the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-

recurrence have equally highlighted the role of their mandates in preventing (recurrence) of atrocity crimes.

Special Procedures can make pivotal contribution to enhance our understanding of the connection between atrocity prevention and various unique thematic mandates; Special Procedures may contribute to raising the alarm in situations of imminent risk, but also provide guidance and recommendations to all states to strengthen their national atrocity prevention capacities.

In addition, country-specific mandate holders often point us to unique warning signs within countries which may be at particular risk of atrocity crimes. In the past, Special Rapporteurs were often the first to warn of risk factors of situations which later escalated into atrocities. For example, report 48/21 specifically highlights that "In 1994 in Rwanda, the Special Rapporteur on extrajudicial, summary or arbitrary executions forewarned of a potential genocide."

While Special Procedures regularly focus on or address the role of prevention in their reporting and documentation, the gap between early warning and early action persists. The problem is often not the availability of or access to information but how best to ensure appropriate and timely attention to the issues raised by mandate holders.

To help close this gap, and in line with the recommendations of the report, we wish to encourage UN member states to:

1) Actively and fully cooperate with Special Procedures, including by issuing standing invitations and allowing visits, where applicable;

2) Ensure that the establishment and renewal of mandates for Special Procedures include, where appropriate, a specific reference to the prevention of and early warning for atrocity crimes, in line with their mandate;

3) Implement recommendations by Special Procedures to strengthen national atrocity prevention capacities, including, where applicable, by creating national mechanisms for preventing atrocity crimes and by appointing or strengthening a national Focal Point on R2P;

4) Explore avenues to ensure greater information sharing and coordination among different mandate holders;

5) Ensure mandate holders have access to brief and share information with various UN mechanisms, including the Security Council, General Assembly and UPR, as well as Treaty Bodies;

6) Work with the Office of the High Commissioner to strengthen its capacity to effectively support Special Procedures mandates in terms of prevention and early warning for atrocity crimes.

While Special Procedures provide us with unique, precise and action-oriented information to prevent atrocity crimes, we must become better at utilizing this information to uphold our individual and collective Responsibility to Protect.

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3. Atrocities in Burma

On November 26, 2021, the governments of Australia, Canada, New Zealand, Norway, the Republic of Korea, the United Kingdom and the United States issued a joint statement on increasing violence in Myanmar. The joint statement appears below, and

as a State Department media note at https://www.state.gov/joint-statement-on-increasing-violence-in-myanmar/.

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We reiterate our grave concern over reports of ongoing human rights violations and abuses by the Myanmar Security Forces across the country, including credible reports of sexual violence and torture, especially in Chin State, Sagaing Region and Magwe Region. In Chin State, it is reported the military has burned homes, churches and an orphanage in Thantlang village, and has targeted humanitarian organizations. More than 40,000 people are reported to have been displaced in Chin State and 11,000 in Magwe Region as a result of recent violence. Reports of internet shutdowns and other methods of communication in Chin State and other areas of the country are also troubling. Communities impacted by violence need access to information to keep themselves safe. We are concerned about allegations of weapons stockpiling and attacks by the military, including shelling and airstrikes, use of heavy weapons, and the deployment of thousands of troops accompanying what security forces assert are counter-terrorism operations, which are disproportionately impacting civilians. We also note our increasing concern at armed clashes in Rakhine State in early November.

The current situation and reports by the UN Special Rapporteur on the Situation of Human Rights in Myanmar raise acute concerns about the risks of future violence and atrocities across Myanmar, and what the international community can and should be doing to prevent such atrocities.

We welcome the Press Statement by the UN Security Council on 10 November, which called for the immediate cessation of violence, protection of civilians, and full, safe and unhindered humanitarian access. We call for the respect of human rights and the immediate cessation of all human rights violations and abuses, and violence against civilian populations. To that end, we call on the international community to suspend all operational support to the military, and to cease the transfer of arms, materiel, dual-use equipment, and technical assistance to the military and its representatives. We encourage the international community to work together to prevent future atrocities in Myanmar, including by supporting justice and accountability for those responsible for atrocities.

The situation in Myanmar has an impact on regional security. We reiterate our support for the ASEAN Five Point Consensus, noting in particular the call for a cessation of violence and for genuine engagement with ASEAN`s Special Envoy in leading inclusive dialogues aimed at peace.

Recalling the horrific violence perpetrated against Rohingya in Rakhine State in 2017, we call on Myanmar Security Forces to immediately end the violence being perpetrated across the country. We will continue to work closely with ASEAN, the UN and the wider international community to promote accountability and support a lasting resolution to the current crisis and a return to the path of democracy.

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4. Atrocities in Xinjiang

Ambassador Linda Thomas-Greenfield delivered remarks at a high-level virtual event co-hosted by the United States on the situation in Xinjiang on May 12, 2021. The Ambassador's remarks are excerpted below and available at https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-a-high-level-virtual-event-co-hosted-by-the-united-states-on-the-situation-in-xinjiang/.

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In Xinjiang, people are being tortured. Women are being forcibly sterilized. There are incredible reports, and credible reports, that many Uyghur people and other ethnic and religious minorities – who only wish to practice basic freedoms of religion, belief, expression, and movement – are being forced to work until they drop, manufacturing clothes and goods at the behest of the state. The New York Times reported that the goal is to – as one official put it – "break their lineage, break their roots, break their connections, and break their origins." Rayhan reminded me that this violence doesn't just dehumanize the people it's inflicted upon – it also dehumanizes anyone who stands by and let it happen.

The Universal Declaration of Human Rights begins with the word "universal" for a reason. Indeed, the foundational unit of the United Nations – from the first sentence of the Charter – is not just the nation state. It is also the human being. Today, we have heard – and will continue to hear – how the rights of Uyghurs and other ethnic minorities in Xinjiang are being abused and violated to the extreme. The victims of these abuses aren't just victims. They are heroes, whose strength and bravery should serve as an example to all.

We will keep standing up and speaking out until China's government stops its crimes against humanity and the genocide of Uyghurs and other minorities in Xinjiang. And we will keep working in concert with our allies and our partners until China's government respects the universal human rights of all its people.

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5. Atrocities in Northern Ethiopia

On February 27, 2021, Secretary Blinken issued the following statement, available at https://www.state.gov/atrocities-in-ethiopias-tigray-region/, expressing grave concern about reported atrocities in the Tigray region of Ethiopia. See also June 23, 2021 State Department press statement condemning an air strike on a village market in Tigray, available at https://www.state.gov/air-strike-on-village-market-in-tigray/; June 25, 2021 press statement on the killing of Doctors Without Borders staff in Tigray, available at https://www.state.gov/killing-of-doctors-without-borders-staff-in-tigray/.

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The United States is gravely concerned by reported atrocities and the overall deteriorating situation in the Tigray region of Ethiopia. We strongly condemn the killings, forced removals and displacements, sexual assaults, and other extremely serious human rights violations and abuses by several parties that multiple organizations have reported in Tigray. We are also deeply concerned by the worsening humanitarian crisis. The United States has repeatedly engaged the Ethiopian government on the importance of ending the violence, ensuring unhindered humanitarian access to Tigray, and allowing a full, independent, international investigation into all reports of human rights violations, abuses, and atrocities. Those responsible for them must be held accountable.

The United States acknowledges the February 26 statements from the Ethiopian Office of the Prime Minister and the Ministry of Foreign Affairs promising unhindered humanitarian access, welcoming international support for investigations into human rights violations and abuses, and committing to full accountability. The international community needs to work collectively to ensure that these commitments are realized.

The immediate withdrawal of Eritrean forces and Amhara regional forces from Tigray are essential first steps. They should be accompanied by unilateral declarations of cessation of hostilities by all parties to the conflict and a commitment to permit unhindered delivery of assistance to those in Tigray. The United States is committed to working with the international community to achieve these goals. To that end, USAID will deploy a Disaster Assistance Response Team to Ethiopia to continue delivering life-saving assistance.

We ask international partners, especially the African Union and regional partners, to work with us to address the crisis in Tigray, including through action at the UN and other relevant bodies.

The United States remains committed to building an enduring partnership with the Ethiopian people.

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The State Department issued another statement on September 10, 2021 expressing grave concern about the "ongoing conflict in multiple regions of Ethiopia," including "[r]eports of continued human rights abuses and atrocities by the Ethiopian National Defense Forces, the Eritrean Defense Forces, Amhara regional and irregular forces, the TPLF and other armed groups…" Press statement, available at https://www.state.gov/ongoing-conflict-and-human-rights-abuses-in-northern-ethiopia/.

The governments of Australia, Canada, Denmark, the Netherlands, the United Kingdom, and the United States issued a joint statement on December 6, 2021, condemning acts in Ethiopia as "likely constitut[ing] violations of international law." The joint statement appears below and as a State Department media note at https://www.state.gov/joint-statement-on-detentions-in-ethiopia/.

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We … are profoundly concerned by recent reports of the Ethiopian government's detention of large numbers of Ethiopian citizens on the basis of their ethnicity and without charge. The Ethiopian government's announcement of a State of Emergency on November 2 is no justification for the mass detention of individuals from certain ethnic groups.

Reports by the Ethiopian Human Rights Commission (EHRC) and Amnesty International describe widespread arrests of ethnic Tigrayans, including Orthodox priests, older people, and mothers with children. Individuals are being arrested and detained without charges or a court hearing and are reportedly being held in inhumane conditions. Many of these acts likely constitute violations of international law and must cease immediately. We urge unhindered and timely access by international monitors.

We reiterate our grave concern at the human rights abuses and violations, such as those involving conflict related sexual violence, identified in the joint investigation report by the Office of the United Nations High Commissioner for Human Rights and the EHRC, and at ongoing reports of atrocities being committed by all parties to the conflicts. All parties must comply with their obligations under international humanitarian law, including those regarding the protection of civilians and humanitarian and medical personnel.

It is clear that there is no military solution to this conflict, and we denounce any and all violence against civilians, past, present and future. All armed actors should cease fighting and the Eritrean Defense Forces should withdraw from Ethiopia. We reiterate our call for all parties to seize the opportunity to negotiate a sustainable ceasefire without preconditions. Fundamentally, Ethiopians must build an inclusive political process and national consensus through political and legal means, and all those responsible for violations and abuses of human rights must be held accountable.

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The State Department issued another statement expressing grave concern about "new reports alleging egregious human rights abuses, atrocities, and destruction of civilian infrastructure by Tigrayan forces in the Amhara and Afar regions of Ethiopia." See December 12, 2021 press statement, available at https://www.state.gov/reports-of-human-rights-abuses-atrocities-and-destruction-in-amhara-and-afar-regions/.

The State Department issued a further statement on December 17, 2021, expressing concern about "unconfirmed new reports alleging mass detentions, killings, and forced expulsions of ethnic Tigrayans in western Tigray by Amhara security forces." Press statement, available at https://www.state.gov/reports-of-mass-detentions-killings-and-forced-expulsions-in-western-tigray/.

6. Statement by the President on Armenian Genocide

On April 24, 2021, President Biden issued the following statement, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/24/statement-by-president-joe-biden-on-armenian-remembrance-day/.

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Each year on this day, we remember the lives of all those who died in the Ottoman-era Armenian genocide and recommit ourselves to preventing such an atrocity from ever again occurring. Beginning on April 24, 1915, with the arrest of Armenian intellectuals and community leaders in Constantinople by Ottoman authorities, one and a half million Armenians were deported, massacred, or marched to their deaths in a campaign of extermination. We honor the victims of the Meds Yeghern so that the horrors of what happened are never lost to history. And we remember so that we remain ever-vigilant against the corrosive influence of hate in all its forms.

Of those who survived, most were forced to find new homes and new lives around the world, including in the United States. With strength and resilience, the Armenian people survived and rebuilt their community. Over the decades Armenian immigrants have enriched the United States in countless ways, but they have never forgotten the tragic history that brought so many of their ancestors to our shores. We honor their story. We see that pain. We affirm the history. We do this not to cast blame but to ensure that what happened is never repeated.

Today, as we mourn what was lost, let us also turn our eyes to the future—toward the world that we wish to build for our children. A world unstained by the daily evils of bigotry and intolerance, where human rights are respected, and where all people are able to pursue their lives in dignity and security. Let us renew our shared resolve to prevent future atrocities from occurring anywhere in the world. And let us pursue healing and reconciliation for all the people of the world.

The American people honor all those Armenians who perished in the genocide that began 106 years ago today.

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Cross References

Afghan Special Immigrant Visa program, **Ch. 1.B.5.e**
Afghanistan refugee program, **Ch. 1.C.5**
Relocation and evacuation operations in Afghanistan, **Ch. 2.A.2**
Crimes against humanity, **Ch. 3.C.1**
International tribunals and other accountability mechanisms, **Ch. 3.C**
ICC investigation into the Palestinian situation, **Ch. 3.C.2.d**
ICC and Libya, **Ch. 3.C.2.e**
ICC and Sudan, **Ch. 3.C.2.f**
The International, Impartial, and Independent Mechanism ("IIIM") for Syria, **Ch. 3.C.4.b**
Promoting Security and Justice for Victims of Terrorism Act, **Ch. 5.A.3**
UN 3C general statement on IHL, **Ch. 6.A.4.a**
HRC 46th session, **Ch. 6.A.5.b**
HRC on Ethiopia, **Ch. 6.A.6.a**
HRC on Afghanistan, **Ch. 6.A.6.b**
HRC on Burma, **Ch. 6.A.6.c**
HRC on Sudan, **Ch. 6.A.6.d**
Joint statement on the situation of women and girls in Afghanistan, **Ch. 6.B.2.c**
ILC Draft Articles on Crimes Against Humanity, **Ch. 7.C.2**
Burma, **Ch. 9.A.7**
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Ukraine, **Ch. 9.B.1**
Israel, **Ch. 9.B.6**
Request for import restrictions on cultural property of Afghanistan, **Ch. 14.A.7**
Burma sanctions, **Ch. 16.A.6**
Libya sanctions, **Ch. 16.A.13.m**
Afghanistan, **Ch. 18.A.2**
Chemical weapons in Syria, **Ch. 19.D.1**

CHAPTER 18

Use of Force

A. GENERAL

1. Proposal to Repeal 2002 Authorization for the Use of Military Force ("AUMF")

On August 3, 2021, Acting Legal Adviser Richard C. Visek testified at a Senate Foreign Relations Committee hearing on the possible repeal of the 2002 AUMF. Mr. Visek's testimony follows and is available at https://www.foreign.senate.gov/hearings/authorizations-of-use-of-force-administration-perspectives-080321.

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Thank you very much, Mr. Chairman and Members of the Committee, for inviting me to address the Administration's support for a proposal to repeal the 2002 AUMF. I'm pleased to have the opportunity to be here.

The preamble to the 2002 AUMF speaks to the threats that the United States was facing from Iraq in 2002 and that the authorization was drafted to address. At that time, Saddam Hussein's regime had demonstrated a continuing threat to the national security of the United States and international peace and security. It was threatening the lives of Americans; flouting its obligations under UN Security Council resolutions; brutally oppressing its own people; threatening its regional neighbors; and posing a danger to international peace and stability. Just months after the 2002 AUMF was enacted, the UN Security Council recognized a military occupation of Iraq by the United States and the United Kingdom to promote the welfare of the Iraqi people, restore security, and support the formation of a new representative government for the Iraqi people. The 2002 AUMF authorized the United States to use necessary force to defend the United States national security from the continuing threat posed by Iraq, and to enforce all relevant United Nations Security Council resolutions regarding Iraq.

Today, the circumstances in Iraq have changed dramatically.. The Iraqi government seeks friendship, partnership, and cooperation with the United States and the international community. The threats posed by ISIS and destabilizing Iranian activities, including Iran-backed militia groups in Iraq, are serious and real, but they are not the threats that the 2002 AUMF was designed to address nearly 20 years ago.

As a result, the Biden-Harris Administration supports the repeal of the 2002 AUMF. Repeal of the 2002 AUMF is aligned with the President's commitments to continuing a strong relationship with our Iraqi partners, and to working with Congress to ensure that outdated authorizations for the use of military force are replaced with a narrow and specific framework that will ensure that we can continue to protect Americans from terrorist threats. As part of efforts to work with Congress on repealing and replacing outdated authorizations of military force, we want to ensure that Congress has a clear and thorough understanding of the effect of any such action. I am here today as part of that effort.

The President has also stated that, in any effort to reform existing AUMFs, it will be critical to maintain authority to address threats to the United States with appropriately decisive and effective military action. To be clear, we do not believe that repeal of the 2002 AUMF will impede our ability to do so. The United States has no ongoing military activities that rely solely on the 2002 AUMF as a domestic legal basis, and repeal of the 2002 AUMF would likely have minimal impact on current counterterrorism operations. At least for the last six years, the U.S. Government has at most referred to the 2002 AUMF as an "additional authority," alongside the 2001 AUMF and, at times, the President's Article II authority, underpinning ongoing counterterrorism operations against ISIS in Iraq and Syria. It is not the sole—or even primary—authority for any of those ongoing operations.

U.S. forces remain in Iraq at the invitation of the Iraqi government in a training, advising, assisting, and intelligence sharing role in support of our Iraqi Security Forces partners in their fight against the continuing threat that ISIS poses in Iraq and Syria. We continue to seek a stable, prosperous, and democratic Iraq.

Although this mission remains essential, we do not believe that the 2002 AUMF is necessary in order to execute that mission or to protect and defend our forces while doing so.

A separate statute, the 2001 AUMF, authorizes the counterterrorism mission being carried out by U.S. forces in Iraq and Syria against ISIS and al-Qa'ida to address the threat those groups continue to pose to the United States. As we have previously briefed this committee, the 2001 AUMF also authorizes U.S. forces to use necessary and appropriate force to defend U.S. or partner forces against threats and attacks as they pursue missions authorized under the AUMF.

In addition, Article II of the Constitution empowers the President to direct certain military action when it serves important national interests, including protecting and defending U.S. personnel and facilities, and when such action would not result in a "war" in the Constitutional sense. The legal and historical foundation of this Constitutional authority to protect the national security interests of the United States is extensive and has been recognized over more than two centuries, across Presidential administrations.

Some members of this Committee have pointed out that Iran's destabilizing activities in Iraq undermine U.S. objectives in Iraq and continue to pose a threat to the national security interests of the United States. We agree. Iran-backed militia groups have engaged in UAV and rocket attacks against U.S. forces and facilities in Iraq that have escalated in recent months. Although we seek to de-escalate and avoid conflict with Iran or Iranian-backed militia groups, the President has made clear that we will take necessary and proportionate action in self-defense to protect U.S. personnel and facilities in Iraq from attacks.

This is evidenced by the military action that U.S. forces have taken to protect and defend our personnel and our partners against attacks from these actors, and to deter future attacks. The President did not rely on the 2002 AUMF in directing any of these recent actions. In particular, on June 27, the President directed targeted strikes against facilities at two locations in Syria and

one location in Iraq near the Iraq-Syria border. These facilities were used by Iran-backed militia groups that have been involved in a series of UAV and rocket attacks against U.S. personnel and facilities in Iraq. The strikes were a necessary and proportionate action to defend our personnel against these attacks and the threat of further attacks, and the operation was consistent with both domestic and international law.

In sum, at the present time, we believe we have sufficient authority to continue the vital counter-ISIS mission in Iraq and Syria and to address any threats to U.S. personnel or the United States that might arise in Iraq, without relying on the 2002 AUMF.

We recognize that there is always a risk that tensions with Iran and Iranian-supported militia groups could further escalate and require a more sustained military response than the discrete, episodic individual strikes to date.

If we are faced with that scenario, and if it becomes clear that other legal authorities are insufficient to address such an escalation, the Biden Administration believes that it would be important for the Congress and the Administration to work together to develop an appropriate new domestic authority that is tailored to addressing such a scenario.

Thank you.

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2. Afghanistan

On April 14, 2021, President Biden delivered remarks, announcing that, "in keeping with [the U.S.-Taliban Agreement] and with our national interests, the United States will begin our final [military] withdrawal [from Afghanistan] … on May 1 of this year." See Chapter 17 for discussion of the U.S.-Taliban Agreement; see also *Digest 2020* at 636-48. The April 14, 2021 speech is available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/14/remarks-by-president-biden-on-the-way-forward-in-afghanistan/.

The President spoke on Afghanistan again on July 30, 2021, announcing the arrival of the first flights to the United States under Operation Allies Refuge, carrying Afghans eligible for special immigrant visas ("SIVs") and their families. See Chapter 1 for further discussion of SIVs. The July 30 speech is available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/30/statement-of-president-joe-biden-on-the-arrival-of-the-first-flight-of-operation-allies-refuge/.

On August 16, 2021, the President announced additional troop deployments to facilitate evacuation efforts after the Taliban arrived in Kabul. See Chapter 2 for further discussion of U.S. relocation and evacuation operations. The August 16 speech is available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/16/remarks-by-president-biden-on-afghanistan/. Excerpts below elaborate on how the national interest in countering terrorism has changed over the 20 years of U.S. presence in Afghanistan.

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Our only vital national interest in Afghanistan remains today what it has always been: preventing a terrorist attack on American homeland.

I've argued for many years that our mission should be narrowly focused on counterterrorism — not counterinsurgency or nation building. That's why I opposed the surge when it was proposed in 2009 when I was Vice President.

And that's why, as President, I am adamant that we focus on the threats we face today in 2021 — not yesterday's threats.

Today, the terrorist threat has metastasized well beyond Afghanistan: al Shabaab in Somalia, al Qaeda in the Arabian Peninsula, al-Nusra in Syria, ISIS attempting to create a caliphate in Syria and Iraq and establishing affiliates in multiple countries in Africa and Asia. These threats warrant our attention and our resources.

We conduct effective counterterrorism missions against terrorist groups in multiple countries where we don't have a permanent military presence.

If necessary, we will do the same in Afghanistan. We've developed counterterrorism over-the-horizon capability that will allow us to keep our eyes firmly fixed on any direct threats to the United States in the region and to act quickly and decisively if needed.

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On August 31, the President announced that the United States had "ended 20 years of war in Afghanistan—the longest war in American history," while also acknowledging that the United States will continue to take action against terrorist targets in Afghanistan using over-the-horizon capabilities, if necessary. The August 31 speech is available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/.

The United States entered into arrangements with many countries to facilitate the evacuation and relocation of individuals from Afghanistan. See Chapter 2 for discussion of these arrangements.

The United States and approximately 100 other countries issued a joint statement on August 29, 2021, describing commitments the Taliban made to allow certain individuals to leave Afghanistan. The joint statement follows, and is available at https://www.state.gov/joint-statement-on-afghanistan-evacuation-travel-assurances/.

> We are all committed to ensuring that our citizens, nationals and residents, employees, Afghans who have worked with us and those who are at risk can continue to travel freely to destinations outside Afghanistan. We have received assurances from the Taliban that all foreign nationals and any Afghan citizen with travel authorization from our countries will be allowed to proceed in a safe and orderly manner to points of departure and travel outside the country. We will continue issuing travel documentation to designated Afghans, and we have the clear expectation of and commitment from the Taliban that they can travel

to our respective countries. We note the public statements of the Taliban confirming this understanding.

On August 30, 2021, Permanent Representative of the United States of America to the United Nations Linda Thomas-Greenfield delivered the U.S. explanation of vote on UN Security Council Resolution 2593, on the situation in Afghanistan and the Taliban's commitments on travel. Ambassador Thomas-Greenfield's remarks are excerpted below and available at https://usun.usmission.gov/explanation-of-vote-delivered-by-ambassador-linda-thomas-greenfield-following-the-adoption-of-a-un-security-council-resolution-on-afghanistan/.

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Today's resolution establishes three clear expectations regarding the future of Afghanistan.

First, the Security Council expects the Taliban to live up to its commitment to facilitate safe passage for Afghans and foreign nationals who want to leave Afghanistan, whether it's today, tomorrow, or after August 31. Consistent with the right to leave any country, including one's own, everybody must be allowed to safely leave Afghanistan, for whatever reason, whenever they want, by air or by land. This is of the utmost importance to us.

Sadly, the United States is grieving the loss of 13 young servicemembers who made the ultimate sacrifice while diligently working to help people depart the country in safety. We are also mourning the hundreds of Afghans who were killed or injured during the attack outside of the Kabul airport. They went to the airport in search of a better life. The international community and those in Afghanistan must honor their memory by doing everything we can to continue to help those who wish to leave.

As of this morning, the United States has facilitated the evacuation of more than 122,000 American citizens, foreign nationals, and at-risk Afghans out of Afghanistan since the end of July. So many have made this possible. Our courageous servicemembers. Our tireless diplomats. And dozens of countries, including many on this Council. Our allies and partners around the world have contributed to the airlift, serving as transit countries, and some resettling Afghan refugees permanently. We are grateful to all who have joined forces in this remarkable effort. Second, the resolution makes the Security Council's enduring commitment to assisting those who remain in Afghanistan crystal clear. It underscores that all parties need to facilitate humanitarian assistance, and that humanitarian actors be given full, safe, and unhindered access to continue service delivery to those in need. The Afghan people are suffering not just from conflict and massive internal displacement, but also from a nationwide drought and the COVID-19 pandemic. UN agencies are warning that humanitarian needs in the coming months will be vast.

The UN Refugee Agency estimates that nearly a half million Afghans have been internally displaced this year alone. The World Food Program estimates that 14 million people in Afghanistan are at risk of starving without food assistance. And UNICEF has reported that COVID-19 vaccinations have dropped by 80 percent in recent weeks. Vital humanitarian assistance must flow to people in desperate need.

Third, the resolution reiterates in strong terms several of the Council's enduring calls regarding the situation in Afghanistan. Today, we have spoken once again on the urgent need to tackle the serious threat of terrorism in Afghanistan. Last week's horrific attack in Kabul demonstrated the very real threat that terrorist groups like ISIS-K pose. President Biden has made clear that we will do what's necessary to defend our security and our people. And the entire international community is committed to ensuring that Afghanistan is never again a safe haven for terrorism.

Through this resolution, the Security Council has also reiterated the vital importance of respect for the rights of Afghanistan's people, including its women, girls, and minorities. We will not waver on this point. Respect for the rights of all the people of Afghanistan goes hand-in-hand with the need for parties to engage in an inclusive, negotiated settlement to bring stability to Afghanistan, which the Council also emphasizes through this resolution.

As Afghanistan enters the next chapter, it is imperative that the international community remain unified and resolute, including in holding the Taliban accountable for its commitments. One such commitment, which the Taliban has made publicly and privately, is that those who wish to leave Afghanistan will be able to do so. Today's resolution signals just how seriously the Security Council takes that commitment – along with the commitments to allow humanitarian aid to flow and prevent terrorism.

Through this resolution, the Security Council has issued a set of calls that are clear, necessary, and in the interests of Afghanistan's people. Moving forward, we must address the most pressing security threats, stand up for the rights of the Afghan people, and lay the groundwork for a stable and inclusive Afghanistan. The people of Afghanistan deserve nothing less.

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Secretary Blinken provided testimony on Afghanistan before the Senate Foreign Relations Committee on September 14, 2021. The testimony is excerpted below and available at https://www.foreign.senate.gov/imo/media/doc/091421_Blinken_Testimony1.pdf.

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I welcome this opportunity to discuss our policy on Afghanistan – including where we are, how we got here, and where we're going in the weeks and months ahead.

For 20 years, Congress has conducted oversight and provided funding for the mission in Afghanistan. …

On this 20th anniversary of 9-11, as we honor the nearly 3,000 men, women, and children who lost their lives, we are reminded why we went to Afghanistan in the first place: to bring justice to those who attacked us and ensure it would never happen again. We achieved those objectives long ago. Osama bin Laden was killed in 2011. Al Qaeda's capabilities were degraded significantly, including its ability to plan and conduct external operations. After 20 years, 2,461 American lives lost, 20,000 injuries, and two trillion dollars spent, it was time to end America's longest war.

When President Biden took office in January, he inherited an agreement that his predecessor had reached with the Taliban to remove all remaining U.S. troops by May 1 of this year. As part of that agreement, the previous Administration pressed the Afghan government to release 5,000 Taliban prisoners – including some top war commanders. Meanwhile, it reduced our own force presence to 2,500 troops.

In return, the Taliban agreed to stop attacking U.S. and partner forces and to refrain from threatening Afghanistan's major cities. But the Taliban continued its relentless march on remote outposts, checkpoints, villages, and districts, as well as the major roads connecting the cities.

By January 2021, the Taliban was in its strongest military position since 9-11 – and we had the smallest number of troops on the ground since 2001.

As a result, upon taking office, President Biden immediately faced the choice between ending the war or escalating it. Had he not followed through on his predecessor's commitment, attacks on our forces and those of our allies would have resumed and the Taliban's nationwide assault on Afghanistan's major cities would have commenced. That would have required sending substantially more U.S. forces into Afghanistan to defend ourselves and prevent a Taliban takeover, taking casualties – and with at best the prospect of restoring a stalemate and remaining stuck in Afghanistan, under fire, indefinitely.

We also used this time to significantly speed up the processing of Special Immigrant Visas for Afghans who worked for us. When we took office, we inherited a program with a 14-step process based on a statutory framework enacted by Congress and involving multiple government agencies – and a backlog of more than 17,000 SIV applicants. There had not been a single interview of an SIV applicant in Kabul in nine months, going back to March of 2020. The program was basically in a dead stall.

Within two weeks of taking office, we restarted the SIV interview process in Kabul. On February 4th, one of the first executive orders issued by President Biden directed us to immediately review the SIV program to identify causes of undue delay and find ways to process SIV applications more quickly.

This spring, I directed significant additional resources to the program, expanding the team of people in Washington processing applications from 10 to 50 and doubling the number of SIV adjudicators at our embassy in Kabul. Even as many embassy personnel returned to the United States, we sent more consular officers to Kabul to process SIV applications.

As a result of these and other steps, including working with Congress, by May we had reduced the average processing time for Special Immigrant Visas by more than a year. Even amid a COVID surge at Embassy Kabul in June, we continued to issue visas. And we went from issuing about 100 Special Immigrant Visas per week in March to more than 1,000 per week in August – when our evacuation and relocation operation began.

That emergency evacuation was sparked by the collapse of the Afghan security forces and government. Throughout the year, we were constantly assessing their staying power and considering multiple scenarios. Even the most pessimistic assessments did not predict that government forces in Kabul would collapse while U.S. forces remained. They were focused on what would happen after the United States withdrew, from September onward. As General Milley, the Chairman of the Joint Chiefs of Staff, has said, "Nothing I or anyone else saw indicated a collapse of this army and this government in 11 days."

Nonetheless, we planned and exercised a wide range of contingencies. Because of that planning, we were able to draw down our embassy and move our remaining personnel to the

airport within 48 hours. And the military – placed on stand-by by the President – was able to secure the airport and start the evacuation within 72 hours.

The evacuation was an extraordinary effort – under the most difficult conditions imaginable – by our diplomats, military, and intelligence professionals. They worked around the clock to get American citizens, Afghans who helped us, citizens of our Allies and partners, and at-risk Afghans on planes, out of the country, and off to the United States or transit locations that our diplomats arranged in multiple countries. Our consular team worked 24-7 to reach out to Americans who could still be in the country, making 55,000 phone calls and sending 33,000 emails by August 31 – and they're still at it. In the midst of this heroic effort, an ISIS-K attack killed 13 service members working the gates at HKIA, wounded 20 others, and killed and wounded scores of Afghans.

In the end, we completed one of the biggest airlifts in history, with 124,000 people evacuated to safety.

And on August 31 in Kabul, the military mission in Afghanistan officially ended, and a new diplomatic mission began.

I want to acknowledge the more than two dozen countries that have helped with the relocation effort – some serving as transit hubs, some welcoming Afghan evacuees for longer periods of time.

And as the 9/11 report suggested, it is essential that we accelerate the process for national security appointments since a catastrophic attack could occur with little or no notice. …

Let me briefly outline what the State Department has done in the past two weeks.

First, we moved our diplomatic operations from Kabul to Doha, where our new Afghan affairs team is hard at work. Many of our key partners have joined us there.

Second, we're continuing our relentless efforts to help any remaining Americans, as well as Afghans and citizens of Allied and partner nations, leave Afghanistan if they choose.

On Thursday, a Qatar Airways charter flight with U.S. citizens and others onboard departed Kabul and landed in Doha. On Friday, a second flight carrying U.S. citizens and others departed Afghanistan. These flights were the result of coordinated efforts by the United States, Qatar, and Turkey to reopen the airport, and intense diplomacy to start the flights.

In addition to those flights, 6 American citizens and 11 permanent residents of the United States have also left Afghanistan via an overland route, with our help.

We are in constant contact with American citizens still in Afghanistan who have told us they wish to leave. Each has been assigned a case management team to offer specific guidance and instructions. Some declined to be on the first flights on Thursday and Friday for reasons including needing more time to make arrangements, wanting to remain with extended family for now, or medical issues that preclude traveling now.

We will continue to help Americans – and Afghans to whom we have a special commitment – depart Afghanistan if they choose, just as we've done in other countries where we've evacuated our embassy and hundreds or even thousands of Americans remained behind – for example, in Libya, Syria, Venezuela, Yemen, and Somalia. There is no deadline to this mission.

Third, we're focused on counterterrorism.

The Taliban has committed to prevent terrorist groups from using Afghanistan as a base for external operations that could threaten the United States or our allies, including Al Qaeda and ISIS-K. We will hold them accountable to that. That does not mean we will rely on them. We will remain vigilant in monitoring threats, and we'll maintain robust counterterrorism capabilities

in the region to neutralize those threats if necessary – as we do in places around the world where we do not have military forces on the ground.

Fourth, we continue our intensive diplomacy with Allies and partners.

We initiated a statement joined by more than 100 countries and a United Nations Security Council Resolution setting out the international community's expectations of a Taliban-led government. We expect the Taliban to ensure freedom of travel; make good on its counter-terrorism commitments; uphold the basic rights of the Afghan people, including women, girls, and minorities; name a broadly representative permanent government; and forswear reprisals. The legitimacy and support it seeks from the international community will depend on its conduct.

We've organized contact groups of key countries to ensure the international community continues to speak with one voice on Afghanistan and to leverage our combined influence.

Last week, I led a ministerial meeting of 22 countries, plus NATO, the EU, and the UN, to align our efforts.

And fifth, we will continue to support humanitarian aid to the Afghan people. .

Yesterday, we announced that the United States is providing nearly $64 million in new humanitarian assistance to the people of Afghanistan, to meet critical health and nutrition needs, address the protection concerns of women, children, and minorities, to help more children – including girls – go back to school. This additional funding means the United States has provided nearly $330 million in assistance to the Afghan people this fiscal year.

In Doha and Ramstein, I toured the facilities where Afghans that we evacuated are being processed before moving on to their next destinations. Here at home, I spent some time at the Dulles Expo Center, where more than 45,000 Afghans have been processed after arriving in the United States. It's remarkable to see what our diplomats, military, and employees from other civilian agencies across the U.S. government have been able to achieve in a very short time.

They've met an enormous human need. They're coordinating food, water, and sanitation for thousands of people. They're arranging medical care, including the delivery of several babies. They're reuniting families who were separated and caring for unaccompanied minors. It's an extraordinary interagency effort – and a powerful testament to the skill, compassion, and dedication of our people.

We can all be deeply proud of what they're doing. And as we've done throughout our history, Americans are now welcoming families from Afghanistan into our communities and helping them resettle as they start their new lives. That's something to be proud of, too.

With that, I look forward to your questions.

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On September 17, 2021, the Department of Defense acknowledged that an errant strike during the evacuation in Afghanistan had killed civilians. The Defense Department article acknowledging the mistake is available at https://www.defense.gov/News/News-Stories/Article/Article/2780257/dod-august-29-strike-in-kabul-tragic-mistake-kills-10-civilians/ and excerpted below.

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The strike by a Hellfire missile in Kabul, August 29, which was launched in an effort to kill ISIS-K planners, instead killed 10 civilians, the commander of U.S. Central Command, Marine Corps Gen. Kenneth F. McKenzie, Jr. said.

During a briefing today at the Pentagon, McKenzie outlined the findings of an investigation he directed following that strike, after reports said civilians may have been killed.

"Having thoroughly reviewed the findings of the investigation and the supporting analysis by interagency partners, I am now convinced that as many as 10 civilians — including up to seven children — were tragically killed in that strike," he said.

"Moreover, we now assess that it is unlikely that the vehicle and those who died were associated with ISIS-K or were a direct threat to U.S. forces."

The general offered condolences to the family and friends of those killed but said that at the time of the strike, the intelligence that was being reported left him and others confident the strike would have averted a threat to U.S. military forces at the nearby Hamid Karzai International Airport, or HKIA, who were busy evacuating civilians.

"Our investigation now concludes that the strike was a tragic mistake," he said.

The general said military intelligence indicated a compound located about 6 kilometers from the airport was being used by ISIS-K planners to plot attacks similar to the one that killed 13 U.S. service members and more than 100 Afghan civilians just three days earlier near the Abbey Gate entrance to HKIA. The same intelligence also indicated that a white vehicle would play an important role in one of the attacks being planned.

Based on that intelligence, McKenzie said surveillance assets, including as many as six MQ-9 Reapers, were focused on that compound. On the morning of Aug. 29, he said, observers spotted the white vehicle arriving at the compound. The observers spent the rest of the day following it from the air as it moved throughout the city and watched as the vehicle occupants moved supplies into and out of the vehicle and later exited the vehicle permanently at locations throughout the city.

Late in the afternoon, the general said, the vehicle dropped off its last passenger and drove to a location approximately three kilometers from the airport.

"We were very concerned that the vehicle could move quickly and be at the airport boundary in a matter of moments," McKenzie said. "By this time, we'd observed the vehicle for about eight hours. While in the compound, the vehicle was observed being approached by a single adult male assessed at the time to be a co-conspirator. The strike was executed at this time, because the vehicle was stationary, and to reduce the potential for civilian casualties."

McKenzie said a Hellfire missile hit the vehicle at 4:53 p.m., and had been configured to detonate inside the vehicle as a way to minimize the chance of civilian casualties.

"It is my assessment that leaders on the ground and in the strike cell had achieved a reasonable certainty at the time of the strike to designate the vehicle as an imminent threat to U.S. forces at the airport, and that they made this self-defense strike in accordance with established rules of engagement," McKenzie said.

Still, McKenzie said, while Centcom believed the strike would prevent an imminent attack on U.S. forces and civilians at the airport, he now understands that to be incorrect.

"It was a mistake, and I offer my sincere apology," he said. "As the combatant commander, I am fully responsible for this strike and its tragic outcome."

The general also said the department is exploring the possibility of ex gratia payments to those affected by the strike.

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On November 29 and 30, 2021, a U.S. delegation met with representatives of the Taliban to discuss ongoing commitments. The State Department readout of the meeting is excerpted below and available at https://www.state.gov/u-s-delegation-meeting-with-taliban-representatives/.

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On November 29 and 30, Special Representative for Afghanistan Thomas West led a senior interagency delegation including representatives from the Department of State, Department of the Treasury, USAID, and the intelligence community in discussions on enduring national interests with senior Taliban representatives and technocratic professionals in Doha, Qatar. The U.S. delegation emphasized the importance of the Taliban fulfilling its public commitment not to allow anyone to pose a threat to any country from the soil of Afghanistan, safe passage for U.S. citizens and Afghans to whom we have a special commitment, the protection of the rights of all of Afghanistan's citizens, including its women, girls, and minorities, and the safe release of hostage Mark Frerichs. The two teams also discussed the international community's on-going and urgent response to the humanitarian crisis in Afghanistan, and the U.S. delegation pledged to continue to support UN and humanitarian actors' efforts to scale up to meet life-saving needs this coming winter.

The United States remains committed to ensuring that U.S. sanctions do not limit the ability of Afghan civilians to receive humanitarian support from the U.S. government and international community while denying assets to sanctioned entities and individuals. The Department of the Treasury has issued general licenses to support the continued flow of humanitarian assistance to the people of Afghanistan and other activities that support basic human needs.

Special Representative West welcomed the Taliban's follow-through on safe passage commitments and recognized improvements in providing all humanitarian workers safe and unimpeded access to communities in need.

The Taliban reiterated their pledge to not allow the territory of Afghanistan to be used by anyone to threaten any country. U.S. officials expressed concern regarding the continuing presence of al-Qa'ida and ISIS in Afghanistan.

The U.S. delegation noted recent statements from Taliban leaders expressing support for women and girls' access to education at all levels and urged implementation of that commitment countrywide. The Taliban expressed openness to engaging with the international community on full access to education and welcomed efforts to verify and monitor progress to enroll women and girls in school at all levels. The Taliban asked for support in the education sector. American officials expressed deep concern regarding allegations of human rights abuses and urged the Taliban to protect the rights of all Afghans, uphold and enforce its policy of general amnesty, and take additional steps to form an inclusive and representative government. This engagement is a continuation of pragmatic diplomacy on Afghanistan in coordination with Allies and partners.

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3. Actions in Response to Iran and Iran-Backed Militia Groups

On February 27, 2021, the Biden administration submitted a report to Congress pursuant to the War Powers Resolution and a letter to the UN Security Council in accordance with Article 51 of the UN Charter regarding actions taken in self-defense. Both the report and the letter concern a targeted military strike against infrastructure in eastern Syria used by Iran-supported non-state militia groups. The War Powers Resolution report is available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/27/a-letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-consistent-with-the-war-powers-resolution/, and excerpted below.

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At my direction, on February 25, 2021, United States forces conducted a targeted military strike against infrastructure in eastern Syria used by Iran-supported non-state militia groups.

Those non-state militia groups were involved in recent attacks against United States and Coalition personnel in Iraq, including the February 15, 2021, attack in Erbil, Iraq, which wounded one United States service member, wounded four United States contractors, including one critically, and killed one Filipino contractor. These groups are also engaged in ongoing planning for future such attacks.

In response, I directed this military action to protect and defend our personnel and our partners against these attacks and future such attacks. The United States always stands ready to take necessary and proportionate action in self-defense, including when, as is the case here, the government of the state where the threat is located is unwilling or unable to prevent the use of its territory by non-state militia groups responsible for such attacks.

I directed this military action consistent with my responsibility to protect United States citizens both 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. The United States took this action pursuant to the United States' inherent right of self-defense as reflected in Article 51 of the United Nations Charter.

I am providing this report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution (Public Law 93-148). I appreciate the support of the Congress in this action.

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The Article 51 Letter dated 27 February 2021 from Ambassador Thomas-Greenfield addressed to the President of the Security Council, U.N. Doc. No. S/2021/202, is excerpted below.

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I wish to report, on behalf of my Government, that the United States, in an exercise of its inherent right of self-defence, as reflected in Article 51 of the Charter of the United Nations, has undertaken a targeted military strike in eastern Syria against infrastructure used by Iran-supported non-State militia groups.

In recent weeks, United States and Coalition partner forces in Iraq have been the target of an escalating series of threats and attacks by such non-State militia groups. These include a rocket attack near Erbil, Iraq, on 15 February that wounded one United States service member, wounded four United States contractors, including one critically, and killed one Filipino contractor.

In response to these attacks, the United States has taken military action in eastern Syria against a facility used by Iran-supported non-State militia groups that are responsible for recent attacks against United States personnel and are engaged in ongoing planning for future such attacks. This necessary and proportionate action was taken to defend United States personnel and to deter further attacks. This military response was conducted together with diplomatic measures, including consultation with Coalition partners.

The continued operation of such non-State militia groups in Syria, and in particular the use of Syrian territory by groups engaged in attacks on United States forces in Iraq, constitutes a threat to the United States and to the region. As noted in the United States' letter to the Security Council of 23 September 2014, States must be able to defend themselves, in accordance with the inherent right of self-defence reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory by non-State militia groups responsible for such attacks.

The United States remains prepared to use necessary and proportionate force in self-defence to respond to future threats to the United States and Coalition forces.

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On June 29, 2021, the Biden administration submitted a report to Congress pursuant to the War Powers Resolution and an Article 51 Letter to the UN Security Council concerning three airstrikes in Syria and Iraq on June 27, 2021. The strikes were undertaken against facilities used by Iran-backed militia groups who have been responsible for unmanned aerial vehicle ("UAV") and rocket attacks on U.S. persons and facilities in recent months. The domestic law basis for the strikes was the President's Article II authority as Commander in Chief, and the international law basis was self-defense. The War Powers Report is excerpted below and available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/29/letter-to-the-speaker-of-the-house-and-the-president-pro-tempore-of-the-senate-consistent-with-the-war-powers-resolution-public-law-93-148/.

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At my direction, on June 27, 2021, United States forces conducted targeted strikes against facilities at two locations in Syria and one location in Iraq near the Iraq-Syria border. These facilities were used by Iran-backed militia groups that have been involved in a series of unmanned aerial vehicle (UAV) and rocket attacks against United States personnel and facilities in Iraq. These militia attacks have escalated in recent months. Recent rocket attacks have included ones on Balad Air Base on April 4, April 18, and May 3, 2021; the Baghdad Diplomatic Support Center near the Baghdad International Airport on May 2, 2021; and Al-Asad Air Base on May 4 and May 24, 2021. Recent UAV attacks have included ones on United States facilities in Erbil on April 14, 2021; Al-Asad Air Base on May 8, 2021; Bashur Air Base on May 10, 2021; and United States facilities near the Baghdad International Airport on June 9, 2021. These attacks have injured and threatened the lives of United States and Coalition personnel. Additional UAV attacks have been attempted.

I directed the June 27 strikes in order to protect and defend the safety of our personnel, to degrade and disrupt the ongoing series of attacks against the United States and our partners, and to deter the Islamic Republic of Iran and Iran-backed militia groups from conducting or supporting further attacks on United States personnel and facilities. In support of these aims, the targeted strikes were directed at facilities used by groups involved in these ongoing attacks for weapons storage, command, logistics, and UAV operations.

I directed this discrete military action consistent with my responsibility to protect United States citizens both 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. The United States took this necessary and proportionate action consistent with international law, and in the exercise of the United States' inherent right of self-defense as reflected in Article 51 of the United Nations Charter. The United States stands ready to take further action, as necessary and appropriate, to address further threats or attacks.

I am providing this report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution (Public Law 93-148). Additional information is provided in a classified annex. I appreciate the support of the Congress in this action.

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The Article 51 letter from Ambassador Thomas-Greenfield to the UN, U.N. Doc. No. S/2021/614, appears below.

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I wish to report, on behalf of my Government, that the United States, in the exercise of its inherent right of self-defense, as reflected in Article 51 of the Charter of the United Nations, has undertaken targeted strikes against facilities at two locations in Syria and one location in Iraq near the Iraq-Syria border. These facilities were used by Iran-backed militia groups that have been involved in a series of unmanned aerial vehicle (UAV) and rocket attacks against U.S. personnel and facilities in Iraq. This letter supplements prior letters provided to this Council, including on February 27, 2021, which further explain the basis for such actions in self-defense

against these ongoing attacks.

These militia attacks have escalated in recent months. Recent rocket attacks have included ones on Balad Air Base on April 4, April 18, and May 3, 2021; the Baghdad Diplomatic Support Center near the Baghdad International Airport on May 2, 2021; and Al-Asad Air Base on May 4 and May 24, 2021. Recent UAV attacks have included ones on U.S. facilities in Erbil on April 14, 2021; Al-Asad Air Base on May 8, 2021; Bashur Air Base on May 10, 2021; and U.S. facilities near the Baghdad International Airport on June 9, 2021. These attacks have injured and threatened the lives of U.S. and Coalition personnel. Additional UAV attacks have been attempted.

In response to these attacks, the United States has taken military action in order to protect and defend the safety of our personnel, to degrade and disrupt the ongoing series of attacks against the United States and our partners, and to deter the Islamic Republic of Iran and Iran-backed militia groups from conducting or supporting further attacks on U.S. personnel or facilities. In support of these aims, these necessary and proportionate actions were directed at facilities used by groups involved in these ongoing attacks for weapons storage, command, logistics, and UAV operations. This military response was taken after non-military options proved inadequate to address the threat, with the aim of deescalating the situation and preventing further attacks. It was conducted together with diplomatic measures, including consultation with Coalition partners.

The United States remains prepared to use necessary and proportionate force in self-defense in response to future threats or attacks.

I request that you circulate this letter as a document of the Security Council.

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4. Bilateral and Multilateral Agreements and Arrangements

a. Jordan

On March 17, 2021, an Agreement on Defense Cooperation between the United States and Jordan entered into force. The agreement was signed at Amman on January 31, 2021 and is available at https://www.state.gov/jordan-21-317.

b. Republic of Korea

On March 17, 2021, as announced in a State Department media note available at https://www.state.gov/u-s-rok-alliance-expanding-bilateral-cooperation-for-the-21st-century/, the United States and the Republic of Korea initialed the draft text for the 11th U.S.-ROK Special Measures Agreement ("SMA"). The multi-year agreement pertains to defense burden sharing. The SMA resulted from a March 17, 2021 meeting between Secretary of State Antony J. Blinken and the Republic of Korea Minister for Foreign Affairs Chung Eui-yong regarding bilateral coordination and regional and global engagement. Secretary of Defense Lloyd Austin also met with his ROK counterpart during a joint ministerial on March 18, 2021. The SMA was signed at Seoul April 8, 2021, entered into force September 1, 2021, with effect from January 1, 2020, and is available at https://www.state.gov/korea-21-901.

c. Japan

On March 31, 2021, the protocol amending the U.S.-Japan Special Measures Agreement (the Agreement between the United States of America and Japan concerning New Special Measures relating to Article XXIV of the Agreement under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, which was signed at Tokyo on January 22, 2016) entered into force via an exchange of notes. The protocol is available at https://www.state.gov/japan-21-331.1.

d. Norway

On April 16, 2021 in Oslo, the United States of America and the Kingdom of Norway concluded a supplementary defense cooperation agreement ("SDCA"). See State Department press statement, available at https://www.state.gov/u-s-norway-supplementary-defense-cooperation-agreement/. The press statement includes the following:

> The SDCA builds on the 1951 NATO Status of Forces Agreement to facilitate further development of opportunities for U.S. forces to train and exercise in Norway, promoting improved interoperability with Norwegian and other allied forces. This agreement reflects decades of close U.S.-Norwegian security partnership and our shared commitment as NATO Allies to Transatlantic security.

e. Vanuatu

On August 6, 2021, the U.S.-Vanuatu defense assistance agreement entered into force. The agreement, available at https://www.state.gov/vanuatu-21-806, was concluded via an exchange of notes at Port Moresby and Port Vila July 2 and August 6, 2021.

f. Greece

On October 14, 2021 in Washington, D.C. the United States and Greece signed a Protocol of Amendment to the U.S.-Greece Mutual Defense Agreement. See State Department press statement, available at https://www.state.gov/signing-of-protocol-of-amendment-to-the-mutual-defense-cooperation-agreement-with-greece/. The press statement includes the following:

> The amendment to the MDCA deepens and expands on our partnership to maintain strong, capable, and interoperable militaries. The MDCA has allowed for U.S. forces to train and operate within Greek territory since 1990. Today's amendment extends the MDCA's validity, making it consistent with other bilateral defense cooperation agreements between NATO Allies and durable

enough to allow for Greece and the United States to advance security and stability in the Eastern Mediterranean and beyond.

5. International Humanitarian Law

a. Protection of civilians

On January 24, 2021, the State Department issued a press statement condemning attacks targeting civilians in Saudi Arabia. The statement follows and is available at https://www.state.gov/the-united-states-condemns-attack-on-saudi-arabia/.

> The United States strongly condemns the latest attack on Riyadh, Saudi Arabia. We are gathering more information, but it appears to have been an attempt to target civilians. Such attacks contravene international law and undermine all efforts to promote peace and stability. As we work to de-escalate tensions in the region through principled diplomacy, including by bringing an end to the war in Yemen, we will also help our partner Saudi Arabia defend against attacks on its territory and hold those who attempt to undermine stability to account.

On March 22, 2021, the State Department issued a press statement condemning Assad regime attacks on civilians in Syria. The statement, available at https://www.state.gov/attacks-on-civilians-in-syria-2/, follows:

> The United States strongly condemns reported Assad regime artillery attacks and Russian airstrikes that killed civilians in western Aleppo and Idlib, yesterday. Reported artillery shelling on the Al-Atareb Surgical Hospital in western Aleppo killed several patients, including a child, and injured more than a dozen medical staff. This hospital's coordinates had been shared with the UN-led deconfliction mechanism.
>
> Additionally, Russian airstrikes struck Idlib near the Bab al-Hawa border crossing with Turkey, reportedly killing one civilian and putting access to much needed assistance at risk. Bab al-Hawa remains the only UN-authorized humanitarian border crossing in Syria and remains the most efficient and effective way to provide life-saving humanitarian assistance to approximately 2.4 million Syrians every month.
>
> Civilians, including civilian medical personnel and facilities, must never be the target of military action. This violence must stop – we reiterate our call for a nationwide ceasefire.

On May 15, 2021, the State Department released a press statement from Secretary Blinken regarding the situation in Ethiopia's Tigray region. The statement is excerpted below and available at https://www.state.gov/continuing-atrocities-and-denial-of-humanitarian-access-in-ethiopias-tigray-region/.

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The United States is gravely concerned by the increasing number of confirmed cases of military forces blocking humanitarian access to parts of the Tigray region. This unacceptable behavior places the 5.2 million people in the region in immediate need of humanitarian assistance at even greater risk. The United States unequivocally calls upon the Governments of Eritrea and Ethiopia to take all necessary steps to ensure that their forces in Tigray cease and desist this reprehensible conduct. We also again call on all parties to comply with obligations under international humanitarian law, including those relevant to the protection of civilians, and to cease immediately all hostilities and allow relief to reach those suffering and in greatest need of assistance. The Ethiopian government should lead in this regard and immediately facilitate full and unhindered access for humanitarian actors to all parts of the Tigray region.

There are many credible reports of armed forces in Tigray committing acts of violence against civilians, including gender-based violence and other human rights abuses and atrocities. The conduct of the Eritrean Defense Forces and Amhara regional forces have been particularly egregious. The continued presence of Eritrean forces in Tigray further undermines Ethiopia's stability and national unity. We again call upon the Government of Eritrea to remove its forces from Tigray. Both Eritrean and Ethiopian authorities have repeatedly promised such a withdrawal, but we have seen no movement towards implementation. We equally urge the Government of Ethiopia to withdraw Amhara regional forces from the Tigray region and ensure that effective control of western Tigray is returned to the Transitional Government of Tigray. Prime Minister Abiy and President Isaias must hold all those responsible for atrocities accountable.

* * * *

b. Draft political declaration on explosive weapons in populated areas

The United States provided an opening statement and a written submission at the informal virtual consultation on "Protecting Civilians in Urban Warfare: Toward a Political Declaration to Address the Humanitarian Harm Arising From the Use of Explosive Weapons in Populated Areas," held March 3-5, 2021. The March 2021 virtual session was part of a series of consultations on a draft political statement, involving UN Member States, the United Nations, the International Committee of the Red Cross, and civil-society organizations over an extended period of years, led by Ireland and chaired by Ambassador Michael Gaffey. The U.S. opening statement and the U.S. written submission are available at https://www.dfa.ie/our-role-policies/international-priorities/peace-and-security/ewipa-consultations/informalconsultationswrittensubmissions/written-submissions---3-5-march-2021-informal-consultations.php. The opening statement is excerpted below. As noted in the opening statement, the United States offered suggested edits to the draft text in the written submission (not excerpted herein).

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…Overall, we believe this new draft of the Declaration offers a number of improvements.

We continue to believe that this process can best promote our shared goal of strengthening protections for civilians by promoting practical, realistic solutions to improve the implementation of IHL in the field, through a text that militarily active states are able to sign up to. We are hopeful that we can get to this outcome together, and look forward to working with you and other delegations to achieve that goal.

The causes of harm to civilians in urban warfare can be complex and involve a range of factors, including incidental harm caused during lawful attacks directed against military objectives, mistaken or lack of identification of the presence of civilians, deliberate targeting of civilians in violation of IHL, or the use of human shields by terrorist groups. This Declaration should reflect this complexity and the challenges of protecting civilians during urban warfare, particularly when fighting terrorist groups that intentionally put civilians at risk. Similarly, promoting a broad range of practical measures undertaken by responsible States in their military operations could yield immediate and concrete results in strengthening protections for civilians.

To that end, I would like to lend my full support to the points offered by France and the United Kingdom earlier this morning, and offer a few general comments in addition:

First, the Declaration – and especially Section I – should create a balanced and accurate picture of the complex causes of harm to civilians in urban warfare. In particular, IHL places obligations on parties both when conducting attacks and when defending against attacks. The challenge of non-state actors emplacing military objectives in populated areas, using civilians as human shields, and otherwise disregarding their obligations under IHL should be noted.

Second, we continue to be concerned about the stigmatization of explosive weapons. Under international humanitarian law, explosive ordnance is a legitimate means of warfare the use of which may be needed to protect civilians during armed conflict. We think that the Declaration should make clear that the use of such weapons is a standard and lawful practice, if done consistent with IHL.

Third, to be useful, we continue to note that this declaration should not attempt to introduce new interpretations of existing IHL, create new standards, or propose commitments based on novel terminology not reflected in existing IHL, such as "reverberating effects." To that end, we are particularly concerned with the use of the phrase "wide area effects" in Sections 3 and 4, and throughout this draft more generally. As a practical matter, in some cases, weapons with "wide area effects" may be the best option for reducing the likelihood of civilian casualties. Trying to produce the same or similar effect through the use of other weapons that produce a "narrower effect," could require using more weapons over a relatively greater period of time and thereby create greater incidental harm to civilians and civilian objects.

As others have already noted, the restrictions on the use of explosive weapons proposed by paragraph 3.3 exceed what is required by IHL. Moreover, it would not achieve the goal of strengthening efforts to protect civilians, particularly for responsible militaries such as that of the United States that need such capabilities to mitigate civilian casualties and who already undertake extensive efforts to comply with IHL and mitigate civilian harm from their use.

Fourth, we believe the Declaration should establish a positive, collaborative way forward for implementation that focuses on voluntary military-to-military exchanges of technical expertise and good practices to improve compliance with IHL and efforts to mitigate civilian harm.

Finally, as a conceptual matter and as previously mentioned, we are concerned that this draft has narrowed its focus to those explosive weapons "with wide area effect." This is not an existing class of weapons or a term that is defined in existing IHL. Its use in this document could contribute to an unhelpful stigmatization of the lawful, responsible use of certain explosive weapons. For example, focusing only on explosive weapons with wide area effects would also mean the declaration and any follow-up implementation discussions would not address improvised explosive devices – a troubling cause of civilian casualties in urban warfare.

We intend to offer specific textual edits this week from the floor and in writing to achieve these objectives, and we thank our Irish facilitators and other colleagues for working together to conclude a Declaration that can meaningfully contribute to states' efforts to protect civilians.

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c. Humanitarian access

On November 12, 2021, the UN Security Council adopted resolution 2605, extending the mandate of the UN Multidimensional Integrated Stabilization Mission in the Central African Republic ("MINUSCA"). In voting for the resolution, the United States delivered an explanation of vote discussing, in part, its view on humanitarian access and international humanitarian law. The explanation of vote is available at https://usun.usmission.gov/explanation-of-vote-following-the-adoption-of-a-resolution-renewing-the-mandate-of-minusca/ and is excerpted below.

> We must also clarify the U.S. position regarding humanitarian access. While we recognize that in certain circumstances states may have obligations related to humanitarian aid, there is no universal and unlimited international legal obligation for States or other parties to an armed conflict to allow and facilitate "safe, rapid, and unhindered" humanitarian access. Therefore, the United States disagrees with the use of the phrase "in accordance with relevant provisions of international law" contained in paragraph 52 of this resolution, where its placement suggests that safe, rapid, and unhindered humanitarian access is required by international law without exception. We note that legally accurate humanitarian access clauses appear in our resolutions for AMISOM, UNMISS, UNISFA, MINUSMA, and UNSOM, among other resolutions. We urge members to draw on these examples going forward. To be clear, the United States continues to strongly support humanitarian access in conflict areas, and we have backed language in numerous Council resolutions that demands parties to a conflict provide safe, rapid, and unhindered access to humanitarian aid.

As discussed in Chapter 3, the UN General Assembly adopted by consensus Resolution 75/291 on the seventh review of the UN Global Counter-Terrorism Strategy on June 30, 2021. The U.S. explanation of position addresses, among other points, U.S. views regarding international humanitarian law and impediments to humanitarian access. The explanation of position discussed and excerpted in Chapter 3 is available at https://usun.usmission.gov/explanation-of-position-on-the-un-general-assembly-

adoption-of-the-global-counter-terrorism-strategy/. The portion on international humanitarian law is repeated below.

> We continue to promote increasing humanitarian assistance and access for those in need consistent with both counterterrorism and humanitarian imperatives. We endorse the language in paragraph 60 – drawn from UN Security Council Resolution 2462, adopted in 2019 – which urges Member States, when designing and applying counterterrorism measures, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law. However, the United States rejects the efforts by some to read language included in paragraph 109 to mean that all Member States – including non-parties to the relevant armed conflict – have obligations under international humanitarian law (IHL) any time it applies to ensure that counterterrorism legislation does not impede humanitarian aid, even if terrorists benefit from such aid. Rather, we read paragraph 109 consistent with paragraph 60, which states that all measures undertaken by Member States to counter the financing of terrorism should comply with their obligations under international law, including when their obligations under IHL are applicable. While we support the critical role humanitarian actors play to alleviate the suffering of those who are displaced and otherwise victimized by terrorism, there is no obligation under international law that requires the completely unrestricted delivery of humanitarian or other assistance to terrorist groups or individual terrorists at all times. We emphasize that paragraph 109 has no impact upon the binding obligation for Member States to criminalize the financing of terrorism and prohibit their nationals or those within their territories from providing funds or other economic resources directly or indirectly to terrorist organizations or individual terrorists for any purpose, even without a link to a specific terrorist act, regardless of whether such support is meant to further the "terrorist," "humanitarian," or any other goals or activities of a terrorist or terrorist organization.

d. Applicability of international law to conflicts in cyberspace

On May 28, 2021, Michele Markoff, acting coordinator, delivered remarks to the UN Group of Governmental Experts on Advancing Responsible State Behavior in Cyberspace in the Context of International Security ("GGE"). Those remarks follow and are available at https://usun.usmission.gov/remarks-to-the-un-group-of-governmental-experts-on-advancing-responsible-state-behavior-in-cyberspace-in-the-context-of-international-security/.

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First, I want to express how honored I am to have worked with all of you over the last two years. This group of 25 experts have approached their work with utmost seriousness and diligence commensurate with the importance and seriousness of the topic. We have shared the clear and absolute understanding that we need to prevent conflict in the world in cyberspace.

Each of you provided important technical and cultural insights in your contributions. That has made this report in depth, meaty, and full of insights, and merits the importance I believe it will be given by the international community. During this final week, all of you have expressed an extraordinary willingness to bridge differences in order to reach consensus and understand the need to strive for the balance of interests. That mindset is perhaps the most critical element that has led to our success.

Ambassador Patriota, I want to reiterate my heartfelt thanks to you and your team for your tireless efforts to guide us through this process, particularly in the face of the unprecedented challenges of the COVID pandemic. You never wavered in your dedication to this process. With the help of our intrepid chair, we now have an intelligent, elegant, and comprehensive document that provides what you and we were striving for – "additional layers of understanding" building on a decade of work.

We should all be proud of this report. It is a product of all of our hard work. In our final sessions, much of our energy was devoted to resolving controversial issues, and we have largely succeeded at that. But this entire document is truly remarkable.

We have achieved a substantial new body of guidance on the eleven norms to which all UN member states have committed to adhere. States will no longer be left asking questions about what it means to implement each of those norms that have gained so much attention. We have provided detailed explanations about the intent of each norm as well as what it would mean to implement or adhere to it. The international community has been asking for such guidance since the 2015 report. With our current text, we have answered those calls.

We have put forth a meaningful body of guidance on considerations states should take into account when they are the victim of an ICT incident – ranging from practical requests for assistance to the complex issue of attribution. Given the threats all states are facing and the rise of serious ICT incidents, this may be one of the most important areas of progress in the report.

We have reaffirmed the role and value of confidence building measures and have provided new insights and recommendations that will drive that work forward for years to come.

We have reinforced that these recommendations and this framework of responsible state behavior that we built together cannot be fully realized without the essential addition of capacity building. All states that want to act responsibly in cyberspace should have the capacity to be able to do so and we should help them achieve that promise.

Since 2004, the GGE process has guided the international community's thinking on how to prevent conflict in cyberspace. Previous GGEs were the ones that articulated the framework of responsible behavior in cyberspace that all UN member states have explicitly and repeatedly endorsed, including through the recent OEWG consensus report. Of course, it is only with implementation we can truly work out how international cyber stability can be achieved. With our new report, we are calling on all states to put this framework into practice.

I am pleased to join consensus on this GGE report. Thank you chair and thank you everyone.

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The United States participated in multiple negotiation sessions in 2021 on the draft report of the Group of Government Experts ("GGE") on responsible State behavior in cyberspace. The U.S. contribution on international law, submitted before the report was finalized, appears below (with most footnotes omitted) and as an appendix to the final report. The Report of the GGE and the official compendium of voluntary national contributions are available at https://www.un.org/disarmament/group-of-governmental-experts/.

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I. Introduction

The United States submits this national contribution to the 2019-21 United Nations Group of Governmental Experts (GGE) on "Developments in the Field of Information and Telecommunications in the Context of International Security." This submission addresses the application of international law to the use of information and communications technologies (ICTs) by States.

The United States seeks to build upon the views expressed in the 2013 and 2015 GGEs reports, including with respect to how international law applies to the use of ICTs. In this submission, the United States seeks to deepen understanding of the legal conclusions in these consensus GGE reports, as well as to promote transparency, by sharing U.S. views on how international law applies to the use of ICTs by States. In this submission, we highlight some basic principles of international law that apply to State behavior in cyberspace and provide, where applicable, some considerations that States may take into account when determining how such principles apply to State use of ICTs in specific situations they confront. The United States believes that fostering discussion on how States understand their existing rights and obligations under international law, including with respect to self-defense, use of force, and armed conflict, apply in cyberspace actually promotes greater predictability and reduces the risk of unintended conflict. Our prior submissions to the 2014-15 and 2016-17 GGEs the Digest of United States Practice in International Law 2014 (732-40) and Digest of United States Practice in International Law 2016 (823-26) are available at: https://www.state.gov/digest-of-united-states-practice-in-international-law/.

II. Application of International Law to Cyber Activities Involving the Use of Force

There are two related bodies of international law that are relevant to the question of how existing international law applies to ICTs and the use of force in and through cyberspace: *jus ad bellum* (the body of law that addresses, *inter alia*, uses of force triggering a State's right to use force in self-defense) and *jus in bello* (the body of law governing the conduct of hostilities in the context of armed conflict).

A. Cyber activities and *jus ad bellum*

Both the 2013 and 2015 GGE reports recognized that the Charter of the United Nations applies to States' use of ICTs. The 2015 GGE report identified a number of principles of the Charter that are of central importance, including the obligation of Member States contained in Article 2(4) regarding refraining in their international relations from the threat or use of force against the territorial integrity or political independence of any State. The 2015 GGE report also noted the inherent right of States to take measures consistent with international law and as

recognized in the Charter. Article 51 of the Charter recognizes "the inherent right of individual or collective self-defense" in response to an armed attack against a Member State.

1. Use of force

Cyber activities may in certain circumstances constitute uses of force within the meaning of Article 2(4) of the UN Charter and customary international law. In determining whether a cyber activity constitutes a use of force prohibited by Article 2(4) of the UN Charter and customary international law or an armed attack sufficient to trigger a State's inherent right of self-defense, States should consider the nature and extent of injury or death to persons and the destruction of, or damage to, property. Although this is necessarily a case-by-case, fact-specific inquiry, cyber activities that proximately result in death, injury, or significant destruction, or represent an imminent threat thereof, would likely be viewed as a use of force / armed attack. If the physical consequences of a cyber activity result in the kind of damage that dropping a bomb or firing a missile would, that cyber activity should equally be considered a use of force / armed attack.

Some of the factors States should evaluate in assessing whether an event constitutes an actual or imminent use of force / armed attack in or through cyberspace include the context of the event, the actor perpetrating the action (recognizing the challenge of attribution in cyberspace, including the ability of an attacker to masquerade as another person/entity or manipulate transmission data to make it appear as if the cyber activity was launched from a different location or by a different person), the target and its location, the effects of the cyber activity, and the intent of the actor (recognizing that intent, like the identity of the attacker, may be difficult to discern, but that hostile intent may be inferred from the particular circumstances of a cyber activity), among other factors.

2. Inherent right of self-defense

A State's inherent right of self-defense, recognized in Article 51 of the UN Charter, may in certain circumstances be triggered by cyber activities that amount to an actual or imminent armed attack. This inherent right of self-defense against an actual or imminent armed attack in or through cyberspace applies whether the attacker is a State actor or a non-State actor. There is no requirement that a State defend itself using the same capabilities with which it is being attacked. States may employ cyber capabilities that rise to the level of a use of force as a means of self-defense against a kinetic armed attack (*i.e.*, one that was not launched in or through cyberspace). Additionally, States may in certain circumstances use kinetic military force in self-defense against an armed attack in or through cyberspace.

The use of force in self-defense must be limited to what is necessary and proportionate to address the imminent or actual armed attack in or through cyberspace. Before resorting to forcible measures in self-defense against an actual or imminent armed attack in or through cyberspace, States should consider whether passive cyber defenses or active defenses below the threshold of the use of force would be sufficient to neutralize the armed attack or imminent threat thereof.

B. Cyber activities and *jus in bello*

The 2015 GGE report recognized the applicability of the established jus in bello principles of humanity, necessity, proportionality, and distinction in cyberspace. The

applicability of the jus in bello more broadly to States' use of ICTs has been reaffirmed by a large number of Member States.[6]

The United States recognizes that cyber activities in the context of an armed conflict may in certain circumstances constitute an "attack" for purposes of the application of the *jus in bello* rules that govern the conduct of hostilities, including the principles of humanity, necessity, proportionality, and distinction recognized in the 2015 GGE report.

The United States has also elaborated on how these principles would apply to cyber capabilities under an armed conflict. For example, the principle of distinction requires that only legitimate military objectives be made the object of attack. In the context of cyber capabilities used in armed conflict, the principle of distinction requires that only legitimate military objectives be made the object of attack.

The principle of proportionality prohibits attacks that may be expected to cause incidental loss to civilian life, injury to civilians, or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated. In the cyber context, this rule would require parties to a conflict to assess the potential effects of cyber activities on both military and civilian infrastructure and users, including shared physical infrastructure (such as a dam or a power grid) that would affect civilians. In addition to the potential physical damage that a cyber activity may cause, such as death or injury that may result from effects on critical infrastructure, parties must assess the potential effects of a cyber attack on civilian objects that are not military objectives, such as private, civilian computers that hold no military significance but may be networked to military objectives.

In addition, when using cyber capabilities in armed conflict, States must comply with their obligations under international humanitarian law related to the protection of medical personnel and facilities. For example, medical personnel and facilities must not be knowingly attacked or unnecessarily prevented from discharging their proper functions, and parties to a conflict must take feasible precautions to reduce the risk of incidental harm to the civilian population and other protected persons and objects, including medical personnel and facilities. The United States has specifically addressed how its international humanitarian law obligations apply to cyberspace operations in the context of armed conflict in the Department of Defense's Law of War Manual, reflecting a commitment to ensure that U.S. legal obligations are understood and respected by its military. Several other States have taken similar steps to share

[6] *See, e.g.*, Australia: International Cyber Engagement Strategy, Annex A: Australia's position on applies to State conduct in cyberspace (3 Oct. 2017), available at: https://www.dfat.gov.au/publications/international-relations/international-cyber-engagement-strategy/aices/preliminary_information/foreword.html; Australia: 2019 International Law Supplement, available at: https://www.dfat.gov.au/publications/international-relations/international-cyber-engagement-strategy/aices/chapters/2019_international_law_supplement.html; Finland: National Positions, International Law and Cyberspace, p.7 (2020), available at: https://front.un-arm.org/wp-content/uploads/2020/10/finland-views-cyber-and-international-law-oct-2020.pdf; France: Ministry of Defense, International Law Applied to Operations in Cyberspace, pp. 12-18 (Sept. 2019); Netherlands: Letter of 5 July 2019 from the Minister of Foreign Affairs to the President of the House of Representatives on the international legal order in cyberspace, Appendix: International law in cyberspace, p. 5, available at: https://www.government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace; New Zealand: The Application of International Law to State Activity in Cyberspace, 1 Dec. 2020, available at: https://www.mfat.govt.nz/en/media-and-resources/ministry-statements-and-speeches/cyber-il/; UK: Attorney General Jeremy Wright, Cyber and International Law in the 20th Century, 23 May 2018, available at: https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century.

their views on how international humanitarian law applies and / or address cyber specifically in their military manuals.[8]

For example, in the context of *jus ad bellum*, it is important for States to understand what types of activities would be interpreted by other States as violations of Article 2(4) or that might prompt a State to invoke its right of self-defense under Article 51. Similarly, it is important for States to develop clear understandings of the restrictions that the Charter and customary international law place on this type of conduct; for example, even where a State may lawfully use force in self-defense, its response must be necessary and proportionate to respond to an actual or imminent armed attack. The United States has sought to be transparent about its views in this regard, including through its submissions to this and previous GGEs, and would encourage other States to do the same.

Similarly, international humanitarian law regulates the conduct of hostilities to minimize their effects on civilians and avoid unnecessary suffering. It does so in part through specific protections for civilians and civilian objects. Understanding how these protections apply in the context of cyber attacks is particularly important, given the often dual-use nature of ICT infrastructure and interconnectivity of ICTs. Affirmation that this body of law applies is consistent with our common commitment to the pursuit of peace.

III. Application of International Law to Cyber Activities Below the Level of a Use of Force

A. Respect for the sovereign equality of States and human rights

As recognized in the 2013 and 2015 GGE reports, State sovereignty and the international principles that flow from sovereignty apply to States' ICT-related activities and to their jurisdiction over ICT infrastructure within their territory.

The United States believes that State sovereignty, among other long-standing international legal principles, must be taken into account in the conduct of activities in cyberspace. Whenever a State contemplates conducting activities in cyberspace, the equal sovereignty of other States needs to be considered.

The implications of sovereignty for cyber activities are complex, but we can start by noting two important implications of sovereignty for ICT-related activities. First, we acknowledge the continuing relevance of territorial jurisdiction, even to cyber activities, and second, we acknowledge the exercise of jurisdiction by the territorial State is not unlimited; it must also be consistent with applicable international law, including international human rights obligations.

Among other international legal principles, the 2015 GGE report acknowledges the principle of non-intervention in the internal affairs of other States. As articulated by the International Court of Justice (ICJ) in its judgment on the merits in the Nicaragua Case, this rule of customary international law forbids States from engaging in coercive action that bears on a matter that each State is entitled, by the principle of State sovereignty, to decide freely, such as the choice of a political, economic, social, and cultural system. This is generally viewed as a relatively narrow rule of customary international law, but States' cyber activities could run afoul of this prohibition. For example, a cyber operation by a State that interferes with another country's ability to hold an election or that manipulates another country's election results would

[8] *See* note 6 *supra*; see also Danish Ministry of Defense, Military Manual on International Law Relevant to Danish Armed Forces in International Operations, § 3.10, Regulation of Computer Network Operations in international law (12 Oct. 2020), available at: https://forsvaret.dk/en/publications/military-manual/.

be a clear violation of the rule of non-intervention. Other States have made similar observations.[11] Further, a cyber operation that attempts to interfere coercively with a State's ability to protect the health of its population--for example, through vaccine research or running cyber-controlled ventilators within its territories during a pandemic--could be considered a violation of the rule of non-intervention.

In certain circumstances, one State's non-consensual cyber operation in another State's territory, even if it falls below the threshold of a use of force or non-intervention, could also violate international law. However, a State's remote cyber operations involving computers or other networked devices located on another State's territory do not constitute a per se violation of international law. In other words, there is no absolute prohibition on such operations as a matter of international law. This is perhaps most clear where such activities in another State's territory have no effects or de minimis effects. The very design of the Internet may lead to some encroachment on other sovereign jurisdictions.

Finally, while the physical infrastructure that supports the Internet and cyber activities is generally located in sovereign territory and is subject to the jurisdiction of the territorial State, the exercise of jurisdiction by the territorial State is not unlimited. It must be consistent with applicable international law, including international human rights obligations. The 1948 Universal Declaration of Human Rights (UDHR) says: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." All human beings hold certain rights, whether they choose to exercise them in a city square or an Internet chat room. The right to freedom of expression is well-established internationally in both the UDHR and the International Covenant on Civil and Political Rights. Both of these instruments clearly state that this right can be exercised through any media and regardless of frontiers. Both of these instruments set forth the right of individuals to publish, to create art, to practice their religions, and to gather together and discuss issues of the day. Regardless of whether these activities occur online or offline, they are governed by the same principles.

B. The Concept of "Due Diligence"

In recent public statements on how international law applies in cyberspace, a few States have referenced the concept of "due diligence": that States have a general international law obligation to take steps to address activity emanating from their territory that is harmful to other States, and that such a general obligation applies more specifically, as a matter of international law, to cyber activities. The United States has not identified the State practice and *opinio juris* that would support a claim that due diligence currently constitutes a general obligation under international law. We do believe, however, that if a State is notified of harmful activity emanating from its territory it must take reasonable steps to address such activity.

C. State responsibility for internationally wrongful acts

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[11] *See, e.g.*, Australia: 2019 International Law Supplement, available at: https://www.dfat.gov.au/publications/international-relations/international-cyber-engagement-strategy/aices/chapters/2019_international_law_supplement.html; Estonia: President Kersti Kaljulaid, Opening Speech at Cybercon, 29 May 2019, available at: https://www.president.ee/en/official-duties/speeches/15241-president-of-the-republic-at-the-opening-of-cycon-2019/index.html; Finland: National Positions, International Law and Cyberspace, p. 3 (2020), available at: https://front.un-arm.org/wp-content/uploads/2020/10/finland-views-cyber-and-international-law-oct-2020.pdf; New Zealand: The Application of International Law to State Activity in Cyberspace, 1 Dec. 2020, available at: https://www.mfat.govt.nz/en/media-and-resources/ministry-statements-and-speeches/cyber-il/ UK; Attorney General Jeremy Wright, Cyber and International Law in the 20th Century, 23 May 2018, available at: https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century.

Both the 2013 and 2015 GGE reports concluded that States must meet their international obligations regarding internationally wrongful acts attributable to them under international law. In addition, they must not use proxies to commit internationally wrongful acts using ICTs. Under the law of State responsibility, a State is responsible for an internationally wrongful act when there is an act or omission that is attributable to it under international law that constitutes a breach of an international obligation of the State. Cyber activities may therefore constitute internationally wrongful acts under the law of State responsibility if they are inconsistent with an international obligation of the State and are attributable to it.

The law of State responsibility supplies the standards for attributing acts, including cyber acts, to States. For example, cyber operations conducted by organs of a State or by persons or entities empowered by domestic law to exercise elements of governmental authority are attributable to that State. As important, as a legal matter, States cannot escape responsibility for internationally wrongful cyber acts by perpetrating them through proxies; cyber operations conducted by non-State actors are attributable to a State under the law of State responsibility when such operations are engaged in pursuant to the State's instructions or under the State's direction or control, or when the State later acknowledges and adopts the operations as its own. Thus, when there is information—whether obtained through technical means or all-source intelligence—that permits attribution of a cyber act of an ostensibly non-State actor to a State under the international law of State responsibility, the victim State has all of the rights and remedies against the responsible State permitted to it under international law.

The law of State responsibility does not set forth burdens or standards of proof for attribution. Such questions may be relevant for judicial or other types of proceedings, but they do not apply as an international legal matter to a State's determination about attribution of internationally wrongful cyber acts for purposes of its response to such acts, including by taking unilateral, self-help measures permissible under international law, such as countermeasures. In that context, a State acts as its own judge of the facts and may make a unilateral determination with respect to attribution of a cyber operation to another State. Absolute certainty is not required. Instead, international law generally requires that States act reasonably under the circumstances. Similarly, there is no international legal obligation to reveal evidence on which attribution is based. But to facilitate global understanding of emerging state practice in this rapidly developing area, public attributions should, wherever feasible, include sufficient evidence to allow corroboration or cross-checking of allegations.

Attribution plays an important role in States' responses to malicious cyber activities as a matter of international law. It is crucial, however, to distinguish legal attribution from attribution in the technical and political senses. States and commentators often express concerns about the challenge of attribution in a technical sense—that is, the challenge in light of certain characteristics of cyberspace of obtaining facts, whether through technical indicators or all-source intelligence, that would inform a State's policy and legal determinations about a particular cyber incident. Others have raised issues related to political decisions about attribution—that is, considerations that might be relevant to a State's decision to go public and identify another State as the actor responsible for a particular cyber incident and to condemn a particular cyber act as unacceptable. As norms emerge to clarify how international law addresses the issue of attribution, it would be useful, wherever possible, for law-abiding states to share information regarding both technical knowhow and state practice.

D. Countermeasures and Retorsions

In certain circumstances, a State injured by cyber activities that are attributable to another State and that constitute an internationally wrongful act, but do not amount to an armed attack, may respond with non-forcible countermeasures. Such countermeasures must be directed only at the State responsible for the wrongful act, must meet the requirements of necessity and proportionality, must be designed to induce the State to return to compliance with its international obligations, and, under the customary international law of State responsibility, must be suspended without undue delay if the internationally wrongful act has ceased.

Before an injured State can undertake countermeasures in response to a cyber-based internationally wrongful act attributable to a State, it generally must call upon the responsible State to cease its wrongful conduct, unless urgent countermeasures are necessary to preserve the injured State's rights. The sufficiency of this prior demand on the responsible State should be evaluated on a case-by-case basis in light of the particular circumstances of the situation at hand and the purpose of the requirement, which is to give the responsible State notice of the injured State's claim and an opportunity to respond. Countermeasures taken in response to cyber activities attributable to States that constitute internationally wrongful acts may take the form of cyber-based countermeasures or non-cyber-based countermeasures.

Countermeasures are distinct from acts of retorsion, which are unfriendly acts that are not inconsistent with any international obligations. Acts of retorsion may include the imposition of sanctions or the declaration that a diplomat is persona non grata. A State can always undertake such responsive measures that are not inconsistent with any of its international obligations in order to influence the behavior of other States, including in response to destabilizing cyber activities.

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On July 19, 2021, the State Department issued a press statement from Secretary Blinken in response to the People's Republic of China engaging in destabilizing and irresponsible behavior in cyberspace. The press statement follows and is available at https://www.state.gov/responding-to-the-prcs-destabilizing-and-irresponsible-behavior-in-cyberspace/.

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The United States and countries around the world are holding the People's Republic of China (PRC) accountable for its pattern of irresponsible, disruptive, and destabilizing behavior in cyberspace, which poses a major threat to our economic and national security. The PRC's Ministry of State Security (MSS) has fostered an ecosystem of criminal contract hackers who carry out both state-sponsored activities and cybercrime for their own financial gain. In addition, the United States government, alongside our allies and partners, has formally confirmed that cyber actors affiliated with the MSS exploited vulnerabilities in Microsoft Exchange Server in a massive cyber espionage operation that indiscriminately compromised thousands of computers and networks, mostly belonging to private sector victims. As evidenced by the indictment of three MSS officers and one of their contract hackers unsealed by the Department of Justice today, the United States will impose consequences on PRC malicious cyber actors for their irresponsible behavior in cyberspace.

Apart from the PRC's direct commitments not to engage in cyber-enabled theft of intellectual property for commercial gain, the international community has laid out clear expectations and guidelines for what constitutes responsible behavior in cyberspace. Responsible states do not indiscriminately compromise global network security nor knowingly harbor cyber criminals – let alone sponsor or collaborate with them. These contract hackers cost governments and businesses billions of dollars in stolen intellectual property, ransom payments, and cybersecurity mitigation efforts, all while the MSS had them on its payroll.

The United States is working with our partners and allies to promote responsible state behavior in cyberspace, counter cybercrime, and oppose digital authoritarianism. We are also providing support to countries that are committed to building their capacity to protect their digital networks, investigate and impose consequences on malicious cyber actors, and participate in international conversations on cyber policy. These efforts will enhance global security and stability in cyberspace. The State Department is committed to driving this agenda forward, and we call upon all states that wish to see greater stability in cyberspace to join us in these efforts.

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B. CONVENTION ON CERTAIN CONVENTIONAL WEAPONS

1. Interventions on Lethal Autonomous Weapons Systems ("LAWS")

On August 3, 2021, Attorney-Adviser Amanda Wall delivered the U.S. opening statement at the 1st session of the 2021 Group of Governmental Experts ("GGE") on emerging technologies in the area of Lethal Autonomous Weapons Systems ("LAWS") in Geneva. The U.S. opening statement is excerpted below and available at https://geneva.usmission.gov/2021/08/03/opening-statement-at-gge-on-lethal-autonomous-weapons-systems-laws/?_ga=2.247522247.1981555328.1638452377-485298462.1638452377.

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Our goal as a delegation for this session, and I hope our shared goal as a GGE for these two weeks, is simple: we seek to make as much progress as possible to develop consensus on substantive conclusions or recommendations on aspects of the normative and operational framework. This is the prime opportunity for us to do so. We look forward to seizing this chance to make as much substantive progress as possible, and urge delegations to remain focused on fulfilling our present mandate. Our future mandate is necessary and important, and we will be in a better position to recognize what that mandate should look like after we have done some of the additional substantive work that High Contracting Parties have already identified in their recent contributions during informal meetings and written submissions, which are for consideration at this formal meeting as well.

To that end, during our informal meetings in June and July, the U.S. Delegation presented a joint paper on behalf of Australia, Canada, Japan, the United Kingdom, and the United States, which recommended that the GGE focus on four aspects of the normative and operational framework on emerging technologies in the area of LAWS. Those four aspects are: (1)

Application of IHL; (2) Human Responsibility; (3) Human-Machine Interaction; and (4) Weapons Reviews. We continue to believe that focusing our discussions on those four key aspects would be a productive way to advance our work with an eye toward the Review Conference later this year. Our joint paper shows how much progress the GGE has already made in achieving consensus in these four aspects of the framework, but we believe the GGE can do more to achieve consensus on additional substantive conclusions or recommendations in advance of the Review Conference. With that in mind, in June, the United States also submitted a working paper proposing additional conclusions under each of these four elements. I'll summarize them briefly here, and we hope to discuss these proposed conclusions in greater detail over the course of this week.

First, we believe that a critical aspect of the GGE's work on the operative and normative framework is to articulate the limits that existing IHL places on the use of emerging technologies in the area of LAWS. How IHL requirements are implicated could depend on how a weapon system is to be used. Therefore, if we want to articulate more clearly the limits that IHL places on the use of emerging technologies in the area of LAWS in military operations, a necessary step is to specify the different ways these technologies can be used in military operations. Consequently, under "application of IHL," we have proposed clarifying how IHL requirements apply to three general scenarios for the use of autonomous functions in weapons systems: 1) homing munitions that involve autonomous functions; 2) decision support tools that that can inform decision-making about targeting; and 3) relying on autonomous functions in weapon systems to select and engage targets.

Under this same aspect, we have also proposed identifying ways in which emerging technologies in the area of LAWS could be used to reduce the risk of harm to civilians in military operations, and to strengthen compliance with IHL. As many delegations have noted, new technologies can create humanitarian benefits like: increasing a commander's awareness of civilians on the battlefield; improving the commander's ability to assess the risk of collateral damage; improving precision and accuracy of weapons; and automatically disabling munitions if they miss their targets. And, a critical part of the normative and operational framework is using technology to advance the objects and purposes of the CCW.

Second, under "human responsibility," we have proposed a number of conclusions about how existing international legal principles of responsibility apply to human conduct and decisions involving emerging technologies in the area of LAWS. From a normative perspective, it is important to reaffirm that these general principles of legal responsibility apply in this specific context and to reject the notion that new technologies can be used to evade responsibility or to create an "accountability gap." From an operational perspective, we have also proposed a number of good practices that the GGE could endorse to promote accountability in military operations involving the use of emerging technologies in the area of LAWS. These include general practices – like conducting operations under a clear operational chain of command and establishing and using procedures for the reporting of incidents involving potential violations. They also include practices specific to the use of weapons systems – like rigorous testing of and training on the weapon system so commanders and operators understand the likely effects of employing the weapon system.

Third, under "human-machine interaction," our working paper proposes a number of practices that the GGE could endorse that would help ensure that weapon systems based on emerging technologies in the area of LAWS effectuate the intent of commanders and operators to comply with IHL, in particular, by avoiding unintended engagements and minimizing harm to

civilians and civilian objects. For example, testing and evaluation of weapon systems during development, training of personnel, and clear human-machine interfaces can reduce the risk of accidents or unintended engagements in military operations. These measures are drawn from U.S. military practice in developing and using autonomous and semi-autonomous weapon systems, and emphasize that what constitutes appropriate human-machine interaction at one stage of the life-cycle can depend on human-machine interaction at other stages in the life-cycle. A one-size-fits-all approach would oversimplify this issue, in our view.

Finally, under the fourth aspect, we have proposed that the GGE endorse guidelines and good practices for conducting legal reviews of weapon systems based on emerging technologies in the area of LAWS. These include, for example, conducting legal reviews when weapon systems are modified, or when new concepts for use of existing weapons are being developed.

We hope these proposals can serve as a starting point for real substantive discussions over the next two weeks. We support a strong, substantive outcome for the Review Conference this year, and the best way to achieve that in our view is to find the areas of substantive consensus and develop them as fully as possible this week and next week. We believe there is emerging consensus to focus on these four areas in order to achieve that goal. And, we look forward to working from these areas and to discussing the substantive proposals we have put forth, as well as those that other delegations have put forth in that common effort.

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Deputy Legal Adviser Charlie Trumbull delivered the U.S. statement on agenda item 5(A) on August 4, 2021 at the 1st session of the 2021 GGE on LAWS. See U.N. Doc. No. CCW/GGE.1/2021/1 (Item 5(A) on the agenda refers to "exploration of the potential challenges posed by emerging technologies in the area of Lethal Autonomous Weapons Systems to International Humanitarian Law"). Mr. Trumbull's statement is excerpted below and available in full at https://geneva.usmission.gov/2021/08/04/u-s-statement-at-the-gge-on-laws-item-5a/?_ga=2.57737578.1981555328.1638452377-485298462.1638452377.

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Guiding Principle (a) reflects the foundational premise that IHL applies to all weapons systems, and the GGE's 2019 report contains significant conclusions on IHL. Of course, much more work can be done on this agenda item. Understanding how IHL applies to the use of emerging technologies in the area of LAWS is critical to effectively implementing the other guiding principles, including guiding principles (b), (c), (d), (e), and (h).

Mr. Chair, the GGE should build on its successful work on IHL by further clarifying IHL requirements applicable to the use of emerging technologies in the area of LAWS. In particular, we have recommended that the GGE conclude that:

> Consistent with IHL, autonomous functions may be used to effectuate more accurately and reliably a commander or operator's intent to strike a specific target or target group.

> The addition of autonomous functions, such as the automation of target selection and engagement, to weapon systems can make weapons more precise and accurate in striking military objectives by allowing weapons or munitions to "home in" on targets selected by a human operator.
> If the addition of autonomous functions to a weapon system makes it inherently indiscriminate, *i.e.*, incapable of being used consistent with the principles of distinction and proportionality, then any use of that weapon system would be unlawful.
> The addition of autonomous functions to a weapon system can strengthen the implementation of IHL when these functions can be used to reduce the likelihood of harm to civilians and civilian objects.

A number of colleagues have highlighted similar points yesterday, so we would suggest these could be fruitful areas for consensus recommendations or conclusions.

We have also proposed that the GGE build on the 2019 report, which recognized the importance of precautions, by elaborating on the types of precautions that States have employed in using weapon systems with autonomous functions. On page 4 of our national commentary, we proposed the following:

> Feasible precautions must be taken in use of weapon systems that autonomously select and engage targets to reduce the expected harm to civilians and civilian objects. Such precautions may include:
> Warnings (*e.g.*, to potential civilian air traffic or notices to mariners);
> Monitoring the operation of the weapon system; and
> Activation or employment of self-destruct, self-deactivation, or self-neutralization mechanisms (*e.g.*, use of rounds that self-destruct in flight or torpedoes that sink to the bottom if they miss their targets).

Reaching more granular understandings like this of IHL requirements would strengthen the normative and operational framework. For example, such understandings would improve the ability to conduct legal review of weapons, to train personnel to comply with IHL requirements, and to apply principles of State and individual responsibility.

We plan to discuss the issue of human-machine interaction in greater detail during the appropriate agenda item later this week, but let me just note that in our view IHL does not establish a requirement for "human control" as such. Rather, IHL seeks, *inter alia*, to ensure the use of weapons is consistent with the fundamental principles and requirements of distinction, proportionality, and precautions. Introducing new and vague requirements like that of human control could, we believe, confuse, rather than clarify, especially if these proposals are inconsistent with long-standing, accepted practice in using many common weapons systems with autonomous functions.

The application of IHL to the use of emerging technologies in the area of LAWS is a critical topic, and as we noted in our opening statement, we would recommend focusing on this as one of four aspects of the normative and operational framework that our mandate asks us to explore and develop. I also wanted to respond to some of the perspectives in the discussion yesterday.

First, we have heard a number of delegations question whether autonomous weapons could be capable of distinguishing between civilians and combatants, distinguishing between

combatants and persons placed hors de combat, or making the assessments required by the principle of proportionality. Yet, this GGE has repeatedly recognized that IHL does not impose obligations on weapon systems, which as objects cannot assume an obligation. Accordingly, IHL does not require a weapon to distinguish between military objectives and persons and objects that are protected from being made the object of attack or to assess whether an attack is expected to cause excessive death or injury to civilians and damage to civilian objects. Rather, IHL imposes obligations on persons. It is the person who makes the decision governed by IHL, such as the military commander who directs the attack, who is obliged to meet the applicable IHL requirements. In this sense, we don't view autonomy in weapons systems as replacing humans in making these judgments required by IHL. So, for example, the critical consideration is not whether a weapon system itself can distinguish between military objectives and persons and objects that are protected from being made the object of attack or whether a weapon system can make proportionality assessments similar to a human, but rather whether such weapons systems can, under the circumstances, be used by a human operator or commander consistent with IHL requirements.

Second, the ICRC and other delegations have noted that certain uses of autonomy could pose certain risks for compliance with IHL. We agree that virtually any advance in technology can present a risk if used in an irresponsible or unlawful manner. However, the fact that a technology poses risks does not mean that it should be prohibited. As the Ambassador from India and other speakers reminded us yesterday, technology can also be used to achieve benefits, like precision and reducing the risks of civilian casualties. We should not demonize technology. Rather, we should carefully weigh risks against benefits of emerging technologies in the specific circumstances, by, for example, using risks assessments and mitigation measures, as the GGE has recognized in Guiding principle (g). It provides:

> Risk assessments and mitigation measures should be part of the design, development, testing and deployment cycle of emerging technologies in any weapons systems;

Third, as the French Ambassador noted, the proposal to prohibit "unpredictable" weapons also warrants much greater discussion before the GGE could reach consensus on it. In line with the comments of the German Ambassador yesterday, it may be more useful to focus on practices for ensuring that a weapon system does what commanders or operators intend. Indeed, a core purpose of the U.S. Department of Defense's Directive 3000.09 "Autonomy in Weapons Systems," is to "[e]stablish[] guidelines designed to minimize the probability and consequences of failures in autonomous and semi-autonomous weapon systems that could lead to unintended engagements." We have shared this practice in the interest of transparency and encourage other States to share their practice as well.

Lastly, we do not necessarily regard relying on autonomous functions in weapon systems as a delegation of life and death decisions to algorithms.

Sensors and software are also used in many safety-critical applications, including in normal civilian life. Just because the functioning of software or algorithms can have consequences for human life does not mean that the software is a moral agent or that there is no human responsible for these consequences.

In addition, using software to select and engage a target doesn't necessarily mean that a person has not exercised appropriate levels of human judgment to ensure compliance with IHL. Autonomous functions have been used in weapon systems consistent with IHL for many years,

including to select and engage targets. In existing practice, decisions about life and death have been made through military decision-making processes at the strategic, operational, and tactical levels, including the targeting process.

Moreover, using software or autonomous functions does not mean that a person cannot be held accountable for wrongdoing. Established legal principles of accountability continue to apply when persons use emerging technologies in the area of LAWS. The U.S. delegation has proposed a number of conclusions relating to human responsibility to emphasize this point, which we plan to discuss in more detail later.

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Amanda Wall delivered the U.S. statement at the GGE on LAWS on August 4, 2021, regarding agenda item 5(C) (further consideration of the human element in the use of lethal force and aspects of human-machine interaction in the development, deployment and use of emerging technologies in the area of LAWS). The statement is available at https://geneva.usmission.gov/2021/08/04/u-s-statement-at-the-gge-on-laws-agenda-item-5c/?_ga=2.247522247.1981555328.1638452377-485298462.1638452377, and excerpted below.

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We have appreciated the emerging consensus for further work in the area of human-machine interaction. This is an area in which further common understandings can and should be built. Guiding Principle (c) is an excellent foundation on which to build these additional common understandings. This guiding principle recognizes that human-machine interaction should ensure IHL compliance, and also recognizes the need to consider human-machine interaction comprehensively, across the life cycle of the weapon system. Therefore, in our view, a positive next step for the GGE in this area would be to elaborate on good practices in human-machine interaction that can strengthen compliance with IHL. As our UK colleagues very clearly and helpfully noted this morning, IHL is specially adapted to regulating the use of weapons in armed conflict, and our discussion of human-machine interaction should therefore, as reflected in Guiding Principle (c), be for the purpose of strengthening implementation of IHL.

The United States proposed a new conclusion on human-machine interaction for the GGE's consideration, along these lines. It begins by stating that: "Weapons systems based on emerging technologies in the area of LAWS should effectuate the intent of commanders and operators to comply with IHL, in particular, by avoiding unintended engagements and minimizing harm to civilians and civilian objects."

This conclusion is drawn from real-world practice in human-machine interaction and also recognizes that IHL imposes requirements on human beings. Our proposal then goes on to elaborate three categories of measures across the lifecycle of the weapon:

- Weapons systems based on emerging technologies in the area of LAWS should be engineered to perform as anticipated. This should include verification and validation and testing and evaluation before fielding systems.
- Relevant personnel should properly understand weapons systems based on emerging technologies in the area of LAWS. Training, doctrine, and tactics, techniques, and procedures should be established for the weapon system. Operators should be certified by relevant authorities that they have been trained to operate the weapon system in accordance with applicable rules. And,
- User interfaces for weapons systems based on emerging technologies in the area of LAWS should be clear in order for operators to make informed and appropriate decisions in engaging targets. In particular, interfaces between people and machines for autonomous and semi-autonomous weapon systems should: (i) be readily understandable to trained operators; (ii) provide traceable feedback on system status; and (iii) provide clear procedures for trained operators to activate and deactivate system functions.

We are interested in the views of GGE participants on these proposed new conclusions. We believe that the GGE could support States in implementing IHL by endorsing these good practices. We also believe that these good practices provide a basis for further discussion and intergovernmental exchanges. For example, one of the Department of Defense's principles for the ethical use of artificial intelligence is such a good practice in ensuring that relevant personnel properly understand the weapon system, if AI capabilities are used in an autonomous or semi-autonomous weapon system. This DoD AI ethical principle is called "Traceable" and provides that:

> The Department's AI capabilities will be developed and deployed such that relevant personnel possess an appropriate understanding of the technology, development processes, and operational methods applicable to AI capabilities, including with transparent and auditable methodologies, data sources, and design procedure and documentation.

Additionally, to follow up on a point that a variety of delegations have mentioned, including our colleagues from the UK and France this morning, human responsibility is a critical aspect of the normative and operational framework for the use of emerging technologies in the area of LAWS. We therefore believe it would be productive for the GGE to address how well-established international legal principles of State and individual responsibility apply to States and persons who use weapon systems with autonomous functions. The United States has proposed eight new conclusions on human responsibility for the GGE's consideration.

1. Under principles of State responsibility, every internationally wrongful act of a State, including such acts involving the use of emerging technologies in the area of LAWS, entails the international responsibility of that State.
2. A State remains responsible for all acts committed by persons forming part of its armed forces, including any such use of emerging technologies in the area of LAWS, in accordance with applicable international law.
3. An individual, including a designer, developer, an official authorizing acquisition or deployment, a commander, or a system operator, is responsible for his or her decisions governed by IHL with regard to emerging technologies in the area of LAWS.

4. Under applicable international and domestic law, an individual remains responsible for his or her conduct in violation of IHL, including any such violations involving emerging technologies in the area of LAWS. The use of machines, including emerging technologies in the area of LAWS, does not provide a basis for excluding legal responsibility.
5. The responsibilities of any particular individual in implementing a State or a party to a conflict's obligations under IHL may depend on that person's role in the organization or military operations, including whether that individual has the authority to make the decisions and judgments necessary to the performance of that duty under IHL.
6. Under IHL, a decision, including decisions involving emerging technologies in the area of LAWS, must be judged based on the information available to the decision-maker at the time and not on the basis of information that subsequently becomes available.
7. Unintended harm to civilians and other persons protected by IHL from accidents or equipment malfunctions, including those involving emerging technologies in the area of LAWS, is not a violation of IHL as such. And,
8. States and parties to a conflict have affirmative obligations with respect to the protection of civilians and other classes of persons under IHL, which continue to apply when emerging technologies in the area of LAWS are used. These obligations are to be assessed in light of the general practice of States, including common standards of the military profession in conducting operations.

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On August 5, 2021, the United States delivered an intervention at the 1st session of the 2021 GGE on LAWS on "Reviewing Potential Military Applications of Emerging Technologies." This intervention reviewed a working paper the United States submitted in 2019 on U.S. practice in the development and use of autonomous functions in weapon systems. The full intervention is available at https://geneva.usmission.gov/2021/08/05/u-s-statement-at-the-gge-on-laws-during-the-discussion-of-agenda-item-5d/?_ga=2.247522247.1981555328.1638452377-485298462.1638452377, and excerpts follow.

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This presentation will address:

(1) application of IHL requirements in three general scenarios for the use of autonomous functions in weapon systems;

(2) steps that States can take to help implement IHL requirements; and

(3) the potential for emerging technologies in the area of LAWS to strengthen implementation of IHL.

We believe that the issues addressed in this presentation will support the GGE's work on the legal, technological, and military aspects of emerging technologies in the area of LAWS, including its work on the normative and operational framework. Even though we are making this presentation during agenda item 5(d), "Review of potential military applications of related technologies in the context of the Group's work;" the issues addressed in this presentation are relevant to other agenda items, including agenda items 5(a), 5(b), and 5(c).

For example:

How IHL requirements apply can depend on how autonomous functions in weapon systems are used. …

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The following IHL requirements are of particular relevance:

(a) Distinction. In that, "Combatants may make military objectives the object of attack, but may not direct attacks against civilians, civilian objects, or other protected persons and objects."

(b) Proportionality. In that, "Combatants must refrain from attacks in which the expected loss of life or injury to civilians, and damage to civilian objects incidental to the attack, would be excessive in relation to the concrete and direct military advantage expected to be gained."

(c) Precautions. In that, "Combatants must take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack."

It may be useful to consider that:

these requirements impose duties on humans, and not on machines,

They are implemented in military operations through responsible commands, and

not every duty will be implemented by every human within the command.

We'd also note that these requirements address "attacks," rather than the firing or activation of weapon systems as such. For example, the single firing of a weapon system might only be one part of an "attack," and the mere activation of a weapon system might not constitute an "attack" at all.

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I appreciate you listening to our presentation of these three use scenarios and how IHL applies to them. Our 2019 working paper discusses these scenarios in detail, and we also have a paper submitted this year that provides concrete proposals for the GGE's consideration on how IHL applies to these scenarios.

Considering these scenarios helps highlight the importance of practical measures to implement IHL requirements in respect of autonomous functions in weapon systems. These practical measures include: 1) rigorous testing to assess system performance and reliability; 2) establishing doctrine, training, and procedures to ensure that weapons are used in accordance with how they have been designed, tested, and reviewed; and 3) the legal review of weapons prior to their use.

Rigorous testing to assess weapon system performance and reliability supports compliance with IHL. …

Establishing doctrine, training, and procedures for the weapon system is another important mechanism that helps ensure that the weapon is used consistent with IHL. How IHL considerations are applied could depend on how the weapon is to be used. If a weapon system was developed with a particular concept of employment in mind (for example, scenario 1 with homing munitions.), it might create unanticipated problems if the weapon were used in ways not contemplated by those who developed and tested the weapon system.

The legal review of weapons prior to their use enables the State developing or acquiring the weapons to consider relevant IHL issues, including precautions to reduce the risk of civilian casualties. The legal review of the weapon also affords an opportunity to ensure that designers and developers of the weapon system and others tasked with ensuring the reliability of the weapon system have applied their expertise. Similarly, the legal review of the weapon also provides a mechanism for reviewing and considering additional doctrine, training, and procedures that would help ensure the weapon is used consistent with IHL.

One of the guiding principles for the GGE's work is that "[c]onsideration should be given to the use of emerging technologies in the area of lethal autonomous weapons systems in upholding compliance with IHL and other applicable international legal obligations." Thus, it is important to consider how emerging technologies in the area of LAWS can strengthen implementation of IHL requirements.

As the United States has noted in its working paper on humanitarian benefits of emerging technologies in the area of lethal autonomous weapon systems submitted at the August 2018 GGE meeting, new advancements in autonomy in weapon systems hold great promise for strengthening the implementation of IHL. For example, as I've previously mentioned during this presentation, autonomous functions could be used to make weapons more precise and increase the accuracy of human decision-making in stressful and time-critical situations.

In addition, emerging technologies in the area of LAWS could have benefits that extend beyond simply reducing the risk of civilian casualties in military operations.

For example, emerging technologies in the area of LAWS could strengthen efforts to ensure accountability over the use of force by having system logs that automatically record the operation of the weapon system. This kind of recording could facilitate investigations of both the weapon system's performance and use.

Automated systems also could identify incidents meriting further review or investigation. By way of comparison, some banks, credit card companies, and other financial institutions use automated systems to identify suspicious activity and potentially fraudulent transactions. Weapons systems with autonomous functions could similarly be programmed with reporting mechanisms to highlight unusual uses meriting further review.

Lastly, automated tracking systems could assist in the tracking of unexploded ordnance and fulfilling associated responsibilities under the CCW Protocol V on Explosive Remnants of War. For example, a weapon system that automatically tracked its own fires could identify and record the location where its ordnance did not explode as intended, thereby facilitating the clearance of explosive remnants of war.

To summarize:

(1) Existing IHL, including the requirements of distinction, proportionality, and precaution, provides a comprehensive framework to govern the use of autonomy in weapon systems.

(2) Internal procedures for review and testing, including the legal review of weapons, are essential good practices for implementing IHL requirements. And,

(3) Emerging technologies in the area of LAWS could strengthen the implementation of IHL by, for example,

- reducing the risk of civilian casualties,
- allowing for more informed decision-making,
- facilitating the investigation or reporting of incidents involving potential violations,
- enhancing the ability to implement corrective actions, and
- automatically generating information on unexploded ordnance.

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2. U.S. Working Papers on LAWS

On September 27, 2021, the United States submitted to the GGE on LAWS its "Proposals on Aspects of the Normative and Operational Framework." U.N. Doc. No. CCW/GGE.1/2021/WP.3. The U.S. paper is excerpted below and available at https://undocs.org/ccw/gge.1/2021/wp.3.

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1. As described in the Discussion Paper submitted by Australia, Canada, Japan, the Republic of Korea, the United Kingdom, and the United States, the Convention on Certain Conventional Weapons (CCW) Group of Governmental Experts (GGE) on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (LAWS) has already reached a significant number of consensus conclusions under the four elements that numerous delegations have proposed to serve as the focus for organizing the GGE's consensus recommendations in relation to the clarification, consideration and development of aspects of the normative and operational framework on emerging technologies in the area of lethal autonomous weapons systems.

2. The United States believes that the GGE can accomplish even more in these four areas, and this paper provides U.S. proposals for further conclusions under each element: (a) application of international humanitarian law (IHL); (b) human responsibility; (c) human-machine interaction; and (d) weapons reviews.

3. These proposals are also available in the U.S. Commentaries on the Guiding Principles adopted by the CCW GGE, which the United States submitted in 2020.

A. U.S. Proposals on the Application of IHL

Clarifying how IHL requirements apply to three general scenarios for the use of autonomous functions in weapon systems: 1) homing munitions that involve autonomous functions; 2) decision support tools that that can inform decision-making about targeting; and 3) relying on autonomous functions in weapon systems to select and engage targets

4. Consistent with IHL, autonomous functions may be used to effectuate more accurately and reliably a commander or operator's intent to strike a specific target or target group.

(a) The addition of autonomous functions, such as the automation of target selection and engagement, to weapon systems can make weapons more precise and accurate in striking

military objectives by allowing weapons or munitions to "home in" on targets selected by a human operator.

(b) If the addition of autonomous functions to a weapon system makes it inherently indiscriminate, *i.e.*, incapable of being used consistent with the principles of distinction and proportionality, then any use of that weapon system would be unlawful.

(c) The addition of autonomous functions to a weapon system can strengthen the implementation of IHL when these functions can be used to reduce the likelihood of harm to civilians and civilian objects.

5. Consistent with IHL, emerging technologies in the area of LAWS may be used to inform decision-making.

(a) When making a decision governed by IHL, commanders and other decision-makers must make a good faith assessment of the information that is available to them at the time.

(b) IHL generally does not prohibit commanders and other decision-makers from using tools to aid decision-making in armed conflict. Whether the use of a tool to aid decision-making in armed conflict is consistent with IHL may depend on the nature of the tool, the circumstances of its use, as well the applicable rules and duties under IHL.

(c) Reliance on a machine assessment to consider a target to be a military objective must be compatible with the decision-maker's duty under IHL to exercise due regard to reduce the risk of harm to civilians and civilian objects. Such compatibility depends on the relevant circumstances ruling at the time, including:

i. how accurately and consistently the machine performs in not mischaracterizing civilian objects as military objectives (*i.e.*, false positives);

ii. the decision-maker giving the machine assessment appropriate weight relative to other information relevant to whether the target was a military objective (*e.g.*, operational context, intelligence reporting of the threat identified by the system); and

iii. the urgency to make a decision (*e.g.*, whether the decision occurred in combat operations or in the face of an imminent threat of an attack, or whether more time could be taken before making a decision).

6. Consistent with IHL, weapons systems that autonomously select and engage targets may be used where the human operator has not expressly intended to strike a specific target or group of targets when activating the weapon system.

(a) The commander or operator could act consistently with the principle of distinction by:

i. Using weapon systems that autonomously select and engage targets in areas that constitute military objectives; or

ii. Using weapon systems that autonomously select and engage targets with the intent of making potential targets constituting military objectives (*e.g.*, potential incoming projectiles in an active protection system) the object of attack, provided that the weapon systems perform with sufficient reliability (*e.g.*, an active protection system consistently selecting and engaging incoming projectiles) to ensure that force is directed against such targets.

(b) The expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the employment of weapons systems that autonomously select and engage targets must not be excessive in relation to the concrete and direct military advantage expected to be gained.

i. The expected loss of civilian life, injury to civilians, and damage to civilian objects is to be informed by all available and relevant information, including information about: (i) the presence of civilians or civilian objects within the area and during the time when the weapon

system is expected to be operating; (ii) the performance of the weapon's autonomous functions in selecting and engaging military objectives; (iii) the risks posed to civilians and civilian objects when the weapon engages military objectives; (iv) the incidence of military objectives that could be engaged by the weapon system in the operational area; and (v) the effectiveness of any precautions taken to reduce the risk of harm to civilians and civilian objects.

ii. The concrete and direct military advantage expected to be gained is to be informed by all available and relevant information, which may include information about how the employment of the weapon system: (i) threatens military objectives belonging to the adversary; (ii) contributes to the security of the operating forces; (iii) diverts enemy resources and attention; (iv) shapes or diverts the movement of enemy forces; and (v) supports military strategies and operational plans.

(c) Feasible precautions must be taken in use of weapon systems that autonomously select and engage targets to reduce the expected harm to civilians and civilian objects. Such precautions may include:

i. Warnings (e.g., to potential civilian air traffic or notices to mariners);

ii. Monitoring the operation of the weapon system; and

iii. Activation or employment of self-destruct, self-deactivation, or self-neutralization mechanisms (e.g., use of rounds that self-destruct in flight or torpedoes that sink to the bottom if they miss their targets).

Examples of ways in which emerging technologies in the area of LAWS could be used to reduce the risks to civilians in military operations

7. CCW GGE Guiding Principle (h) ("Consideration should be given to the use of emerging technologies in the area of lethal autonomous weapons systems in upholding compliance with IHL and other applicable international legal obligations") should be implemented during legal reviews of new weapons, during the formulation of military strategies and plans, and during the planning and conduct of military operations. To facilitate such consideration and to encourage innovation that furthers the objects and purposes of the CCW, the GGE should develop examples of specific practices that those involved in these activities could consider. For example, the GGE could begin this workstream by cataloging examples of ways in which emerging technologies in the area of LAWS could be used to reduce risks to civilians in military operations, such as by:

• incorporating autonomous self-destruct, self-deactivation, or self-neutralization mechanisms into munitions;

• increasing awareness of civilians and civilian objects on the battlefield;

• improving assessments of the likely effects of military operations;

• automating target identification, tracking, selection, and engagement to improve speed, precision, and accuracy; and

• reducing the need for immediate fires in self-defense.1

B. U.S. proposals on Human Responsibility

Legal responsibility

(a) Under principles of State responsibility, every internationally wrongful act of a State, including such acts involving the use of emerging technologies in the area of LAWS, entails the international responsibility of that State.

(b) A State remains responsible for all acts committed by persons forming part of its armed forces, including any such use of emerging technologies in the area of LAWS, in accordance with applicable international law.

(c) An individual, including a designer, developer, an official authorizing acquisition or deployment, a commander, or a system operator, is responsible for his or her decisions governed by IHL with regard to emerging technologies in the area of LAWS.

(d) Under applicable international and domestic law, an individual remains responsible for his or her conduct in violation of IHL, including any such violations involving emerging technologies in the area of LAWS. The use of machines, including emerging technologies in the area of LAWS, does not provide a basis for excluding legal responsibility.

(e) The responsibilities of any particular individual in implementing a State or a party to a conflict's obligations under IHL may depend on that person's role in the organization or military operations, including whether that individual has the authority to make the decisions and judgments necessary to the performance of that duty under IHL.

(f) Under IHL, a decision, including decisions involving emerging technologies in the area of LAWS, must be judged based on the information available to the decision-maker at the time and not on the basis of information that subsequently becomes available.

(g) Unintended harm to civilians and other persons protected by IHL from accidents or equipment malfunctions, including those involving emerging technologies in the area of LAWS, is not a violation of IHL as such.

(h) States and parties to a conflict have affirmative obligations with respect to the protection of civilians and other classes of persons under IHL, which continue to apply when emerging technologies in the area of LAWS are used. These obligations are to be assessed in light of the general practice of States, including common standards of the military profession in conducting operations.

Accountability practices

8. The following general practices help ensure accountability in military operations, including operations involving the use of emerging technologies in the area of LAWS:

(a) Conducting operations under a clear operational chain of command.

(b) Subjecting members of the armed forces to a system of military law and discipline.

(c) Establishing and using procedures for the reporting of incidents involving potential violations.

(d) Conducting assessments, investigations, or other reviews of incidents involving potential violations.

(e) Disciplinary and punitive measures as appropriate.

9. The following practices with respect to the use of weapons systems, including those based on emerging technologies in the area of LAWS, can promote accountability:

(a) Rigorous testing of and training on the weapon system, so commanders and operators understand the likely effects of employing the weapon system.

(b) Establishing procedure and doctrine applicable to the use of the weapon system, which provide standards for commanders and operators on responsible use and under which they can be held accountable under the State's domestic law.

(c) Using the weapon system in accordance with established training, doctrine, and procedures and refraining from unauthorized uses or modifications of the weapon system.

C. U.S. proposals on Human-Machine Interaction

10. Weapons systems based on emerging technologies in the area of LAWS should effectuate the intent of commanders and operators to comply with IHL, in particular, by avoiding unintended engagements and minimizing harm to civilians and civilian objects. This can be effectuated through the following measures:

(a) Weapons systems based on emerging technologies in the area of LAWS should be engineered to perform as anticipated. This should include verification and validation and testing and evaluation before fielding systems.

(b) Relevant personnel should properly understand weapons systems based on emerging technologies in the area of LAWS. Training, doctrine, and tactics, techniques, and procedures should be established for the weapon system. Operators should be certified by relevant authorities that they have been trained to operate the weapon system in accordance with applicable rules.

(c) User interfaces for weapons systems based on emerging technologies in the area of LAWS should be clear in order for operators to make informed and appropriate decisions in engaging targets. In particular, the interface between people and machines for autonomous and semi-autonomous weapon systems should: (i) be readily understandable to trained operators; (ii) provide traceable feedback on system status; and (ii) provide clear procedures for trained operators to activate and deactivate system functions.

D. U.S. Proposals on Weapons Reviews

Guidelines and good practices for militaries to consider using in conducting legal reviews of weapons systems based on emerging technologies in the area of LAWS

11. Legal advisers should be consulted regularly in the development or acquisition process as decisions that could pose legal issues are being made so that legal issues can be identified and more in-depth reviews can be conducted where necessary.

(a) A weapon system under modification should be reviewed to determine whether the modification poses any legal issues.

(b) New concepts for the employment of existing weapons should also be reviewed, when such concepts differ significantly from the intended uses that were considered when those systems were previously reviewed.

12. The nature of the legal review and advice should be tailored to the stage of the process of developing or acquiring the weapon.

(a) Providing legal advice early in the development or acquisition process allows IHL considerations to be taken into account early in the life cycle of the weapon.

(b) At the end of the development or acquisition process, formal legal opinions can memorialize relevant conclusions and analysis while also being useful to consider in subsequent reviews.

13. The legal review should consider the international law obligations applicable to the State intending to develop or acquire the weapon system, including prohibitions or other restrictions applicable to specific types of weapons, and whether the intended or expected uses of the weapon system can be consistent with those obligations under IHL.

14. The legal review should consider whether the weapon is illegal per se, i.e., whether the use of the weapon is prohibited in all circumstances.

(a) The legal review should consider whether the weapon is of a nature to cause superfluous injury or unnecessary suffering, or if it is inherently indiscriminate, or is otherwise incapable of being used in accordance with the requirements and principles of IHL.

(b) Analyzing whether a weapon is "inherently indiscriminate," should consider whether the weapon is capable of being used in accordance with the principles of distinction and proportionality.

(c) In considering whether a weapon with new autonomous features or functions is consistent with the prohibitions against weapons calculated to cause superfluous injury or against

weapons that are inherently indiscriminate, it may be useful to compare the weapon to existing weapons not falling under these prohibitions.

15. The legal review should advise those developing or acquiring the weapon system or its concepts of employment to consider potential measures to reduce the likelihood that use of the weapon will cause harm to civilians or civilian objects.

16. Persons conducting the legal review should understand the likely effects of employing the weapon in different operational contexts. Such expectation should be produced through realistic system developmental and operational test and evaluation.

17. Bearing in mind national security considerations or commercial restrictions on proprietary information, States should share good practices on weapons reviews or legal reviews of particular weapons where appropriate.

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Australia, Canada, Japan, the Republic of Korea, the United Kingdom, and the United States submitted a joint working paper in September 2021, entitled, "Building on Chile's Proposed Four Elements of Further Work for the Convention on Certain Conventional Weapons (CCW) Group of Governmental Experts (GGE) on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (LAWS)." The joint working paper is excerpted below and available at https://undocs.org/ccw/gge.1/2021/wp.2.

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1. At the request of the Chair of the Group of Governmental Experts (GGE) on April 26, 2021, this discussion paper builds on the four elements that Chile has proposed to serve as the focus for organizing the GGE's consensus recommendations in relation to the clarification, consideration and development of aspects of the normative and operational framework on emerging technologies in the area of lethal autonomous weapons systems (LAWS): 1) application of international humanitarian law; 2) human responsibility; 3) human-machine interaction; and 4) weapons reviews.

2. Under each topic, this paper identifies the relevant guiding principles and consensus conclusions already adopted by the GGE. These principles and conclusions, in our view, should be included as part of the GGE's consensus recommendations to the Sixth CCW Review Conference. This paper also suggests areas for developing new GGE consensus recommendations or for further work in 2021 and beyond. This paper is without prejudice to the form that such consensus recommendations may take.

Application of International Humanitarian Law

Relevant Guiding Principles:

• International humanitarian law continues to apply fully to all weapons systems, including the potential development and use of lethal autonomous weapons systems. (Guiding Principle (a)).

• Consideration should be given to the use of emerging technologies in the area of lethal autonomous weapons systems in upholding compliance with IHL and other applicable international legal obligations. (Guiding Principle (h)).

Relevant Consensus Conclusions of the GGE:

• IHL imposes obligations on States, parties to armed conflict and individuals, not machines. (2019 Report ¶17b).

• A weapons system based on emerging technologies in the area of lethal autonomous weapons systems must not be used if it is of a nature to cause superfluous injury or unnecessary suffering, or if it is inherently indiscriminate, or is otherwise incapable of being used in accordance with the requirements and principles of IHL. (2019 Report ¶17h).

• The potential use of weapons systems based on emerging technologies in the area of lethal autonomous weapons systems must be conducted in accordance with applicable international law, in particular IHL and its requirements and principles, including *inter alia* distinction, proportionality and precautions in attack. (2019 Report ¶17a).

• The IHL requirements and principles including *inter alia* distinction, proportionality and precautions in attack must be applied through a chain of responsible command and control by the human operators and commanders who use weapons systems based on emerging technologies in the area of lethal autonomous weapons systems. (2019 Report ¶17d).

• Human judgement is essential in order to ensure that the potential use of weapons systems based on emerging technologies in the area of lethal autonomous weapons systems is in compliance with international law, and in particular IHL. (2019 Report ¶17e).

• Compliance with the IHL requirements and principles, including inter alia distinction, proportionality and precautions in attack, in the potential use of weapons systems based on emerging technologies in the area of lethal autonomous weapons systems requires inter alia that human beings make certain judgements in good faith based on their assessment of the information available to them at the time. (2019 Report ¶17f).

• In cases involving weapons systems based on emerging technologies in the area of lethal autonomous weapons systems not covered by the CCW and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. (2019 Report 17g).

Potential Areas for Further GGE Consensus Recommendations or Work:

• Further clarifying how IHL requirements (*e.g.*, distinction, proportionality, and precautions) apply to the use of emerging technologies in the area of LAWS, for example, by considering possible, relevant military applications, such as

− homing munitions that involve autonomous functions;

− decision support tools that that can inform a commander or operator's decision-making about targeting; and

− relying on autonomous functions in weapon systems to select and engage targets.

• Identifying examples of ways in which emerging technologies in the area of LAWS could be used to reduce the risks to civilians in military operations.

Human Responsibility

Relevant Guiding Principles:

• Human responsibility for decisions on the use of weapons systems must be retained since accountability cannot be transferred to machines. This should be considered across the entire life cycle of the weapons system. (Guiding Principle (b)).

• Accountability for developing, deploying and using any emerging weapons system in the framework of the CCW must be ensured in accordance with applicable international law,

including through the operation of such systems within a responsible chain of human command and control. (Guiding Principle (d)).

Relevant Consensus Conclusions of the GGE:

• Humans must at all times remain accountable in accordance with applicable international law for decisions on the use of force. (2018 Report ¶23a).

• Responsibility for the deployment of any weapons system in armed conflict remains with States. States must ensure accountability for lethal action by any weapon system used by the State's forces in armed conflict in accordance with applicable international law, in particular international humanitarian law. (2017 Report ¶16c).

• States, parties to armed conflict and individuals remain at all times responsible for adhering to their obligations under applicable international law, including IHL. States must also ensure individual responsibility for the employment of means or methods of warfare involving the potential use of weapons systems based on emerging technologies in the area of lethal autonomous weapons systems in accordance with their obligations under IHL. (2019 Report ¶17c).

• Accountability for the use of force in armed conflict must be ensured in accordance with applicable international law, including through the operation of any emerging weapons systems within a responsible chain of command and control. (2018 Report 23e).

• Human responsibility for the use of weapons systems based on emerging technologies in the area of lethal autonomous weapons systems can be exercised in various ways across the life-cycle of these weapon systems and through human-machine interaction. (2019 Report ¶21).

Potential Areas for Further GGE Consensus Recommendations or Work:

• Articulating how well established international legal principles of responsibility apply to the use of emerging technologies in the area of LAWS.

• Identifying good practices at various stages of the life-cycle to help ensure accountability in military operations involving the use of emerging technologies in the area of LAWS.

Human-Machine Interaction

Relevant Guiding Principles:

• Human-machine interaction, which may take various forms and be implemented at various stages of the life cycle of a weapon, should ensure that the potential use of weapons systems based on emerging technologies in the area of lethal autonomous weapons systems is in compliance with applicable international law, in particular IHL. In determining the quality and extent of human-machine interaction, a range of factors should be considered including the operational context, and the characteristics and capabilities of the weapons system as a whole. (Guiding Principle (c)).

Relevant Consensus Conclusions of the GGE:

• Touch points in the human-machine interface include: (0) political direction in the pre-development phase; (1) research and development; (2) testing, evaluation and certification; (3) deployment, training, command and control; (4) use and abort; (5) post-use assessment. (2018 Report 23).

• Necessary investments in human resources and training should be made in order to comply with IHL and retain human accountability and responsibility throughout the development and deployment cycle of emerging technologies. (2018 Report 23g).

• Human responsibility for the use of force must be retained. To the extent possible or feasible, this could extend to intervention in the operation of a weapon if necessary to ensure compliance with IHL. (2018 Report 23f).

Potential Areas for Further GGE Consensus Recommendations or Work:

• Identifying good practices for human-machine interaction, including such practices identified in academic research or developed in industry, that can strengthen compliance with international humanitarian law when using weapon systems based on emerging technologies in the area of LAWS.

• Analyzing existing practice in using weapon systems and emerging technologies to elaborate on the range of factors that should be considered in determining the quality and extent of human-machine interaction under Guiding Principle (c).

• Identifying the various decisions, activities, and processes across the life-cycle that would collectively contribute towards and enable appropriate human-machine interaction with weapons systems based on emerging technologies in the area of lethal autonomous weapons systems. Analyzing the interaction between these various decisions, activities, and processes and how they should vary based on the operational context and the characteristics and capabilities of the weapons system.

Weapons Reviews

Relevant Guiding Principles:

• In accordance with States' obligations under international law, in the study, development, acquisition, or adoption of a new weapon, means or method of warfare, determination must be made whether its employment would, in some or all circumstances, be prohibited by international law. (Guiding Principle (e)).

• When developing or acquiring new weapons systems based on emerging technologies in the area of lethal autonomous weapons systems, physical security, appropriate non-physical safeguards (including cyber-security against hacking or data spoofing), the risk of acquisition by terrorist groups and the risk of proliferation should be considered. (Guiding Principle (f)).

• Risk assessments and mitigation measures should be part of the design, development, testing and deployment cycle of emerging technologies in any weapons systems. (Guiding Principle (g)).

Relevant Consensus Conclusions of the GGE:

• Legal reviews, at the national level, in the study, development, acquisition or adoption of a new weapon, means or method of warfare are a useful tool to assess nationally whether potential weapons systems based on emerging technologies in the area of lethal autonomous weapons systems would be prohibited by any rule of international law applicable to that State in all or some circumstances. States are free to independently determine the means to conduct legal reviews although the voluntary exchange of best practices could be beneficial, bearing in mind national security considerations or commercial restrictions on proprietary information. (2019 Report 17(i)).

• Weapons systems under development, or modification which significantly changes the use of existing weapons systems, must be reviewed as applicable to ensure compliance with IHL. (2018 Report 23(c)).

• During the design, development, testing and deployment of weapons systems based on emerging technologies in the area of lethal autonomous weapons systems, the risks inter alia of civilian casualties, as well as precautions to help minimize the risk of incidental loss of life, injuries to civilians and damage to civilian objects must be considered. Other types of risks

should be considered, as appropriate, including but not limited to the risk of unintended engagements, risk of loss of control of the system, risk of proliferation, and risk of acquisition by terrorist groups. (2019 Report 23a).

• Risk mitigation measures can include: rigorous testing and evaluation of systems, legal reviews, readily understandable human-machine interfaces and controls, training personnel, establishing doctrine and procedures, and circumscribing weapons use through appropriate rules of engagement. (2019 Report 23b).

• Where feasible and appropriate, verifiability and certification procedures covering all likely or intended use scenarios must be developed, the experience of applying such procedures should be shared bearing in mind national security considerations or commercial restrictions on proprietary information. (2018 Report 23d)

• Where feasible and appropriate, inter-disciplinary perspectives must be integrated in research and development, including through independent ethics reviews bearing in mind national security considerations and restrictions on commercial proprietary information. (2018 Report 23b).

Potential Areas for Further GGE Consensus Recommendations or Work:

• Identifying guidelines and good practices for militaries to consider using in conducting legal reviews of weapons systems based on emerging technologies in the area of LAWS.

• Further identifying potential risks and mitigation measures that could be considered in the design, development, testing, and deployment of weapons systems based on emerging technologies in the area of LAWS

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On June 11, 2021, the United States submitted a response to the chair of the GGE's invitation to share relevant national policies and practices. The June 11 U.S. submission is available, with attachments, at https://documents.unoda.org/wp-content/uploads/2021/06/United-States-submission-on-national-practice.pdf. The opening portion of the paper, introducing and explaining the attachments, follows.

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The United States has long advocated for the sharing of national practices and policies related to the implementation of international humanitarian law (IHL). IHL establishes rules governing the use of weapon systems in armed conflict, no matter the type of technology incorporated in the weapon systems. Through robust national implementation measures, States can ensure the effective implementation of IHL, and through the sharing of practices, practitioners in one State can benefit from lessons learned in another.

In the context of the Convention on Certain Conventional Weapons (CCW) Group of Governmental Experts (GGE) on emerging technologies in the area of lethal autonomous weapons systems, the United States has appreciated the efforts of other States to share their practice, including a growing number of States that are developing and publicly articulating their national policies on ensuring the responsible use of emerging technologies. The United States has also sought to share U.S. practice. For example, the United States has shared in past GGE discussions U.S. practice:

• on the Counter-Rocket, Artillery, and Mortar System (April 2018);

• on a system to counter naval mines, the Single Sortie Detect to Engage (Sept. 2018); and

• on the AN/TPQ-53 Counterfire Radar System (March 2019).

More generally, U.S. Department of Defense (DoD) Directive 3000.09, Autonomy in Weapon Systems, provides policy guidance on the development and use of autonomous and semi-autonomous functions in weapon systems. (Attachment 1). For example, this policy establishes guidelines designed to minimize failures in autonomous and semi-autonomous weapon systems that could lead to unintended engagements.

DoD also requires the legal review of weapon systems. DoD Directive 2311.01, DoD Law of War Program, provides that "[t]he intended acquisition, procurement, or modification of weapons or weapon systems is reviewed for consistency with the law of war." ¶1.2.d. The Directive also establishes the DoD Law of War Working Group, which among other functions, develops and coordinates law of war "analysis regarding the legality of new means or methods of warfare under consideration by DoD components." ¶3.1. Under DoD Directive 2311.01, the DoD Law of War Manual serves as the authoritative statement on the law of war within DoD and includes extensive guidance in Chapter VI regarding the legal review of new weapons and legal rules specific to certain types of weapons. In addition, DoD Directive 5000.01, The Defense Acquisition System, provides that:

> The acquisition and procurement of DoD weapons and information systems must be consistent with all applicable domestic law, and the resulting systems must comply with applicable treaties and international agreements (for arms control agreements, see DoD Directive (DoDD) 2060.01), customary international law, and the law of armed conflict (also known as the laws and customs of war). An attorney authorized to conduct such legal reviews in the DoD must conduct the legal review of the intended acquisition of weapons or weapons systems.

¶1.2v. The Military Departments within DoD have implemented this requirement and provided further guidance on the legal review of weapons in issuances for their personnel:

• Department of the Army: Army Regulation 27-53, Legal Review of Weapons and Weapon Systems, Sept. 23, 2019.

• Department of the Navy: Paragraph 10 of Enclosure 3 of SECNAV Instruction 5000.2F, Defense Acquisition System and Joint Capabilities Integration and Development System Implementation, March 26, 2019, addresses "Mandatory Legal Review of Potential Weapons & Weapon Systems."

• Department of the Air Force: Part 2 of Air Force Instruction 51-401, The Law of War, Aug. 3, 2018, addresses "Legal Reviews of Weapons and Cyber Capabilities." See also Air Force Policy Directive 51-4, Operations and International Law, July 24, 2018.

U.S. military practice in conducting the legal review of weapons was described extensively in a 2017 DoD submission to a study by the Stockholm International Peace Research Institute (SIPRI).

Artificial Intelligence (AI) has received attention both within DoD and in our GGE discussions. AI applications across all sectors of life, such as transportation and health care, present the possibility of great benefits to society, especially in light of the rapid pace of ongoing developments in this field. However, there are also concerns that AI could be misused or

misapplied. Organizations across various sectors are seeking proactively to develop principles to guide the responsible development and use of AI. Similarly, a key focus area of DoD's Strategy on Artificial Intelligence is "Leading in military ethics and AI safety." In February 2020, the Secretary of Defense reaffirmed "that the Department will use AI consistent with applicable domestic and international law, in particular the law of war and adopted Artificial Intelligence Ethical Principles for the Department of Defense. (Attachment 2). On May 26, 2021, the Deputy Secretary of Defense reaffirmed these principles and established DoD's holistic, integrated, and disciplined approach for implementing them, including articulating six foundational tenets. (Attachment 3). As AI has the potential to transform positively a whole spectrum of DoD activities, these memos are not limited to weapon systems. The DoD AI Ethical Principles apply to all DoD AI capabilities, of any scale, including AI-enabled autonomous systems, for warfighting and business applications.

We have shared these references and documents in order: (1) to continue to provide transparency on U.S. practice; (2) to encourage others to share their practice and to consider U.S. practice; and (3) to facilitate further discussion about the development and use of emerging technologies in the area of lethal autonomous weapons systems. We are happy to discuss U.S. practice with other delegations to the GGE.

Attachments:

1. U.S. Department of Defense Directive 3000.09, Autonomy in Weapons Systems, Nov. 21, 2012, incorporating Change 1, May 8, 2017

2. Secretary of Defense, *Artificial Intelligence Ethical Principles for the Department of Defense*, Feb. 21, 2020

3. Deputy Secretary of Defense, *Implementing Responsible Artificial Intelligence in the Department of Defense*, May 26, 2021

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3. U.S. Opening Statements

On December 3, 2021, Deputy Legal Adviser Joshua Dorosin delivered the U.S. opening statement at the CCW GGE on LAWS. Mr. Dorosin's statement is excerpted below, and available at https://geneva.usmission.gov/2021/12/03/convention-on-ccw-group-of-governmental-experts-on-emerging-technologies-in-the-area-of-laws/.

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We appreciate your efforts in presenting a draft report for discussion. Although we will offer specific line edits as we walk through the draft, we wanted to make two general comments on substance and two comments on the way forward.

First, the United States seeks a robust, substantive outcome for this GGE to be presented to the Review Conference. It is essential that this outcome captures the substantial existing body of consensus work that this GGE has done over the past several years in formulating principles and practices that States can implement to promote responsible behavior related to emerging

technologies in the area of LAWS. We appreciate some of the good paragraphs already part of the Chair's draft in furtherance of this goal, which could form the basis of such an outcome.

Second, while we want a substantive outcome, we have also been very clear, including in the two prior GGE sessions, on what we cannot accept and we have explained in detail the reasons for our opposition. In this regard, we were disappointed that the draft report continues to include concepts on which there is clearly no consensus within the GGE, which are subject to diverging interpretations, and which are not part of existing IHL. This includes the proposed articulation of "sufficient human control" in the draft. We heard at the GGE in September a number of significant concerns with this section of the Chair's paper, and we remain of the view that sufficient human control – however it might be defined or understood – may be one available means to achieve IHL compliance, but it is not an end or a legal requirement in and of itself. Similarly, we have consistently expressed our opposition to the formulation of new, categorical limitations on targets, duration, and scope. While we will offer some specific suggestions on how to move forward with this General Commitments section of the draft report, we want to emphasize that it will be far more productive to build on areas in which this GGE has reached consensus than to re-hash the same arguments on issues on which there is clearly no consensus.

Third, we want to better understand the Chair's vision for how this proposed political declaration will be developed. It would be ideal for the Review Conference to take what the GGE has negotiated, verbatim, and to adopt that at the Review Conference. This approach would be consistent with the practice of the GGE in past years, when the GGE has made recommendations to the Meeting of High Contracting Parties – for example, with the Guiding Principles. We do not believe it is prudent to leave matters for the Review Conference to negotiate. The RevCon will need to address a number of issues beyond LAWS in a brief period of time. Leaving further negotiations on LAWS for the RevCon risks reopening consensus language agreed by the GGE participants, and also risks not having the best experts for such a negotiation in the room when they are needed most.

We must reflect in our consensus recommendations to the Review Conference the valuable work that this GGE has already done over the past several years. This work can give States guidance on principles and practices that they can implement. One practical way to do this is to incorporate as much previously agreed language as possible in the draft report: we regret that the Chair has not taken this advice from many States at our last two GGE meetings. The previously agreed language was often very carefully negotiated and even what may appear to be minor changes to it may be problematic for some delegations. We recommend that the Chair include the work that we've done over the years to demonstrate the progress that the GGE has achieved and also be efficient with our limited time by using previously agreed language to the greatest extent possible.

Finally, we are concerned with the Chair's proposal in the draft report for the GGE's new mandate. In particular, the language mandating the GGE to "negotiate an instrument" is not something that we can accept at this stage. Although ambiguity in the nature of such an instrument might seem attractive to some, we think it would cause paralysis and politicization that would set the GGE up for failure, especially given our extensive debates and lack of consensus on the issue of a legally binding instrument. And, on that issue, the United States position is well known. We need to be realistic and to set up future GGE's for success.

We recommend that our new mandate continue to provide needed flexibility and recognize that this issue is an evolving one. We are all familiar with how the software on our

phones and computers is constantly updated. Emerging technologies will continue to be developed and people's relationship with them and their understanding of them will also continue to evolve. For the United States, this is one reason we believe it is important to proceed in an incremental and methodical manner. We need to build a strong foundation if our work is to stand the test of time.

We believe that the best way to make progress is through the development of a non-binding Code of Conduct, which would both strengthen and build upon the significant work that has been accomplished thus far. Such a Code would help States promote responsible behavior and compliance with international law. It could also provide an updateable vehicle through with the GGE could continue its work, further elaborating aspects of the Code and sharing practices in its implementation, without prejudice to other efforts. We will discuss this proposal in greater detail later in the GGE session.

With those initial general comments in mind, we look forward to working with you and other delegations to make as much progress as possible this week and next week on the draft report, so we can lay the groundwork for a productive and successful Review Conference.

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Mr. Dorosin again delivered the U.S. opening statement at the Sixth Review Conference of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects ("6th CCW RevCon") on December 13, 2021. The RevCon opening statement is available at https://geneva.usmission.gov/2021/12/14/us-opening-statement-at-the-6th-ccw-review-conference/?_ga=2.18636601.1854197590.1648047017-803430361.1648047017, and excerpted below.

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The United States places great value in the Convention on Certain Conventional Weapons (CCW) as an international humanitarian law (IHL) treaty 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 believe that the CCW provides a unique forum for substantive discussions about these important issues as it is a body that ensures that all issues are considered with the benefit of contributions and perspectives from an appropriate mix of diplomatic, military, legal, technical, and policy experts, as well as from civil society.

The United States recognizes the importance of universalization and full implementation of the CCW, and we join other High Contracting Parties in calling on States that have not yet done so to become parties to the Convention and its protocols. We especially appreciate the efforts of the Implementation Support Unit and various office holders in promoting universalization of the Convention and its protocols.

We would like to commend the excellent efforts of the Chairpersons and the various coordinators of the work related to Amended Protocol II and Protocol V. We are pleased with the discussions on implementation of these protocols and support their continuation as decided last week by their respective High Contracting Parties. We are disappointed that views of High

Contracting Parties to Amended Protocol II continue to diverge on the need for a focused discussion on issues related to mines other than anti-personnel mines (MOTAPM), including with respect to the protection of civilians, and the United States remains committed to seeking consensus on a way forward on this issue. In this connection, the United States would welcome an exchange of good practices related to the use of such mines, consistent with the provisions of Amended Protocol II, which we believe would contribute to strengthening the overall implementation of the Protocol.

We look forward to the Review Conference adopting the recommendations related to the review of these protocols. In addition, we support the adoption of a new Declaration on Improvised Explosive Devices, as recommended by the High Contracting Parties to Amended Protocol II. The United States recognizes the serious threat posed by the use of IEDs around the world, and it is appropriate that the High Contracting Parties emphasize their continued commitment to working to mitigate this threat.

The United States is the world's largest contributor to conventional weapons destruction programs, which includes its support for the clearance of landmines, IEDs, and explosive remnants of war. Since 1993, the United States has provided more than $4 billion in conventional weapons destruction assistance to more than 100 countries. For a comprehensive review of the U.S. Conventional Weapons Destruction Program, our delegation refers you to the 20th edition of our annual report titled "To Walk the Earth in Safety," which covers U.S. assistance activities during 2020. The report is available at the back of the room and on the State Department website (https://www.state.gov/reports/to-walk-the-earth-in-safety-2021).

The United States has participated actively in the Group of Governmental Experts (GGE) on emerging technologies in the area of lethal autonomous weapons systems (LAWS). We deeply appreciate the tireless efforts made over the past five years by the four Chairs – most recently by Ambassador Marc Pecsteen, and previously by Ambassadors Karklins, Gjorginski, and Gill – to advance our work on this complex issue. We have been encouraged by the active participation of so many High Contracting Parties in the work of the GGE. Over five years, we have been able to reach consensus on many substantive conclusions and build our common understanding of the issues, including by the decision of the High Contracting Parties to endorse the 11 Guiding Principles in 2019. In particular, we have made significant progress on the topics of the application of IHL, human-machine interaction, human accountability and State responsibility, weapons reviews, and risk mitigation, and we are confident we can make more.

Despite the inability of the GGE to agree to substantive consensus recommendations for us to consider at this Conference, we believe that the GGE made important progress under the difficult circumstances presented by the COVID-19 pandemic, which is work that should, alongside of previous GGE reports, provide an important basis for our continued work. The United States continues to believe that the GGE is the right forum to consider this complex topic. It is now incumbent on this Review Conference to agree on a mandate that will allow the GGE to intensify its efforts to make further substantive progress on this issue.

We note that several delegations have raised today their desire to establish a separate focused discussion on Protocol III. In the U.S. experience, we think Protocol III continues to be a valuable and effective instrument of international humanitarian law. We urge all High Contracting Parties to comply with their obligations under this Protocol, but do not see the need at this time for a separate discussion on it.

Mr. President, let me close by noting our support for your efforts with respect to the proposed additional measures for financial reform. It is unfortunate that the Convention

continues to struggle to maintain financial stability. The precarious situation of the Implementation Support Unit in particular is not sustainable. We strongly urge High Contracting Parties to pay their contributions in a timely manner, as this is the only way to fully ensure the financial well-being of this Convention. We also support the initiative by the President to consolidate and reform the financial measures and believe that the adoption of these measures would represent a significant achievement for this Conference.

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C. DETAINEES

1. Transfers

On July 19, 2021, the State Department issued a press statement commending the Kingdom of Morocco for collaborating with the United States to repatriate a Moroccan citizen who had been detained at the Guantanamo Bay Detention Facility. The press statement, available at https://www.state.gov/transfer-of-gtmo-detainee-to-morocco/, goes on to state:

> Abdul Latif Nasir… is the first detainee to be repatriated to his country of origin during the Biden-Harris Administration. The Administration is dedicated to following a deliberate and thorough process focused on responsibly reducing the detainee population of the Guantanamo facility while also safeguarding the security of the United States and its allies.
>
> Morocco's leadership in facilitating Nasir's repatriation, alongside its past willingness to return its foreign terrorist fighters from northeast Syria, should encourage other nations to repatriate their citizens who have traveled to fight for terrorist organizations abroad.

2. Al Hela v. Biden

In August 2020, a divided panel of the United States Court of Appeals for the District of Columbia (D.C. Circuit) held in *Al Hela v. Trump* that the Due Process Clause of the U.S. Constitution does not apply to detainees at Guantanamo and that al-Hela's continued detention is lawful based on his substantial support to al-Qaeda and its associated forces. 972 F.3d 120 (D.C. Cir. 2020). On April 23, 2021, the D.C. Circuit vacated the panel order and granted rehearing *en banc* on "the question of whether [al-Hela] is entitled to relief on his claims under the Due Process Clause." *Al-Hela v. Biden*, No. 19-5079 (D.C. Cir. Apr. 23, 2021). In its July 9, 2021 brief, the U.S. government did not continue to rely on the prior administration's argument that due process cannot apply at Guantanamo and argued that the court need not determine the overall applicability question to deny al-Hela's specific due process claims. Excerpts from the U.S. government's brief are below.

* * * *

In granting rehearing en banc, the Court asked the parties to address whether al-Hela "is entitled to relief on his claims under the Due Process Clause." Order 2 (Apr. 23, 2021). The answer is no. The United States acknowledges that the Constitution allows al-Hela to challenge the lawfulness of his ongoing detention and affords him certain procedural protections to ensure a meaningful opportunity for review through the writ of habeas corpus. With respect to the specific claims al-Hela asserts in this case, the Due Process Clause would provide no greater protections than those that apply under the Suspension Clause to enemy combatants detained at Guantanamo. That principle suffices to resolve this case: for the claims he asserts, al-Hela has received all process due under the Constitution.

The United States previously contended that al-Hela's due process claims could be rejected on the ground that the Due Process Clause is categorically inapplicable to enemy combatants detained at Guantanamo, but we do not renew that argument here. As Judge Griffith observed, "[t]hat is a question with immense sweep that [this] court has repeatedly reserved for a case in which its answer matters." *Al-Hela*, 972 F.3d at 151. Because the answer would not affect the outcome here and would require resolution of sensitive and complex constitutional questions, we disagree with the approach taken in the panel opinion and urge the Court to decline to address the broader issue whether enemy combatants at Guantanamo may ever raise due process claims. Instead, and in line with traditional principles of constitutional avoidance, this Court need only hold that with respect to the specific claims asserted here, al-Hela received all necessary process to ensure a "meaningful opportunity"' to challenge the basis for his detention through habeas proceedings. *Boumediene v. Bush*, 553 U.S. 723, 779 (2008).

A. In this habeas action, al-Hela seeks judicial review of the lawfulness of his ongoing detention. He argues that the length of his detention violates principles of substantive due process, and also that the procedural protections afforded to him through habeas do not satisfy the due process requirements of the Constitution. For the category of claims al-Hela asserts here, the Supreme Court and this Court have developed standards and procedural protections to ensure the "meaningful opportunity"' to challenge the Executive's determination of a detainee's enemy-combatant status that *Boumediene* held was required by the Suspension Clause. Those standards have been applied to many detainee habeas proceedings over the past decade. Any application of the Due Process Clause to the claims al-Hela asserts here would require nothing more.

The Supreme Court in *Boumediene* held that "the constitutional privilege of habeas corpus" extends to persons detained as enemy combatants at Guantanamo Bay and further established that the Suspension Clause by its own force imposes substantive guarantees and procedural protections in this context. 553 U.S. at 732. The Court explained that "the writ must be effective," and that "[t]he habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Id.* at 783; *accord id.* at 787. As a result, a person detained at Guantanamo as an enemy combatant is constitutionally entitled to those "procedural protections" that ensure a "meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." *Id.* at 779, 783 (quotation omitted).

In articulating the "meaningful opportunity" standard, the Court emphasized that "common-law habeas corpus was, above all, an adaptable remedy" whose "precise application and scope changed depending upon the circumstances." *Boumediene*, 553 U.S. at 779. The Court

also provided guideposts for procedural requirements that would ensure a "meaningful" and "effective" habeas proceeding. *Id.* at 779, 783. The Court noted that habeas review in this context does not follow an independent determination following a trial that the petitioner is lawfully detained. Here, where detention is by Executive action, the Court explained that a "habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Id.* at 783. At the same time, the Court was careful to hold that "[h]abeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order," so long as the writ is "effective." *Id.*

* * * *

Because—for the reasons explained more fully below—al-Hela received a meaningful opportunity for review of the lawfulness of his detention, any constitutional protections that apply through the Suspension Clause or through application of the Due Process Clause to habeas proceedings in this context have been satisfied. The Court therefore should hold that al-Hela is not "entitled to relief on his claims under the Due Process Clause," Order 2 (Apr. 23, 2021), without deciding whether the constitutional protections he enjoys emanate from the Due Process Clause in addition to the Suspension Clause. If the en banc Court decides that it is necessary to resolve the applicability question and concludes that the Due Process Clause applies, however, it should limit that holding to encompass only the particular due process claims at issue here, and should make clear that the process due in this context is limited to the substantive guarantees and procedural mechanisms that would implement the habeas right to meaningful review of the detainee's status that *Boumediene* recognized.

B. The panel majority here held, at the suggestion of the United States, that the Due Process Clause does not apply to noncitizens detained as enemy combatants at Guantanamo because it categorically does not apply to any noncitizens without property or presence in the sovereign territory of the United States. *Al-Hela*, 972 F.3d at 150. The United States does not renew that categorical argument here and urges the Court to decline to resolve that complex constitutional question which has "immense sweep," *id.* at 151 (Griffith, J., concurring) because it is unnecessary to the proper disposition of this case. The protections al-Hela has received suffice to satisfy any due process rights that he may have in this context. Consistent with principles of constitutional avoidance, the Court should affirm on that basis without addressing questions about the applicability of the Due Process Clause more generally or to other claims or in other contexts. *See Matal v. Tam*, 137 S. Ct. 17 44, 1755 (2017) (" '[W]e have often stressed' that ... 'we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.'" (citation omitted; first and third alteration in original)).

In concluding that the Due Process Clause is categorically inapplicable at Guantanamo, the panel relied on *Johnson v. Eisentrager*, which held that habeas corpus jurisdiction did not extend to enemy aliens who had been convicted of violating the laws of war and were detained at Landsberg Prison in Germany during the Allied Powers' post-war occupation and further rejected the petitioners' Fifth Amendment claims. 339 U.S. 763, 765-66, 777-85 (1950); *see Boumediene*, 553 U.S. at 763. The panel majority stated that *Eisentrager* "held the Fifth Amendment does not apply to aliens located outside the United States," and that that aspect of *Eisentrager* continues to apply to Guantanamo—and therefore prevents al-Hela from relying on the Due Process Clause. *Al-Hela*, 972 F.3d at 138. In reaching that conclusion, the panel reasoned that Boumediene's holding that habeas corpus jurisdiction extends to enemy

combatants at Guantanamo does not also apply to *Eisentrager*'s due process ruling. *See id.* at 140-50.

Upon further consideration, the United States is of the view that relying on *Eisentrager* to conclude that the Due Process Clause is categorically inapplicable at Guantanamo does not sufficiently account for the Supreme Court's analysis of the application of the Suspension Clause at Guantanamo in *Boumediene* based on factors including the unique characteristics of the government's operations and the de facto sovereignty the United States exercises there. It is true, as the panel emphasized, that the Court's holding in *Boumediene* was limited to the question of habeas jurisdiction and did not reach the separate question of the Due Process Clause's applicability. *See Boumediene*, 553 U.S. at 795 ("Our decision today holds only that the petitioners before us are entitled to seek the writ; that the [Detainee Treatment Act] review procedures are an inadequate substitute for habeas corpus; and that petitioners in these cases need not exhaust the review procedures ... before proceeding with their habeas actions . . ."). But in reaching that holding, the Court interpreted at least some components of *Eisentrager's* extraterritoriality analysis with respect to the availability of habeas as resting on functional considerations that would differentiate Guantanamo from Landsberg Prison, and did not state that other aspects of *Eisentrager's* extraterritoriality analysis, including, the applicability of the Due Process Clause, should rest on a different test of de jure sovereignty, in the context of claims by Guantanamo detainees. *See id.* at 764 ("Nothing in *Eisentrager* says that de jure sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus."). In order to determine whether the Due Process Clause would ever provide protections to noncitizens detained as enemy combatants at Guantanamo under existing Supreme Court precedent, therefore, this Court would need to carefully parse not just *Eisentrager* itself but also the interpretation of *Eisentrager* the Supreme Court employed in *Boumediene.*

That analysis would entail determining whether a functional analysis should govern whether the Due Process Clause applies at Guantanamo, whether such a functional analysis would parallel the one employed for the Suspension Clause in *Boumediene,* whether different types of due process claims should be treated differently, and what the outcome of applying such an analysis to the Due Process Clause would be. And it would be necessary to consider whether judicial enforcement of the asserted rights would be impracticable and anomalous at the military installation at Guantanamo when layered on top of the protections afforded by the Suspension Clause, the law of war, and federal statutes governing the detention of noncitizens held as enemy combatants. The Court would additionally need to determine whether it is free to read *Boumediene* to displace *Eisentrager* with respect to the application of the Due Process Clause at Guantanamo. *See Agostini v. Felton,* 521 U.S. 203, 207 (1997).

We urge the Court not to resolve these complex questions here. As described above and elaborated further below, nothing in *Boumediene* or this Court's subsequent cases suggests that it is necessary to resolve these questions with respect to the particular claims al-Hela has raised here, which fail under applicable precedents applying the Due Process Clause to comparable (or identical) claims. Accordingly, "[t]he cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels" in favor of simply holding that al-Hela is not entitled to relief on his specific claims, without reaching out to decide the broader question of whether and how the Due Process Clause might ever apply to other claims potentially raised by Guantanamo detainees in the future. *Cohen v. Board of Trs. of the Univ. of D.C.,* 819 F.3d 476, 485 (D.C. Cir. 2016) (quotation omitted).

* * * *

3. Gul v. Biden

On April 20, 2021, Guantanamo detainee Asadullah Haroon "Al-Afghani" Gul filed a "Motion for an Order Requiring Immediate Release" with the federal district court judge handling his petition for habeas corpus. *Gul v. Biden*, 16-cv-01462 (D.D.C.). His motion argued that the President's announcement on April 14, 2021, that the United States intended to withdraw its forces from Afghanistan by September 11, 2021, marked an end to the hostilities permitting Gul's continued detention. The U.S. government filed its opposition to Gul's motion on May 21, 2021. On September 8, 2021, Gul filed a "Request for Reconsideration of his Motion for Immediate Release," following the completion of the United States' withdrawal from Afghanistan on August 31, 2021. On October 1, 2021, the United States government filed its supplemental opposition. Excerpts from the U.S. government's supplemental opposition are below. Other Guantanamo detainees have filed arguments identical or similar to Gul's, that the hostilities necessitating their detention has ceased with the U.S. withdrawal from Afghanistan. Those include *Husayn v. Biden*, No. 08-cv-01360 (D.D.C.), Qassim *v. Biden*, No. 04-cv-01194 (D.D.C.), *Rahim v. Biden*, No. 09-cv-01385 (D.D.C), and *Paracha v. Biden*, No. 20-5039 (D.C. Cir) and No. 21-cv-02567 (D.D.C.).

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* * * *

A. The AUMF Authorizes the Use of Force Against al-Qaida and Associated Forces. Petitioner, detained on the grounds that he was part of or substantially supported al-Qaida, *see* Resps.' Opp'n at 14–15 (summarizing operative factual return), contends that the authority to detain such individuals under the AUMF is "defined with respect to the conflict in Afghanistan." *See* Petr's Request at 2. Aside from the reality that hostilities with al-Qaida and associated forces in Afghanistan are not concluded, the limitation Petitioner seeks to impose is inconsistent with the plain language of the AUMF, as well as Congress's clear intent in responding to al-Qaida's attacks on the United States.

The AUMF authorizes the President to "use all necessary and appropriate force"—not solely or specifically within Afghanistan—but, rather, "against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." AUMF, § 2(a), 115 Stat. at 224. As the preamble to the AUMF explains, its purpose is "[t]o authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States." *Id.*, preamble. The statute includes no reference to Afghanistan and no restriction on the statute's geographic reach.

In his August 16, 2021 remarks, the President observed that "we went to Afghanistan almost 20 years ago with clear goals: get those who attacked us on September 11th, 2001, and make sure al-Qaeda could not use Afghanistan as a base from which to attack us again." Remarks by President Biden on Afghanistan (Aug. 16, 2021) at 5, *available at*

https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/16/remarks-by-presidentbiden-on-afghanistan/. But although Afghanistan had served as a home base or hub for al-Qaida, that organization's far-flung terrorist activities had hardly been confined to that country. The September 11, 2001 attacks occurred on U.S. soil, the plot having been hatched and preparations made in places as geographically-scattered as Malaysia, Germany, the United Arab Emirates, and Pakistan, by nationals of a number of different countries. *See The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* 156–68, 236–37 (2004) ("*9/11 Report*").

Even before September 11, 2001, al-Qaida had carried out a series of armed attacks against the United States in locations as far from Afghanistan as Kenya, Tanzania, and the port of Aden in Yemen. *See* 9/*11 Report* at 115–16 (U.S. embassy attacks), 190–91 (U.S.S. Cole attack). Responding to this terrorist group that did not respect national borders, Congress wrote no geographic limitation into the AUMF. A report addressing the legislative history of the AUMF observed: "A notable feature of [the AUMF] is that unlike all other major legislation authorizing the use of military force by the President, this joint resolution authorizes military force against 'organizations and persons' linked to the September 11, 2001 attacks on the United States. In its past authorizations for use of U.S. military force, Congress has permitted action against unnamed nations in specific regions of the world, or against named individual nations, but never against 'organizations or persons.'" Congressional Research Service, Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History (Jan. 16, 2007) (Exh. 3) at 3, *available at* https://www.everycrsreport.com/files/20070116_RS22357_ab70455dadf67abeaac870ec366f2ab688f260d3.pdf.

In contrast to the 2001 AUMF, during the following year, Congress enacted an authorization for use of military force expressly focused on the threat emanating specifically from Iraq. *See* Pub. L. No. 107-243, 116 Stat. at 1500. The 2002 Iraq AUMF provides that the "President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat *posed by Iraq*." *Id.*, § 3(a)(1), 116 Stat. at 1500 (emphasis added). Such a reference to or nexus with a particular region or country has appeared in over a dozen other congressional authorizations for use of military force. For example, in 1983, Congress authorized the President "to continue participation by United States Armed Forces in the Multinational Force in Lebanon." Multinational Force in Lebanon, Pub. Law No. 98-119, § 3, 97 Stat. 805 (1983). Likewise, in 1955, Congress authorized the President specifically "to employ the Armed Forces of the United States for protecting the security of Formosa, the Pescadores and related positions and territories of that area." Joint Resolution, Pub. L. No. 4, 69 Stat. 7 (1955). These and numerous other authorizations for use of force referring to particular locales demonstrate that when Congress intends to include a geographic aspect or reference in such an authorization, Congress does so unambiguously. It did not do so in the 2001 AUMF.

In considering passage of the 2001 AUMF, contemporaneous remarks confirm that Congress intended to grant authority in the 2001 AUMF to use force not with respect to a particular country or region, but with respect to those responsible for the terrorist attacks that the country had just endured. *See, e.g.*, 107 Cong. Rec. H5641 ("I rise tonight to fully endorse and authorize the use of force as directed by the President of this great Nation . . . Mr. President, *no matter where we have to go*, no matter how long we have to fight, we are prepared to fulfill our duty to generations to come.") (Rep. Norwood) (emphasis added); *id.* at H5643 ("I join my

colleagues in support of this resolution authorizing the use of military force . . . [o]ur enemies, whoever and *wherever they are*, and those who harbor them, must clearly understand that we will never tolerate the acts of terrorism, acts of war, that have been perpetrated upon us and they must understand that there is no escape from American justice.") (Rep. Napolitano) (emphasis added); *id.* at H5644 ("The current circumstances leave us with great uncertainty. We do not yet know who committed these unspeakable acts *or where we may find them*, we do not know the scale and scope of what bringing the perpetrators to justice may mean, and we do not know how long it may take.") (Rep. Skelton) (emphasis added).

The 2012 NDAA provides further evidence that Congress intended no geographic restriction on the detention authority conferred by the AUMF. In the NDAA, Congress affirmed that the AUMF authorizes the detention of "[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," § 1021(b)(2), 125 Stat. at 1562, again without any territorial or geographic limitation. Congress thus affirmed the scope of the 2001 AUMF and did not provide a geographic restriction.

B. Respondents' Actions Against Al-Qaida and Associated Forces Reflect the Scope of the Authority Conferred by the AUMF.

Consistent with the text of the AUMF and the manifest intention of Congress in passing it, U.S. forces have long employed the authority granted therein to pursue and engage al-Qaida and associated forces not only in Afghanistan but across borders. This is not a "contrive[d]" litigation position, as Petitioner asserts, Petr's Req. at 2, nor is it a recent development. Rather, the use of AUMF authority beyond Afghanistan is a longstanding consequence of the reality that al-Qaida and associated forces are non-state armed groups that do not respect geographic boundaries.

1. Throughout the Conflict, Hostilities Against Al-Qaida and Associated Forces Have Extended Far Beyond Afghanistan.

From the outset of the hostilities authorized under the AUMF, the armed conflict against al-Qaida and associated forces has not been limited to Afghanistan, and the habeas litigation has reflected that reality.

The background underlying *Boumediene v. Bush* illustrates the point: although some of the petitioners in that case were captured in Afghanistan, others were apprehended "in places as far away from there as Bosnia and Gambia." *Boumediene v. Bush*, 553 U.S. 723, 734 (2008).[10]

Throughout the Guantanamo Bay habeas litigation, the focus of the courts' analysis has been not on the location where a detainee's activities took place, but rather on whether a detainee was part of or substantially supported al-Qaida, Taliban, and associated forces. *See. e.g.*, *Ali v. Obama*, 736 F.3d 542, 547 (D.C. Cir. 2013) (relying on activities in Pakistan).

[10] As early as 2004, Respondents' submissions to the courts referred to "the military campaign in Afghanistan and the war against al Qaeda more generally." Resp. to Petitions for Writ of Habeas Corpus and Mot. To Dismiss or for Judgment as a Matter of Law and Mem. In Support, Civ. No. 04-1142, ECF No. 25 (D.D.C. Oct. 4, 2004) at 15. Subsequently, in a 2009 submission addressing Respondents' detention authority, Respondents explained that imposing a geographic limit on the authority conferred by the AUMF "would contradict Congress's clear intention and would unduly hinder both the President's ability to protect our country from future acts of terrorism and his ability to gather vital intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary." Resps.' Mem. Regarding the Gov't's Detention Authority Relative to the Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litigation*, No. 08-442, ECF No. 1690 (D.D.C. Mar. 13, 2009) at 7 (internal quotation omitted).

Thus, in *Al Hela v. Trump*, the D.C. Circuit affirmed that detention was lawful based on a Yemeni citizen's activities—largely in Yemen—substantially supporting al-Qaida and two groups found to be associated forces of al-Qaida: Egyptian Islamic Jihad ("EIJ") and the Aden-Abyan Islamic Army ("AAIA"). *See Al Hela v. Trump*, 972 F.3d 120 (D.C. Cir. 2020), *judgment vacated for rehearing en banc on other grounds*. In affirming the district court's determination that the groups were associated forces of al-Qaida, the D.C. Circuit focused on both groups' activities throughout the Middle East—outside of Afghanistan—and noted the "global and diffuse nature of the conflict." *Id.* at 133–34, 135. [footnote omitted]

A 2016 White House report addressing the legal and policy frameworks guiding the United States' use of military force and related national security operations likewise confirms the Government's position that the use of force authorized under the AUMF was not limited to Afghanistan. That report noted: "All three branches of the U.S. Government have affirmed the ongoing authority conferred by the 2001 AUMF and its application to al-Qa'ida, to the Taliban, and to forces associated with those two organizations within *and outside* Afghanistan." Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations (Dec. 2016) (Exh. 4), *available at* https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf ("2016 White House Report") at 4 (emphasis added). The 2016 White House Report further explained: "[a]lthough Afghanistan was the focus when the 2001 AUMF was enacted in September 2001, the President's authority to use force pursuant to that statute is not limited to Afghanistan. The 2001 AUMF itself contains no such geographic limitation, and neither Congress nor U.S. Federal courts have limited the President's ability to use force in that way." *Id.* at 49 n.13. The same report noted that the 2001 AUMF authorized then-ongoing military operations in Afghanistan, Iraq, Syria, Somalia, Libya, and Yemen. *See id.* at 15–18. Afghanistan was just one of six "key theaters" identified therein. *Id.* at 15.5

Accordingly, Respondents' position that the hostilities against al-Qaida and associated forces are not limited to Afghanistan is neither new nor unique to this case.

2. Hostilities Against al-Qaida and Associated Forces Remain Ongoing.

Petitioner also urges that the "continued existence of enmity between the United States and another entity does not give rise to detention authority," positing that mere "enmity" without hostilities is all that remains of the threat posed by al-Qaida and associated forces. Petr's Request at 2. Petitioner is mistaken.

As reflected in the recent testimony of the Secretary of Defense and Chairman of the Joint Chiefs of Staff before the Senate Armed Services Committee and House Armed Services Committee, hostilities against al-Qaida and associated forces have not ceased. *See supra* 1–2, *and infra* 14–15. Furthermore, on September 9, 2021, the President reaffirmed that "[t]he terrorist threat that led to the declaration on September 14, 2001, of a national emergency continues." Letter to the Speaker of the House of Representatives and the President of the Senate on the Continuation of the National Emergency with Respect to Certain Terrorist Attacks (Sept. 9, 2021) (Exh. 5), *available at* https://www.whitehouse.gov/briefing-room/statementsreleases/2021/09/09/letter-to-the-speaker-of-the-house-of-representatives-and-the-president-ofthe-senate-on-the-continuation-of-the-national-emergency-with-respect-to-certain-terroristattacks/. As the President explained on August 16, 2021, "[t]oday, the terrorist threat has metastasized well beyond Afghanistan: al Shabaab in Somalia, al Qaeda in the Arabian Peninsula, al-Nusra in Syria, ISIS attempting to create a caliphate in Syria and Iraq, and establishing affiliates in multiple countries in Africa and Asia. " Remarks by President Biden on

Afghanistan (Aug. 16, 2021) at 5, *available at* https://www.whitehouse.gov/briefingroom/speeches-remarks/2021/08/16/remarks-by-president-biden-on-afghanistan/. U.S. forces continue to engage in active hostilities with al-Qaida and associated forces where al-Qaida and associated forces are present, as authorized by the AUMF.

The classified declarations submitted herewith detail the nature of the current ongoing conflict against al-Qaida and associated forces in areas of Africa and the Middle East, including Afghanistan, noting specifically that U.S. forces remain engaged in active hostilities with al-Qaida and associated forces in these regions.

Although al-Qaida's remaining core leadership has been degraded and currently poses a more limited threat to the U.S. homeland, that leadership continues to assert direction for, seek the loyalty of, and encourage cooperation and growth among regional al-Qaida affiliates, which continue to pursue recruitment and plotting, especially in unstable or vulnerable areas, and threaten local U.S. personnel, interests, and partners. *See* Office of the Director of National Intelligence, Annual Threat Assessment, (Apr. 9, 2021) (Exh. 6) *available at* https://www.dni.gov/files/ODNI/documents/assessments/ATA-2021-Unclassified-Report.pdf at 23; *see also* Congressional Research Service, Al Qaeda: Background, Current Status, and U.S. Policy (June 14, 2021) (Exh. 7) at 2; *see generally* Anderson Decl.; DIA Decl.

For its part, al-Qaida considers its war against the United States to continue and remains intent on perpetrating attacks against the United States. Just two weeks ago, on the anniversary of the September 11 attacks, al-Qaida reportedly released a propaganda video featuring its leader, Ayman al-Zawahiri, praising "martyrs" from al-Qaida and associated forces who had been killed in the ongoing hostilities against the United States in locations including Yemen, Egypt, and Syria. *See* FDD's Long War Journal, Ayman al Zawahiri promotes 'Jerusalem Will Not Be Judaized' campaign in new video, (Sept. 11, 2021) (Exh. 8), *available at* https://www.longwarjournal.org/archives/2021/09/ayman-al-zawahiri-promotes-jerusalem-willnot-be-judaized-campaign-in-new-video.php. Zawahiri exhorted his followers that their enemies, *i.e.* the United States and its allies, "can be bled to death . . . waging a war in which the entire world is the battlefield." *Id.*; *see also id.* ("We are a united Ummah [community], waging one war on different fronts").

Indeed, no cessation of hostilities against al-Qaida and associated forces including in Afghanistan has been reached. As discussed above, the Secretary of Defense and Chairman of the Joint Chiefs of Staff, testifying before the Senate Armed Services Committee, assessed that al-Qaida remains in Afghanistan and it and associated forces remain at war with the United States. *See supra* 2; *see also infra* 15 (similar testimony before House Armed Services Committee). Many al-Qaida senior leaders remain based in the Afghanistan region, where the group is weakened but not eliminated. *See* Congressional Research Service, Al Qaeda: Background, Current Status, and U.S. Policy at 1. As discussed above, al-Qaida has demonstrated continued intent and design to attack the United States. A report to the U.N. Security Council published in June assessed that "[l]arge numbers of Al-Qaida fighters . . . are located in various parts of Afghanistan." Report of the Analytic Support and Sanctions Monitoring Team, U.N. Doc. S/2021/486 (June 1, 2021) (Exh. 9) at 3, *available at* https://www.undocs.org/pdf?symbol=en/S/2021/486, and a report to the U.N. Security Council published in July indicated that al-Qaida has a presence in at least 15 Afghan provinces, Report of the Analytical Support and Sanctions Monitoring Team, at 14, U.N. Doc. S/2021/655 (July 21, 2021) (Exh. 10), at 14, *available at* https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-

CF6E4FF96FF9%7D/S_2021_655_E.pdf. As a result, U.S. forces remain "laser-focused" on Afghanistan, closely monitoring al-Qaida and associated forces to ensure that it does not regenerate and redevelop the capability "to export terror from Afghanistan . . . to the United States." Sept. 28, 2021 SASC Hearing Transcript at 119; Bloomberg Government, Testimony before the House Armed Services Committee Hearing (Sept. 29, 2021) (Exh. 11) at 82 (explaining that U.S. forces will be monitoring factors such as "leadership capability, training. . . and demonstrations of intent that al Qaeda and/or ISIS is going to do external operations against the United States or our interests" from Afghanistan); *see* Anderson Decl. ¶¶ 36-42; DIA Decl. 2–4.

Additionally, other al-Qaida groups or associated forces, such as AQIS, *see* Resps' Opp'n at 9, and ISIS-Khorasan, maintain a significant presence in the country. *See* Anderson Decl. ¶¶ 28-29, 39; DIA Decl. 4–5. Indeed, ISIS-Khorasan was responsible for the recent violent and deadly attack on U.S. forces and Afghan civilians during the military's evacuation of civilians from the international airport in Kabul, *see* Remarks by President Biden on the Terror Attack at Hamid Karzai International Airport (Aug. 26, 2021) at 1, *available at* https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/26/remarks-by-president-biden-on-the-terrorattack-at-hamid-karzai-international-airport/; *see also id.* at 3 (announcing that the President had ordered commanders "to develop operational plans to strike ISIS-K assets, leadership, and facilities"). U.S. military forces then conducted an over-the-horizon operation that killed an ISIS-Khorasan planner in Afghanistan. *See* U.S. Central Command statement on counterterrorism strike on ISIS-K planner (August 27, 2021); *see also supra* 14–15 (discussing that US forces continue to monitor closely threats from al-Qaida and associated forces in Afghanistan).

Thus, even if the scope of the armed conflict were limited to Afghanistan as Petitioner mistakenly contends, the current situation would not amount to a "cessation of hostilities" such that release would be required. In *Hamdi v. Rumsfeld*, a plurality of the Supreme Court looked to Article 118 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, providing that "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities," to inform the authority to detain granted by the 2001 AUMF. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (plurality). The Department of Defense Law of War Manual provides "[cessation of active hostilities] is the complete end of the fighting with clearly no probability of resumption of hostilities in the near future." DoD Law of War Manual § 9.73.2; *see also Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010) ("The Conventions, in short, codify what common sense tells us must be true: release is only required when the fighting stops."). The International Committee of the Red Cross, in its recent commentary on the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ("Third Geneva Convention"), likewise refers to "a lasting cessation of armed confrontations without real risk of resumption." *See* ICRC Commentary of 2020, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, 525. And other commentators agree. For example, Professor Georg Schwarzenberger described "cessation of active hostilities" as "when, in good faith, neither side expects a resumption of hostilities." 1 G. Schwarzenberger, International Law 216 (5th ed. 1967); *see also* 2 Lassa Oppenheim, International Law 613 (Hersch Lauterpacht ed., 7th ed. 1952) ("Probably the phrase 'cessation of active hostilities' in the sense of Article 118 refers not to suspension of hostilities in pursuance of an ordinary armistice which leaves open the possibility of a resumption of the struggle, but to a cessation of hostilities as the result of total surrender or of such circumstances or conditions of an armistice as

render it out of the question for the defeated party to resume hostilities."); Resps.' Opp'n at 16 n.5 (collecting commentary). Given the present and evolving threat from al-Qaida and associated forces in Afghanistan, that does not describe the situation there at this time.

Furthermore, within the last year, pursuant to the AUMF, the United States has conducted operations, including airstrikes, against al-Qaida and ISIS[11]–in Syria and against ISIS in Iraq. *See* Letter from the President, Letter to the Speaker of the House and President Pro Tempore of the Senate Regarding the War Powers Report (June 8, 2021) (Exh. 12) ("WPR Report") at 2, 3, *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/08/letter-tothe-speaker-of-the-house-and-president-pro-tempore-of-the-senate-regarding-the-war-powersreport/; *see also* Anderson Decl. ¶ 32. A small number of U.S. military personnel are deployed to Yemen to conduct operations against al-Qaida in the Arabian Peninsula and ISIS. *See* WPR Report at 2, 3. In East Africa, U.S. forces continue to counter the threat posed by ISIS and al-Shabaab, an associated force of al-Qaida; recently, U.S. forces conducted air strikes against al-Shabaab and remain prepared to conduct airstrikes against ISIS and al-Shabaab. WPR Report at 3–4; *see also see also* Anderson Decl. ¶¶ 12-16; DIA Decl. 5, 9.

The record evidence demonstrates that hostilities against al-Qaida and associated forceshave not ceased, whether in Afghanistan or elsewhere.

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On October 19, 2021, the District Court for the District of Columbia denied Gul's Motion for Immediate Release. The court's opinion is available at https://www.govinfo.gov/app/details/USCOURTS-dcd-1_16-cv-01462/context. Excerpts from the district court's opinion denying the Motion for Immediate Release are below.

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* * * *

Respondents' authority to detain Gul derives from the 2001 Authorization for Use of Military Force ("2001 AUMF"). The 2001 AUMF permits the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or

[11] The AUMF has authorized the use of force against ISIS since at least 2004. *See* White House Report at 5. In 2004, Abu Mu'sab al-Zarqawi, the founder of al-Qaida in Iraq (AQI) — the group that became ISIS—in response to an invitation from bin Laden to merge with al-Qaida publicly pledged his group's allegiance to bin Laden, and bin Laden publicly endorsed al-Zarqawi as al-Qaida's leader in Iraq. *See id.* For years afterwards, al-Zarqawi's group conducted deadly terrorist attacks against U.S. and Coalition forces. *See id.* The group has continued to plot attacks against U.S. persons and interests in Iraq and the region—including the brutal murder of kidnapped American citizens in Syria and threats to U.S. military personnel that are now present in Iraq at the invitation of the Iraqi Government. *See id.* at 6. The subsequent 2014 split between ISIS and current al-Qaida leadership does not remove ISIS from coverage under the AUMF. *See id.* Although ISIS broke its affiliation with al-Qaida, the same organization continues to wage hostilities against the United States as it has since 2004, when it joined bin Laden's al-Qaida organization in its conflict against the United States, and ISIS now claims that it—not al-Qaida's current leadership—is the true executor of bin Laden's legacy. *See id.* Nothing in the AUMF requires perpetual amity between organizations subject to its authorization of force, and a contrary interpretation of the statute would allow an enemy force to manipulate the scope of the AUMF by splintering into rival factions while continuing to prosecute the same conflict against the United States. *See id.*

harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). In the 2012 National Defense Authorization Act ("2012 NDAA"), Congress proclaimed that the President's power under the 2001 AUMF "includes the authority for the Armed Forces of the United States to detain covered persons ... pending disposition under the law of war." National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a), 125 Stat. 1298, 1562. That detention authority expires with "the end of the hostilities authorized by the Authorization for Use of Military Force." *Id.* § 102l(c)(l); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities."). In order to determine whether the United States can lawfully detain Gul, therefore, the court must determine whether "hostilities" authorized by the 2001 AUMF continue.

Whether active hostilities persist is perhaps one of the weightiest questions a court can take up, and, for that reason, the court must afford the utmost deference to the Executive's position on that question. The "termination" of "[t]he state of war ... is a political act." *Ludecke v. Watkins*, 335 U.S. 160, 168-69 (1948) (internal quotation marks omitted). "Whether and when it would be open to th[e] [c]ourt[s] to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled." *Id.* at 169. Accordingly, the court must "defer to the Executive's opinion on the matter" of whether active hostilities exist, "at least in the absence of an authoritative congressional declaration purporting to terminate the war." *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010). When "the Executive Branch represents, with ample support from record evidence, that the hostilities described in the AUMF continue," and when Congress has not given a "contrary command," the Executive Branch's representation "controls." *Al-Alwi v. Trump*, 901 F.3d 294, 300 (D.C. Cir. 2011).

III.

Gul argues that the United States lacks the authority to detain him because (1) "the war in Afghanistan is over," and (2) "the United States has defeated al Qaeda in Afghanistan and there are no active hostilities." Pet.'s Br. at 7. His motion therefore presents two questions for this court: (l) whether the United States' authority to detain Gul depends on the existence of active hostilities in Afghanistan specifically and (2) whether active hostilities with al Qaeda exist. The court takes each in turn.

A.

The 2001 AUMF was a sweeping delegation of power that, on its face, contains no geographical limitation. *See* Pub. L. No. 107-40, § 2(a), 115 Stat. at 224. As Respondents point out, that is significant. *See* Resp'ts' Br. at 7. Congress has routinely placed geographic boundaries on its authorizations for the use of military force. In the 2002 Authorization for Use of Military Force in Iraq ("Iraq AUMF"), for example, Congress limited the President's use of force to the "threat posed by Iraq." Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a)(l), 116 Stat. 1498. Earlier, in 1983, Congress limited the President's authority to exercise his war powers in the Lebanon War to "continu[ing] participation by United States Armed Forces in the Multinational Force *in Lebanon*." Joint Resolution, Pub. L. No. 98-119, § 3, 97 Stat. 805 (1983) (emphasis added). In contrast, the 2001 AUMF is not limited by geography, but empowers the President to use force wherever he may find the "nations, organizations, or persons" who "planned, authorized, committed, aided" the September 11 terrorist attacks and those who harbored them. Pub. L. No. 107-40, § 2(a), 115

Stat. at 224. Unlike the Iraq AUMF or the 1983 Joint Resolution, there is simply no statutory hook for Gul's argument that the 2001 AUMF is limited to hostilities in Afghanistan.

Lacking recourse to the statute, Gul takes refuge in the case law. He notes first that in *Hamdi v. Rumsfeld,* the Supreme Court interpreted the 2001 AUMF to authorize detention "for the duration of the *particular conflict* in which" the detainee was captured. 542 U.S. at 518 (emphasis added). That particular conflict, Gul reasons, is "the war in Afghanistan." Pet.'s Br. at 7. He argues that the D.C. Circuit has taken this view in *Al-Bihani v. Obama.* In that case, the D.C. Circuit considered a Guantanamo detainee's challenge that he must be released because "the conflict with the Taliban ... ended." *AI-Bihani v. Obama,* 590 F.3d 866, 874 (D.C. Cir. 2010). Al-Bihani "offer[ed] the court a choice of numerous event dates—the day Afghans established a post-Taliban interim authority, the day the United States recognized that authority, the day Hamid Karzai was elected President—to mark the official end of the conflict." *Id*. The D.C. Circuit rejected those arguments, likening those moments to mere "successful campaigns" in "a long war." *Id.* In passing, the court explained that it would not fashion its own end date for active hostilities, and "[i]n the absence of a determination of political branches that hostilities in *Afghanistan* have ceased, Al-Bihani's continued detention is justified." *Id*. at 875 (emphasis added).

This court does not read *Al-Bihani* to circumscribe the sweeping authority Congress granted the President in the 2001 AUMF. It is not clear that either party before the D.C. Circuit even presented the court with an argument that the 2001 AUMF or the conflict in which Al-Bihani was detained were limited to Afghanistan. Nor did the D.C. Circuit provide any analysis that would support the proposition that the 2001 AUMF is limited to "hostilities in Afghanistan." And the consequences of this court magnifying the D.C. Circuit's passing reference to "in Afghanistan" to a statement restricting the scope of the Executive's power to wage congressionally authorized war are simply incredible. Gul would have this court read *Al-Bihani* to stand for the proposition that all war-on-terror detainees arrested in Afghanistan are no longer lawfully detained. That the court cannot do when, as here, its authority is at its nadir, and neither a higher court, Congress, nor the Executive has geographically bound the relevant conflict to Afghanistan. *See Ludecke,* 335 U.S. at 170 ("These are matters of political judgment for which judges have neither technical competence nor official responsibility.").

Likewise, the court does not read *Al-Bihani* to stand for the proposition that the particular conflict in which a detainee is captured is limited to the country in which the detainee was captured. The facts on the ground indicate that this is certainly not true for the United States' conflict with al Qaeda. The end of the United States' ground war in Afghanistan marks the end of just one aspect of the United States' hostilities with al Qaeda. Respondents have indicated that, not only [REDACTED] Classified Deel. of Dagvin R.M. Anderson in Supp. of Resp'ts' Opp'n to Pet's Req. for Renewed Consideration of Motion for Immediate Release [hereinafter Anderson Deel.] ¶ 42 [REDACTED] Such "a change in the form of hostilities" does not negate the Executive's detention authority so long as "hostilities between the relevant *entities* are ongoing." *Al-Alwi,* 901 F.3d at 300 (emphasis added).

Despite its decision, the court shares Gul's concern that Respondents have asked it to endorse what is fast approaching "perpetual detention."' *Hamdi,* 542 U.S. at 520. Gul has been detained without charge since February 2007. JE 197, at 1283. Fourteen years is, by any measure, an inordinate amount of time to be held without charge. And the events of the last two decades have demonstrated just how "broad and malleable" the "war on terror" is. *Hamdi,* 542 U.S. at 520. The Supreme Court's warning in *Hamdi,* given more than thirteen years ago, seems

more prescient now than ever: "If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that [the detainee] might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that [his] detention could last for the rest of his life." *Id.* Respondents' case that Gul might rejoin enemy forces has significantly eroded with the passage of these last fourteen years. That is particularly true because, as the court separately has concluded, Gul's force is at peace and he never was "part of" al Qaeda.

But the court is nonetheless constrained to respect the decision of Congress to grant the Executive a broad power that is not bound by geography and to defer to the Executive's representations that its conflict with al Qaeda is ongoing. In the face of these definitive statements from the political branches, the court cannot conclude that Gul must be immediately released because hostilities have ceased.

B.

Gul also argues that the United States is no longer in active hostilities with al Qaeda because the United States has declared that it "defeated al Qaeda." Pet.'s Br. at 7. Political rhetoric aside, where "[t]he Executive Branch represents that armed hostilities between United States forces and [the Taliban and al Qaeda] persist" and "[t]he record confirms the Executive Branch's representations," the court must defer to the Executive's determination. *See Al-Alwi*, 901 F.3d at 299.

That is the case here. General Mark Milley testified before the U.S. Senate Armed Services Committee that "Al Qaeda ... maintains a presence in Afghanistan." Resp'ts' Mot., Ex. 1, ECF No. 134-2, at 90-91. Beyond Afghanistan's borders, "[t]he Al Qaeda threat globally is still there," he told the Committee. *Id.* at 93. "Al Qaeda," General Milley explained, "has displaced to ... other parts of the world," but its affiliates have the capability and "aspirations to ... attack the United States." *Id.* Respondents' classified submissions back up General Milley's testimony.

* * * *

The record accordingly "manifests" that the United States is still engaged in active operations against al Qaeda and its dispersed network of regional affiliates, *Al-Alwi*, 901 F.3d at 300. In light of this evidence, "[t]he Government's authority to detain [Gul] pursuant to the AUMF has not terminated." *Id.*

* * * *

Separately, on October 19, 2021, the same District Court judge granted Gul's petition for the writ of habeas corpus, concluding that the U.S. government failed to show by a preponderance of evidence that Gul was a part of or substantial supporter of al-Qaida. The U.S. government did not seek appeal of the District Court's order, permitting the writ to issue. The court's opinion is available at https://www.govinfo.gov/app/details/USCOURTS-dcd-1_16-cv-01462/context.

Cross References

Afghan Special Immigrant Visa program, **Ch. 1.B.5.e**
Afghanistan refugee program, **Ch. 1.C.5**
Relocation and evacuation operations in Afghanistan, **Ch. 2.A.2**
International crime issues relating to cyberspace, **Ch. 3.B.6**
HRC on Afghanistan, **Ch. 6.A.6.b**
Children in Armed Conflict, **Ch. 6.C.1**
Suspending operations at Embassy Kabul, **Ch. 9.A.8**
Armenia and Azerbaijan, **Ch. 9.B.3**
Request for import restrictions on cultural property of Afghanistan, **Ch. 14.A.7**
Cyber activity sanctions, **Ch. 16.A.10**
Afghanistan, **Ch. 17.B.1**
Chemical weapons in Syria, **Ch. 19.D.1**

CHAPTER 19

Arms Control, Disarmament, and Nonproliferation

A. GENERAL

Compliance Report

The State Department announced on April 15, 2021 that it had submitted to Congress the unclassified version of the 2021 Report on Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments ("the Compliance Report"). The report is submitted annually, pursuant to Section 403 of the Arms Control and Disarmament Act, as amended, 22 U.S.C. § 2593a. The 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 2021 report primarily covers the period from January 1, 2020 through December 31, 2020. The report is available at https://www.state.gov/2021-adherence-to-and-compliance-with-arms-control-nonproliferation-and-disarmament-agreements-and-commitments/.

B. NONPROLIFERATION

1. Non-Proliferation Treaty

The Tenth Non-Proliferation Treaty ("NPT) Review Conference ("RevCon") was postponed, first from 2020 to 2021, and then further to 2022, due to the COVID-19 pandemic. In late December 2021, the United States submitted its national report for the Tenth NPT RevCon, describing U.S. efforts to implement certain actions of the Action Plan set forth in the 2010 NPT RevCon Final Document. U.N. Doc. No. NPT/CONF.2020/47. The U.S. report is available at https://undocs.org/NPT/CONF.2020/47. On December 3, 2021, the State Department released the Joint Communique of the Non-Proliferation Treaty P5 Nations, available at

https://www.state.gov/joint-communique-of-the-five-nuclear-weapons-states-of-the-non-proliferation-treaty/, and below.

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1. Representatives from the five Nuclear Non-Proliferation Treaty (NPT) Nuclear Weapon States (NWS), or "P5", met in Paris on 2-3 December 2021 for the 10th P5 Conference, to discuss the preparations for the upcoming 10th NPT Review Conference and related matters.

2. For over fifty years since its entry into force, the NPT has made invaluable contributions to humanity as a whole by providing an international framework that is indispensable to curbing the threat of nuclear proliferation. At the Paris Conference, the NWS reaffirmed their enduring commitment to the NPT across all three pillars, and their unconditional support for its universalization. They emphasized the primacy of the NPT as the cornerstone of the international nuclear non-proliferation and disarmament regime.

3. Just one month ahead of the 10th NPT Review Conference (4-28 January 2022), they reiterated their active determination to approach this milestone event in the most positive and constructive manner. In this regard, they expressed their full support to President-designate Gustavo Zlauvinen in his endeavor to achieve a meaningful outcome.

4. The Paris Conference gave an opportunity to reflect and take stock of NWS efforts and the contribution of this work to the strengthening of the NPT. Twelve years after the establishment of the P5 Process, the NWS firmly believe that this forum has proved useful, and will continue to be a key mechanism for fostering a better mutual understanding among NWS and to examine the means through which they can collectively help facilitate the goals of the NPT.

5. They reaffirmed their commitment under the NPT to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control. They support the ultimate goal of a world without nuclear weapons with undiminished security for all. By helping to ease international tensions and create conditions of stability, security and trust among nations, the NPT has made a vital contribution to nuclear disarmament and to reducing proliferation of nuclear weapons. The NPT continues to help create conditions that are essential for further progress on nuclear disarmament.

6. They also recalled the instrumental role of the NPT in providing confidence that, in line with article III of the Treaty, nuclear energy is not diverted from peaceful uses to nuclear weapons or other nuclear explosive devices. The NPT provides a foundation for the promotion and sharing of the peaceful uses of nuclear technology, to the benefit of all. In this regard, they reiterated their full and continued support to the International Atomic Energy Agency (IAEA) in implementing the safeguards agreements and Additional Protocols, in promoting the benefits of peaceful uses and in verifying States' compliance with their nuclear non-proliferation obligations.

7. They also reflected on the Comprehensive Nuclear Test Ban Treaty (CTBT) and the importance of its entry into force, twenty-five years after it was opened for signature, and recalled the importance of moratoria on nuclear tests to the achievement of disarmament and non-proliferation objectives.

8. They reviewed progress achieved concerning the different work streams under the P5 Process in preparation for the 10th NPT Review Conference: They exchanged updates on their respective nuclear doctrines and policies and reiterated their commitment to the ongoing discussions in this area that contribute to strengthening predictability, confidence and mutual understanding among the NWS. In this regard, they consider this work stream as a tangible risk reduction measure, and reaffirmed their willingness to pursue these discussions, as well as to host a dedicated side-event on nuclear doctrines and policies at the Review Conference;
They recognized their responsibility to work collaboratively to reduce the risk of nuclear conflict. They intend to build on their fruitful work on strategic risk reduction within the P5 Process in the course of the next NPT review cycle, in order to reduce the likelihood of nuclear weapons use. This is complementary to the NPT's overarching goals and is consistent with the NWS' long-term efforts towards disarmament and the ultimate goal of a world without nuclear weapons with undiminished security for all;
They endorsed the second edition of the P5 Glossary of Key Nuclear Terms, which contributes to enhancing mutual trust and understanding among the NWS. They decided to submit the Glossary as a P5 working paper to the 10th NPT Review Conference and hold a side-event during the Conference;
They reaffirmed their commitment to the objectives of the Nuclear-Weapon-Free-Zones, including the Southeast Asia Nuclear-Weapon-Free-Zone, and recalled the importance of advancing discussions between the NWS and the ASEAN countries on the Protocol to the Southeast Asia Nuclear-Weapon-Free-Zone Treaty. They also recalled their support to the establishment of a Middle-East zone free of weapons of mass destruction and their means of delivery;
They reiterated their support for the negotiation of a non-discriminatory, multilateral and internationally and effectively verifiable Fissile Material Cut-off Treaty (FMCT) –banning the production of fissile material for nuclear weapons or other nuclear explosive devices–on the basis of the Shannon mandate and with the participation of all countries in the Conference on Disarmament;
They stressed the shared benefits of the peaceful uses of nuclear energy and the need to strengthen this pillar of the NPT. As such, they reaffirmed their strong support for broadening access within the NPT community to the numerous benefits of nuclear energy, science and technology and their applications for peaceful purposes, their support for the role of nuclear energy in addressing climate change and in achieving the Sustainable Development Goals. They will promote the peaceful uses of nuclear energy during the 10th NPT Review Conference.

9. The Paris Conference also provided an opportunity for substantial discussions among the NWS on the international security environment, non-proliferation issues and the importance of strategic stability. They agreed on the urgency of a full return to the JCPoA and on the need to achieve complete, verifiable and irreversible denuclearization of the Korean Peninsula.

10. They emphasized the importance of transparency and outreach. In that regard, they conducted fruitful dialogues with the NPT Bureau, Non-Nuclear Weapon States and civil society representatives, and intend to keep open all communications channels to contribute to a positive outcome of the NPT Review Conference. They decided to launch a pilot project to develop a Young Professionals Network of P5 academics.

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2. Country-Specific Issues

a. Iran

In April 2021, talks involving the United States and the participants in the 2015 deal relating to Iran's nuclear program, the Joint Comprehensive Plan of Action ("JCPOA"), began in Vienna with the aim of achieving a mutual return to full implementation of the JCPOA. The eighth round of those talks was ongoing as of the end of 2021. See State Department December 28, 2021 press briefing, available at https://www.state.gov/briefings/department-press-briefing-december-28-2021, addressing the state of the talks as of the end of the year.

b. Australia-United Kingdom-United States ("AUKUS")

On September 15, 2021, Australia, the United Kingdom, and the United States announced an enhanced trilateral security partnership called "AUKUS," the first initiative of which is to identify the optimal pathway for Australia to acquire conventionally armed, nuclear-powered submarines, through an intensive 18-month consultation period. See September 15, 2021 White House press briefing on AUKUS, available at https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/15/background-press-call-on-aukus/.

Australia is a global leader in non-proliferation efforts, and it is not seeking – and the United States and the UK are not assisting with – any acquisition of nuclear weapons. The Nuclear Non-Proliferation Treaty does not prohibit non-nuclear-weapon States Parties like Australia from acquiring naval nuclear propulsion.

This partnership is in line with the U.S. commitment to non-proliferation and will be undertaken consistent with the three countries' respective non-proliferation obligations. The shared objective of maintaining the strength of the non-proliferation regime and Australia's exemplary non-proliferation credentials will be central to trilateral discussions.

The cooperation also will be undertaken consistent with the requirements of the U.S. Atomic Energy Act, including with respect to any necessary agreements and requisite congressional review in accordance with its provisions.

The Agreement between the Government of the United States of America, the Government of Australia, and the Government of the United Kingdom of Great Britain and Northern Ireland for the Exchange of Naval Nuclear Propulsion Information (the "Agreement"), signed at Canberra on November 22, 2021, was transmitted to Congress by the President on December 1, 2021, pursuant to section 123 d. of the Atomic Energy Act of 1954, as amended ("AEA").[*] The text of the Agreement is available at https://www.state.gov/multilateral-22-208. Excerpts follow from the Agreement, not including the technical and security annexes.

[*] Editor's note: The Agreement entered into force on February 8, 2022, following the completion of the 60 days of continuous session review required by the AEA.

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The Government of the United States of America (the "United States"), the Government of Australia ("Australia"), and the Government of the United Kingdom of Great Britain and Northern Ireland (the "United Kingdom") (collectively, the "Parties") ,

Recalling their leaders' announcement of an enhanced trilateral security partnership among the Parties called AUKUS, of which the first initiative is a shared ambition to support Australia in acquiring nuclear-powered submarines for the Royal Australian Navy;

In this regard, recalling that the Parties have embarked on a trilateral effort to seek an optimal pathway to deliver this capability;

Considering that the United Kingdom and Australia are participating with the United States in international arrangements pursuant to which they are making substantial and material contributions to their mutual defense and security;

Recognizing that their common defense and security will be advanced by the exchange of naval nuclear propulsion information concerning military reactors;

Believing that such exchange can be undertaken without unreasonable risk to each Party's common defense and security;

Reaffirming their respective obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, done at London, Moscow, and Washington on July 1, 1968 (NPT); and

Taking into consideration the United States Atomic Energy Act of 1954, as amended,

Have agreed as follows:

ARTICLE I General Provision

While the United States, the United Kingdom, and Australia are participating in international arrangements for their mutual defense and security and making substantial and material contributions thereto, each Party may communicate to and exchange with the other Parties information, in accordance with the provisions of this Agreement, provided that the communicating Party determines that such cooperation will promote and will not constitute an unreasonable risk to its defense and security.

ARTICLE II Exchange of Information

Each Party may communicate to or exchange with the other Parties naval nuclear propulsion information as is determined to be necessary to research, develop, design, manufacture, operate, regulate, and dispose of military reactors, and may provide support to facilitate such communication or exchange, to the extent and by such means as may be mutually agreed.

ARTICLE III Responsibility for Use of Information

The use of any information (including design drawings and specifications) communicated or exchanged under this Agreement shall be the responsibility of the Party receiving it, and the originating Party does not provide any indemnity, and does not warrant the accuracy or completeness of such information and does not warrant the suitability or completeness of such information for any particular use or application.

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The President's transmittal message to the Congress for the Agreement is available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/01/a-message-to-the-congress-on-the-agreement-between-the-government-of-the-united-states-of-america-the-government-of-australia-and-the-government-of-the-united-kingdom-of-great-britain-and-northern-i/, and excerpted below.

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I am pleased to transmit to the Congress, …the text of …[the Agreement]. I am also pleased to transmit my written approval, authorization, and determination concerning the Agreement. The memorandum submitted to me by the Secretary of Energy providing a summary position on the Agreement is also enclosed.

Pursuant to the enhanced trilateral security partnership called "AUKUS" announced earlier this year, our three governments are engaging in an 18-month consultation period to seek an optimal pathway for delivery of nuclear-powered submarines for the Royal Australian Navy at the earliest achievable date. The Agreement would permit the three Parties to communicate and exchange Naval Nuclear Propulsion Information and would provide authorization to share certain Restricted Data as may be needed during trilateral discussions, thereby enabling full and effective consultations.

In my judgment, the Agreement meets all statutory requirements.

I have determined that the United Kingdom and Australia, by participating with the United States pursuant to international arrangements, are making substantial and material contributions to the mutual defense and security. The United Kingdom is party to the North Atlantic Treaty, and Australia is party to the Australia, New Zealand, and United States Security Treaty.

I have approved the Agreement, authorized its execution, and urge that the Congress give it favorable consideration.

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c. Poland

As discussed in *Digest 2020* at 717, the United States and Poland signed the Agreement between the Government of the United States of America and the Government of the Republic of Poland on Cooperation Towards the Developments of a Civil Nuclear Power Program and the Civil Nuclear Power Sector in the Republic of Poland, at Upper Marlboro on October 19, 2020 and at Warsaw on October 22, 2020. The agreement entered into force February 24, 2021 and is available at https://www.state.gov/poland-21-224.

d. Romania

As discussed in *Digest 2020* at 717, the United States and Romania signed the Agreement between the Government of the United States of America and the

Government of Romania on Cooperation Towards the Cernavoda Nuclear Power Projects and the Civil Nuclear Power Sector in Romania, at Upper Marlboro on December 4, 2020 and at Bucharest on December 9, 2020. The agreement entered into force July 28, 2021 and is available at https://www.state.gov/romania-21-728.

e. Ghana

On July 13, 2021, the United States of America and the Republic of Ghana signed a Memorandum of Understanding Concerning Civil Nuclear cooperation ("NCMOU"). The State Department media note regarding the signing of the NCMOU is excerpted below and available at https://www.state.gov/the-united-states-of-america-and-republic-of-ghana-sign-a-memorandum-of-understanding-concerning-strategic-civil-nuclear-cooperation/.

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[T]he …NCMOU… improves our cooperation on nuclear energy and strengthens our diplomatic and economic relationship.

Dr. C.S. Eliot Kang, the Senior Official for Arms Control and International Security, signed for the United States, and Hon. Kwaku Ampratwum Sarpong, Deputy Minister for Foreign Affairs and Regional Integration, signed for Ghana.

The United States and Ghana have an enduring diplomatic relationship, which includes long-standing cooperation in the fields of security, energy and commerce. Cooperation in nuclear energy, science and technology can lead to significant contributions to clean energy, agricultural improvements, clean water, advanced medical treatments, and more.

Nuclear Cooperation MOUs 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.

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f. Germany

The United States and Germany signed an arrangement for the exchange of technical information and cooperation in nuclear safety at Vienna September 20, 2021. The arrangement entered into force September 20, 2021 and is available at https://www.state.gov/germany-21-920.

g. Indonesia

The United States and Indonesia signed an arrangement for the exchange of technical information and cooperation in nuclear safety at Vienna September 23, 2021. The

arrangement entered into force September 23, 2021 and is available at https://www.state.gov/indonesia-21-923.

h. Finland

On September 23, 2021, the United States and Finland agreed to extend their 2016 arrangement for the exchange of technical information and cooperation in nuclear safety. The extension entered into force on September 28, 2021 and is available at https://www.state.gov/finland-21-923.1.

i. Sweden

On September 20, 2021, the United States and Sweden signed an arrangement for the exchange of technical information and cooperation in nuclear safety. Their arrangement entered into force on September 20, 2021 and is available at https://www.state.gov/sweden-21-920.1.

C. ARMS CONTROL AND DISARMAMENT

1. Comprehensive Nuclear Test Ban Treaty

Ambassador Jeffrey DeLaurentis, senior advisor for special political affairs, delivered remarks at a UN Security Council open debate on the 25th anniversary of the Comprehensive Nuclear Test Ban Treaty on September 27, 2021. His remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-open-debate-on-the-25th-anniversary-of-the-comprehensive-nuclear-test-ban-treaty/.

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Today's discussion brings to mind the seminal role Ireland played 60 years ago in reducing the dangers posed by nuclear weapons. The "Irish Resolution" of 1961 led to the creation of the Non-Proliferation Treaty, leaving us far more secure and more prosperous than we would be without it. As we celebrate the 25th anniversary of the Comprehensive Nuclear Test Ban Treaty, it is important to recognize the paramount role of the CTBT, even prior to its entry into force, in establishing and maintaining a nearly universal political norm against nuclear explosive testing.

Let me affirm that the United States supports the CTBT and is committed to working to achieve its entry into force, recognizing the significant challenges that lie ahead in reaching this goal. In line with the goals of the CTBT, the United States continues to observe its zero-yield nuclear explosive testing moratorium, and we call on all states possessing nuclear weapons to declare or reiterate such a moratorium.

Maintaining the international norm against nuclear explosive testing remains in the interest of all states. This norm is essential for sustaining the international non-proliferation regime and contributing to a more peaceful and secure world.

As we look ahead to the future of the CTBT, the United States is committed to taking a leading role in revitalizing international arms control efforts. We welcome engagements with all states who share our commitment to implementing effective measures toward achieving a world without nuclear weapons.

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2. New START Treaty

a. Extension

The United States of America and the Russian Federation agreed to a five-year extension of the New START Treaty, in accordance with Article XIV of the treaty, via an exchange of notes at Moscow January 26, 2021. The agreement to extend New START entered into force February 3, 2021. The extension agreement is available at https://www.state.gov/russian_federation-21-203. On February 3, 2021, the State Department issued a press statement from Secretary of State Antony J. Blinken regarding the extension of New START. The statement follows and is available at https://www.state.gov/on-the-extension-of-the-new-start-treaty-with-the-russian-federation/.

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President Biden pledged to keep the American people safe from nuclear threats by restoring U.S. leadership on arms control and nonproliferation. Today, the United States took the first step toward making good on that pledge when it extended the **New START Treaty** with the Russian Federation for five years.

Extending the New START Treaty ensures we have verifiable limits on Russian ICBMs, SLBMs, and heavy bombers until February 5, 2026. The New START Treaty's verification regime enables us to monitor Russian compliance with the treaty and provides us with greater insight into Russia's nuclear posture, including through data exchanges and onsite inspections that allow U.S. inspectors to have eyes on Russian nuclear forces and facilities. The United States has assessed the Russian Federation to be in compliance with its New START Treaty obligations every year since the treaty entered into force in 2011.

Especially during times of tension, verifiable limits on Russia's intercontinental-range nuclear weapons are vitally important. Extending the New START Treaty makes the United States, U.S. allies and partners, and the world safer. An unconstrained nuclear competition would endanger us all.

President Biden has made clear that the New START Treaty extension is only the beginning of our efforts to address 21st century security challenges. The United States will use the time provided by a five-year extension of the New START Treaty to pursue with the Russian Federation, in consultation with Congress and U.S. allies and partners, arms control that addresses all of its nuclear weapons. We will also pursue arms control to reduce the dangers from China's modern and growing nuclear arsenal. The United States is committed to effective arms control that enhances stability, transparency and predictability while reducing the risks of costly, dangerous arms races.

Just as we engage the Russian Federation in ways that advance American interests, like seeking a five-year extension of New START and broader discussions to reduce the likelihood of crisis and conflict, we remain clear eyed about the challenges that Russia poses to the United States and the world. Even as we work with Russia to advance U.S. interests, so too will we work to hold Russia to account for adversarial actions as well as its human rights abuses, in close coordination with our allies and partners.

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b. Resumption of Bilateral Consultative Commission Sessions

The Nineteenth Session of the Bilateral Consultative Commission under the U.S.-Russia New START Treaty was held in Geneva, October 5-14, 2021. It was the first session of the BCC convened in nearly two years, due to the COVID-19 pandemic. See State Department media note, available at https://www.state.gov/on-the-nineteenth-session-of-the-bilateral-consultative-commission-under-the-new-start-treaty/. At the session, the delegations discussed practical issues related to the implementation of the treaty.

D. CHEMICAL AND BIOLOGICAL WEAPONS

1. Chemical Weapons in Syria

a. Anniversary of Attack in Ghouta

On August 21, 2021, the State Department issued a press statement marking the eighth anniversary of the Ghouta chemical weapons attack. The statement follows and is available at https://www.state.gov/syria-eighth-anniversary-of-the-ghouta-chemical-weapons-attack/.

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Eight years ago, on the early morning of August 21, 2013, the Assad regime released the nerve agent sarin on its own people in the Ghouta district of Damascus, killing more than 1,400 Syrians, many of them children. The United States estimates that the Assad regime has used chemical weapons against the Syrian people at least 50 times since the conflict began. On this somber anniversary, we remember and honor all the victims of the Assad regime's chemical weapons attacks.

We continue to call upon the Assad regime to fully declare and destroy its chemical weapons program in accordance with its international obligations.

The United States condemns in the strongest possible terms the use of chemical weapons anywhere, by anyone, under any circumstances, and we reiterate our resolve to ensure that there is no impunity for those who use these weapons.

Just as there must be accountability for the Assad regime's use of chemical weapons, the United States strongly supports efforts to ensure accountability for the numerous other atrocities the regime has committed against the Syrian people, many of which rise to the level of war

crimes and crimes against humanity, and we reaffirm our support for efforts to secure a political resolution in line with UN Security Council resolution 2254.

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b. OPCW IIT Second Report

The State Department announced in an April 14, 2021 press statement, available at https://www.state.gov/opcw-charges-syrian-regime-with-chemical-weapons-attack/, that the Organization for the Prohibition of Chemical Weapons ("OPCW") Investigation and Identification Team ("IIT") released its second report attributing yet another chemical weapons attack in Syria to the Assad regime. U.N. Doc. No. S/1943/2021, available at https://www.opcw.org/sites/default/files/documents/2021/04/s-1943-2021%28e%29.pdf. The State Department press statement is excerpted below.

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The IIT report concluded there are reasonable grounds to believe that on February 4, 2018, in Saraqib, Syria, the Syrian Arab Air Force dropped a cylinder containing chlorine, which dispersed over a large area. This act imposed deliberate and unconscionable suffering on Syrian victims.

This latest finding should come as a surprise to no one. The Assad regime is responsible for innumerable atrocities, some of which rise to the level of war crimes and crimes against humanity. The regime has consistently responded with death and destruction to calls by the Syrian people for reform and change. These well-documented atrocities include the use of chemical weapons, and this most recent report follows the first from IIT last year that attributed three other chemical weapons attacks to the Assad regime.

The United States concurs with the OPCW's conclusions cited in this report and continues to assess that the Assad regime retains sufficient chemicals to use sarin, to produce and deploy chlorine munitions, and to develop new chemical weapons. Despite the OPCW's efforts to induce Syria to adhere to its obligations under the Chemical Weapons Convention and UN Security Council Resolution 2118, the Assad regime continues to ignore calls from the international community to fully disclose and verifiably destroy its chemical weapons program. The OPCW report is but the latest reminder of Assad's flagrant repudiation of the rule of law.

The United States supports the impartial and independent work of the OPCW, particularly the IIT Fact-Finding Mission and Declaration Assessment Team. We applaud the OPCW's leadership and Technical Secretariat for the professional manner in which they carry out their mission. To be clear, no amount of disinformation, conspiracy theories or distortion of the facts by the regime or its enablers can argue away Assad's crimes. The United States condemns the use of chemical weapons, by anyone, anywhere at any time. The use of chemical weapons by any state or non-state actor presents an unacceptable security threat to all states and cannot occur with impunity.

All responsible nations must stand in solidarity against the deployment of chemical weapons by preserving the global norm against such use; and we must be ready to hold the Assad regime, and anyone who chooses to use these horrific weapons, accountable.

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c. OPCW Decision Condemning Syria's Use of Chemical Weapons

In an April 22, 2021 media note, available at https://www.state.gov/opcw-condemns-syrias-repeated-use-of-chemical-weapons/, the State Department announced that, on April 21, 2021 the OPCW Conference of the States Parties, meeting at The Hague, adopted a decision addressing the Assad regime's continued use and possession of chemical weapons in violation of the Chemical Weapons Convention ("CWC") and its failure to fulfill measures set out by the OPCW Executive Council in a July 2020 decision. The decision suspends certain of Syria's rights and privileges under the Convention until Syria has completed the directions in the Executive Council's July 2020 decision. The media note is excerpted below. The text of the OPCW decision and additional information is available here: https://www.opcw.org/media-centre/news/2021/04/conference-states-parties-adopts-decision-suspend-certain-rights-and.

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This decision fulfills the recommendation made by the Executive Council in response to the April 2020 findings of the OPCW's Investigation and Identification Team (IIT), which identified that the Syrian Arab Air Force was responsible for three chemical weapons attacks involving sarin and chlorine in March 2017 in the northern Syrian town of Ltamenah. The IIT has since issued an additional report of Syria's use of chemical weapons in a separate instance, which adds to a robust body of evidence by other international investigative bodies that the regime has repeatedly used these weapons on its own people. The United States commends the OPCW staff for its thorough, expert, and professional work in producing these reports. The United States itself assesses that the Assad regime has used chemical weapons at least 50 times since acceding to the CWC in 2013.

The decision condemns Syria's use of chemical weapons and suspends certain of its rights and privileges under the Convention until the OPCW Director-General reports to the Council that Syria has completed the measures requested in the Executive Council's July 2020 decision. In that decision, the Council requested that Syria declare any chemical weapons it continues to possess as well as its chemical weapons production facilities and other related facilities. It also requested that Syria resolve all outstanding issues regarding the initial declaration of its chemical weapons stockpile and program. This is the first time such action has been taken against a country at the OPCW. A copy of the decision will be provided to the United Nations Security Council and to the United Nations General Assembly.

Along with the international community, the United States urges the Assad regime to cooperate with the OPCW, to declare and destroy its remaining stockpile, to renounce its chemical weapons program, and to comply with its obligations under the CWC.

The United States welcomes the OPCW's decision and applauds the international community's continued commitment to upholding the international norm against the use of

chemical weapons. The use of chemical weapons by any state presents an unacceptable security threat to all states. As demonstrated today, the international community will continue to pursue accountability for the use of chemical weapons, for which there can be no impunity.

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2. OPCW

a. Aerosolized Use of Central Nervous System-acting Chemicals for Law Enforcement

On December 1, 2021 the OPCW Conference of the States Parties adopted a decision affirming that the aerosolized use of central nervous system-acting chemicals is inconsistent with law enforcement purposes as a "purpose not prohibited" under the CWC. The State Department media note on the action, excerpted below and available at https://www.state.gov/u-s-leads-international-action-to-address-the-aerosolized-use-of-central-nervous-system-acting-chemicals-for-law-enforcement/, describes the role of the United States in leading to the decision.

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This decision sends a clear signal that countries cannot hide their work to advance an offensive capability for the aerosolized use of central nervous system-acting chemicals under the guise of doing so for law enforcement.

The United States, in collaboration with Australia, Switzerland, and 49 other countries cosponsored the decision, which was adopted by a super majority with 85 in favor, and only 10 voting against the decision.

The danger posed by these chemicals was initially highlighted by their ill-considered use by Russia in 2002 to end the Moscow Theatre siege, which left 129 hostages dead. Since 2002, the OPCW Scientific Advisory Board (SAB) has assessed these chemicals and in its most recent report, explained that central nervous system-acting chemicals, which include fentanyls "can have a very low safety margin when delivered as an aerosol" and further noted that "there have been examples of the [aerosolized] use of CNS-acting chemicals in law enforcement that have resulted in permanent harm and death due to an irreversible action on life processes." It is clear that aerosolized central nervous system-acting chemicals cannot be safely used for law enforcement purposes.

The United States has long been concerned that some countries are concealing their offensive work related to central nervous system-acting chemicals. In the annual report to Congress on States Parties' compliance with the CWC, the United States has raised concerns regarding China, Iran, and Russia's interest in these chemicals.

Today's decision seeks to prevent the use of these chemicals as chemical weapons and ensures that States Parties' shared understanding is clearly memorialized. The United States appreciates that the international community has again taken collective action to ensure the Chemical Weapons Convention and its implementing body, the OPCW, remain a viable and effective tool working to achieve a world free of chemical weapons.

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b. Russia

On October 5, 2021, the State Department issued a media note regarding action at a meeting of the OPCW that day regarding Russia's chemical weapons use. The media note is excerpted below and available at https://www.state.gov/u-s-leads-effort-to-press-russia-on-chemical-weapons-use-at-the-organization-for-the-prohibition-of-chemical-weapons-executive-council-meeting/.

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Today in The Hague, the United States and 44 other countries submitted questions to the Russian Federation regarding the poisoning of Mr. Aleksey Navalny on Russian soil last year. The presentation of these questions coincides with the Ninety-Eighth Session of the Organization for the Prohibition of Chemical Weapons (OPCW) Executive Council, a 41-member policy-making body charged with promoting the effective implementation of and compliance with the Chemical Weapons Convention (CWC). The CWC, of which both the United States and the Russian Federation are members, allows States Parties to "request clarification on any matter that causes doubt in regard to compliance."

The United States and many in the international community have long sought clarity on Russia's attempted assassination of Mr. Navalny with a chemical weapon on August 20, 2020, and whether it intends to cooperate with the OPCW. Given its status as a State Party to the CWC, Russia's continued lack of transparency and cooperation surrounding the poisoning is particularly concerning. The questions were submitted in accordance with paragraph 2 of Article IX of the CWC, which sets forth the formal process by which a State Party can make a request to another State Party for clarification on any matter that may cause doubt about compliance. The CWC requires Russia to provide its response within 10 days.

Any use of chemical weapons is unacceptable, and anyone who uses them should be identified and held to account. The United States has concluded that FSB agents poisoned Mr. Navalny in Russia using an unscheduled nerve agent from a Novichok group of agents, and only Russia has researched, developed, and used such chemical weapons. There can be no impunity for such actions. The United States calls on Russia to answer the questions in accordance with its obligations and to make clear to the international community what it has done and is doing to ensure that there is no further use of chemical weapons from Russian territory.

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Cross References

Anti-satellite missile test conducted by the Russian Federation, **Ch. 12.B.3**
Iran-related sanctions, **Ch. 16.A.1**
Sanctions relating to Navalny poisoning, **Ch. 16.A.3.b**
Nonproliferation sanctions, **Ch. 16.A.8**
Actions in Response to Iran and Iran-Backed Militia Groups, **Ch. 18.A.3**